

## Roberts on Obamacare: Liar, Lunatic, or Legitimate?

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*“There are only three possibilities. Either your sister is telling lies, or she is mad, or she is telling the truth. You know she doesn’t tell lies and it is obvious that she is not mad. For the moment then and unless any further evidence turns up, we must assume that she is telling the truth.”*

C.S. Lewis, *The Lion, the Witch, and the Wardrobe*<sup>1</sup>

### INTRODUCTION

When Chief Justice John Roberts issued his opinion in *National Federation of Independent Business v. Sebelius*,<sup>2</sup> he was widely accused of being a liar. Decorum required that people not use the word “liar,” but it was implied clearly enough. One euphemism was to call his opinion “political.” Calling someone’s reasoning political is not necessarily equivalent to calling him a liar; his reasoning may be facially political (“I voted for Clinton because she’s a Democrat.”). But Roberts’s opinion was not facially political. Rather, it purported to be justified by *legal* reasons. Thus, to describe it as political is to claim that Roberts did not mean what he said.<sup>3</sup> It is to claim that he lied.

Another line of attack was to claim that Roberts’s reasoning was “illogical.” Again, this is not necessarily an accusation of deceit. A person may simply be bad at logic. But no one thinks Roberts did poorly on his LSAT. Rather, calling Roberts’s opinion “illogical” is to really say that “his opinion was so implausible he can’t possibly have believed what he said.” The implication again is that Roberts’s illogic gave the lie.

It is a problem if Roberts lied in his opinion, and not just because of the general norm that lying is wrong. If Roberts lied, the law laid down in his opinion is illegitimate. Legitimacy in a liberal democracy requires

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<sup>1</sup> C.S. LEWIS, *THE LION, THE WITCH, AND THE WARDROBE* 48 (2000).

<sup>2</sup> 132 S. Ct. 2566 (2012).

<sup>3</sup> There is a difference between being ideologically influenced and crassly partisan. Brian Z. Tamanaha, *The Several Meanings of “Politics” in Judicial Politics Studies: Why “Ideological Influence” Is Not “Partisanship,”* 61 *EMORY L.J.* 759, 774-75 (2012). Roberts is clearly being accused of partisanship, as in demonstrating unfair favor in disregard of the law.

objectivity.<sup>4</sup> And if Roberts did not tell us his real reasons for his decision in *NFIB v. Sebelius*, his decision cannot have been objective or legitimate. This is not to say that he must discover and recite every unconscious drive that influenced his decision.<sup>5</sup> But Roberts was required to provide us with a sincere public justification for his decision. If he did not believe such a public justification existed, he should have said so. To do otherwise would have undermined the legitimacy of his opinion.

So we should consider whether we really believe Roberts lied. This Article argues that the evidence strongly suggests that he did not. Moreover, it will argue that when a judge issues an opinion, we should presume that the opinion is a truthful statement of the judge's reasons for his decision. This is not to say that we should presume it is correct. Whether a student gets a question wrong is a different issue from whether he cheated on the test. This Article concludes that Roberts gave a truthful statement of his opinion.

This Article also applies the criteria of a legitimating objectivity to the controversial aspects of Roberts's opinion.<sup>6</sup> Broadly, legal objectivity requires that legal judgments be based on normatively relevant reasons, standards, and arguments offered in a public deliberation.<sup>7</sup> The Article will show that Roberts's opinion satisfies the criteria of a legitimating legal objectivity.

Section I will provide a very brief overview of the aspects of Roberts's opinion that have been called political or illogical. Section II argues that Roberts's opinion was not inappropriately political, and proposes that judges' opinions should be presumed to be truthful statements of their opinions. Section III considers the claim that Roberts's opinion was illogical, focusing on the arguments regarding taxes and penalties in Roberts's majority opinion and Justice Scalia's dissent, and argues that Roberts's opinion is correct over and against the joint opinion of Scalia,

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<sup>4</sup> See, e.g., Gerald J. Postema, *Objectivity Fit for Law*, in OBJECTIVITY IN LAW AND MORALS 99, 115-16 (Brian Leiter ed., 2001); cf. Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447, 1462 (1990) (book review) ("Law emerges because people desire predictability, stability, equal protection, the reign of justice, etc., and because they want to believe that it is possible to secure these things by instituting a set of impartial procedures.").

<sup>5</sup> "It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed." *Shepard v. United States*, 290 U.S. 96, 104 (1933) (Cardozo, J.).

<sup>6</sup> This conception of legal objectivity, "objectivity as publicity," was developed and defended elsewhere. See generally Postema, *supra* note 4, at 112 ("[T]here is hope that the objectivity of a judgment can secure its legitimacy in the face of deep disagreement over its truth or correctness."); Kenneth K. Ching, *Methodological Versus Naturalistic Legal Objectivity*, 57 ST. LOUIS U. L.J. 59 (2012).

<sup>7</sup> Postema, *supra* note 4, at 118.

Kennedy, Thomas, and Alito or is at least a reasonable opinion. Finally, Section IV argues that Roberts's opinion satisfies the criteria of a legitimating legal objectivity.

Although this Article undertakes a defense of aspects of Roberts's opinion, that is not its main point. Its purpose is to defend the practice of legal judging from the cynical assertion that judges are just politicians in black robes, a commonly made assertion that undermines our entire legal system.<sup>8</sup> Though Roberts's opinion is our case study, the analysis in this Article could likely be applied to many judicial opinions deemed to be illegitimately political.

### I. TAXES AND PENALTIES IN *NFIB v. SEBELIUS*

The allegation that Roberts's opinion is political, dishonest or illogical is primarily based on his reasoning, as summarized loosely by its critics, that the Affordable Care Act's shared responsibility payment was not a tax for purposes of the Anti-Injunction Act (the "AIA"), but was a tax for purposes of assessing its constitutionality. The reasoning is reminiscent of Senator John Kerry saying, "I actually did vote for the \$87 billion before I voted against it."<sup>9</sup> This Article's discussion of *NFIB v. Sebelius* is focused on these alternative tax treatments of the shared responsibility payment, with the primary analysis occurring in Section III. Discussion of other aspects of the case is limited to the scope of this Article.

In 2010, Congress enacted the Patient Protection and Affordable Care Act (the "ACA").<sup>10</sup> The purpose of the ACA was to increase the number of Americans with health insurance and decrease the cost of health care.<sup>11</sup> Among its provisions, the ACA requires most Americans to maintain minimum essential health insurance.<sup>12</sup> This provision is known by many as

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<sup>8</sup> Cf. Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 9 GEO. MASON L. REV. 319, 351-52 (2012) ("Acceptance of judicial power depends, in part, on the perception that judges can administer law in a relatively neutral, rather than politicized, matter. More extensive, more systematic disclosure of judges' intertwined policy and political preferences might undermine this perception, thus weakening the courts and encouraging the cynical, untrue view that judging is nothing but politics garbed in robes.").

<sup>9</sup> *Kerry discusses \$87 billion comment*, CNN.COM (Sept. 30, 2004), <http://www.cnn.com/2004/ALLPOLITICS/09/30/kerry.comment/index.html>; Joel Roberts, *Kerry's Top Ten Flip-Flops*, CNN.COM (Feb. 11, 2009), [http://www.cbsnews.com/2100-250\\_162-646435.html](http://www.cbsnews.com/2100-250_162-646435.html). For video of the comment, see *John Kerry's Flip-Flop- I Actually Voted for the \$87 Billion Before I Voted Against It.mp4*, YOUTUBE, <http://www.youtube.com/watch?v=xRT6CnCK348>.

<sup>10</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010); *Nat. Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012).

<sup>11</sup> *Nat. Fed'n of Indep. Bus.*, 132 S. Ct. at 2580.

<sup>12</sup> 26 U.S.C.A. § 5000A (West 2013).

the “individual mandate.” Beginning in 2014, those who fail to comply with this requirement must pay a “shared responsibility payment,” which the Act refers to as a “penalty.”<sup>13</sup>

Twenty-six states, several individuals, and the National Federation of Independent Business sued in federal court.<sup>14</sup> They argued, *inter alia*, that the individual mandate was unconstitutional.<sup>15</sup> The Court of Appeals for the Eleventh Circuit agreed, holding that the mandate exceeded Congress’ powers and was not a tax.<sup>16</sup> A court-appointed amicus argued that the suit was barred by the AIA.<sup>17</sup> The AIA prohibits most lawsuits to restrain the assessment or collection of any tax.<sup>18</sup> The plaintiffs sought to restrain the collection of the ACA’s penalty for non-compliance with the individual mandate. Because the penalty does not become enforceable until 2014, the amicus argued that the Internal Revenue Code treats the penalty as a tax and the AIA barred the current suit.<sup>19</sup> The Eleventh Circuit did not consider whether the AIA barred the challenge.<sup>20</sup>

The U.S. Supreme Court affirmed in part and reversed in part the Eleventh Circuit’s judgment. Delivering the opinion of the Court, Justice Roberts concluded that the AIA did not bar the suit.<sup>21</sup> He also found that the individual mandate was not a valid exercise of Congress’ power under the Commerce and Necessary and Proper Clauses.<sup>22</sup> However, Roberts did conclude that the individual mandate and shared responsibility payment were valid exercises of Congress’ power to “lay and collect Taxes.”<sup>23</sup> Analysis of aspects of this case is provided below in Section III.

## II. LIAR?

It is audacious to call a man a liar, especially when that man is the Chief Justice of the U.S. Supreme Court. Yet, that is exactly what many have

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<sup>13</sup> 26 U.S.C. § 5000A(b), (g)(2) (West 2013); *Nat. Fed’n of Indep. Bus.*, 132 S. Ct. at 2582-83.

<sup>14</sup> *Id.* at 2580.

<sup>15</sup> *Id.*

<sup>16</sup> *Florida ex rel Atty. Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1313 (11th Cir. 2011).

<sup>17</sup> *Nat. Fed’n of Indep. Bus.*, 132 S. Ct. at 2583.

<sup>18</sup> *Id.* at 2582.

<sup>19</sup> *Id.* at 2582.

<sup>20</sup> *Id.* at 2581 n.1.

<sup>21</sup> *Id.* at 2582-84. Justices Ginsburg, Breyer, Sotomayor, and Kagan joined in this section.

<sup>22</sup> Though they did not join Roberts’s opinion, Justices Scalia, Kennedy, Thomas, and Alito also concluded that the individual mandate was not a valid exercise of Congress’s power under the Commerce and Necessary and Proper Clauses. *Id.* at 2642 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

<sup>23</sup> *Id.* at 2594-95. Justices Ginsburg, Breyer, Sotomayor, and Kagan joined in this section.

done in the wake of *NFIB v. Sebelius*. The legitimating objectivity of Roberts's opinion is completely undermined if the reasons he stated in his opinion were not his real reasons for ruling in favor of the ACA's constitutionality. Or to put it bluntly, Roberts's opinion cannot be deemed objective if it is a lie. This section asks whether Roberts did, in fact, lie.

#### A. *The Accusation: Roberts's Opinion Was a Political Lie*

Some commentators on *NFIB v. Sebelius* explicitly have called Roberts's opinion dishonest.<sup>24</sup> Many more have done so implicitly. And it has been commonplace to call Roberts's opinion "political."<sup>25</sup> For example, "[Roberts] acted less like a judge than like a politician, and a slippery one."<sup>26</sup> Or, "no one is confident . . . that Roberts actually believes his own position."<sup>27</sup> Allegedly, Roberts's stated reasons for his decision

<sup>24</sup> Kingsley Guy, *Tortous [sic] Logic Ruled in Obama Care Ruling*, SOUTH FLORIDA SUN-SENTINEL, July 6, 2012, [http://articles.sun-sentinel.com/2012-07-06/news/fl-kgcol-obamacare-ruling-guy-0706-20120706\\_1\\_tax-on-medical-devices-obamacare-medicaid-simple-majority-vote](http://articles.sun-sentinel.com/2012-07-06/news/fl-kgcol-obamacare-ruling-guy-0706-20120706_1_tax-on-medical-devices-obamacare-medicaid-simple-majority-vote) ("The tortuous logic Chief Justice John Roberts used in his majority opinion to arrive at that conclusion, however, represents jurisprudential legerdemain seldom seen in the annals of the high court."); Leo Morris, *With Friends Like These...*, FORT WAYNE NEWS-SENTINEL, July 19, 2012, <http://nscontent.news-sentinel.com/?q=blog/post/201207/friends-these> ("What Roberts did was a betrayal of bedrock conservative principles, and the reasoning he used to justify his vote employed some of the most twisted, shamelessly dishonest logic ever heard from the court."); Ilya Somin, *How to Respond to the Individual Mandate Decision*, THE VOLOKH CONSPIRACY (July 30, 2012, 12:32 PM), <http://www.volokh.com/2012/07/30/how-to-respond-to-the-individual-mandate-decision/> (citing legal expert Professor Eric Claeys's characterization of Roberts's behavior as deliberate misinterpretation and promise-breaking).

<sup>25</sup> Matthew J. Franck, *The Chief Don't Get No Respect*, NAT'L REV. ONLINE (June 29, 2012), <http://www.nationalreview.com/content/chief-don't-get-no-respect> ("[T]he chorus seems to be 'the chief justice behaved politically,' and then that putative behavior is either praised or blamed."); Darrell Huckaby, *Supreme Court Has Long History of Political Decisions*, NEWTON CITIZEN, June 30, 2012, <http://www.newtoncitizen.com/news/2012/jun/30/darrell-huckaby-supreme-court-has-long-history-of/> (comparing the *NFIB v. Sebelius* decision to other Court decisions thought to be "political"); John Ireland, *Roberts Logic Hard to Follow on Health Care*, IDAHO PRESS-TRIBUNE, July 5, 2012, available at 2012 WLNR 13999460 ("Roberts' strained logic was a way for him to preserve an election-year issue without furthering Congress's power to regulate commerce."); David N. Mayer, *Supreme Folly 2012: The Supreme Court's "ObamaCare" Decision*, MAYERBLOG: THE WEB LOG OF DAVID N. MAYER (July 5, 2012), <http://users.law.capital.edu/dmayer/Blog/blogIndex.asp?entry=20120705.asp> ("[A] decision [to avoid the Court being characterized as partisan] would not have been activist – but Roberts' attempt to avoid that result certainly is."); Ben Shapiro, *The Worst Ruling Since Dred Scott*, LOGAN DAILY NEWS, at A4 (July 7, 2012) ("Like other nasty Supreme Court decisions of the past, this one was made based not on the Constitution, but on the political predilections of the judges. . . . [Roberts] apparently switched his vote . . . after feeling pressure from the Obama administration and the media; he decided that he'd simply toss the issue to the voters rather than doing his constitutional job. . . . Politics mattered more to Roberts than duty.")

<sup>26</sup> Ramesh Ponnuru, *In Health-Care Ruling, Roberts Writes His Own Law*, BLOOMBERG (June 28, 2012, 6:30 PM), [www.bloomberg.com/news/2012-06-28/in-health-care-ruling-roberts-writes-his-own-law.html](http://www.bloomberg.com/news/2012-06-28/in-health-care-ruling-roberts-writes-his-own-law.html).

<sup>27</sup> Jonah Goldberg, *Roberts's Ruling Took Guts*, NAT'L REV. ONLINE (June 29, 2012, 12:00 AM), <http://www.nationalreview.com/node/304363>.

were not his real reasons, and his real reasons were sacrificed on the altar of politics.<sup>28</sup> Some say his real motivation was to preserve the reputation of the court.<sup>29</sup> Others claim he was intimidated into issuing a disingenuous opinion.<sup>30</sup> In general, commentators refused to believe Roberts meant what he said.<sup>31</sup> All of these assessments imply that Roberts gave us false reasons for his decision. In other words, he lied. Georgetown law professor Randy Barnett crystallized the significance of these accusations: “The fact that this decision was apparently political, rather than legal, completely undermines its legitimacy as a precedent.”<sup>32</sup>

### B. Lying Undermines Objectivity

If it were true that Roberts lied in his *NFIB v. Sebelius* opinion, it would undermine the legitimating objectivity of that opinion. If Roberts has not set forth his real reasons for his decision, then we simply cannot evaluate them. They are not public objects we can look at and consider. We cannot evaluate whether his reasons are proper or improper (i.e., examine for political bias or personal interest).<sup>33</sup> We cannot evaluate whether they are correct or “worthy of acceptance.”<sup>34</sup> And we are forced to suspect that they are neither proper nor correct, for why else would Roberts have concealed them? If Roberts lied about his rationale, then we cannot know whether his judgment meets criteria for a legitimating objectivity. A legal judgment

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<sup>28</sup> *Id.*

<sup>29</sup> See Mona Charen, *Conservatives and the Court*, NAT'L REV. ONLINE (June 29, 2012, 12:00 AM), <http://www.nationalreview.com/content/conservatives-and-court> (“Roberts bent over backwards to find the law constitutional, most likely because he was loath to see the court attacked.”); Ashby Jones & Brent Kendall, *Roberts Straddles Ideological Divide*, WALL ST. J., June 28, 2012, <http://online.wsj.com/article/SB10001424052702303561504577494723149538572.html> (noting that the decision “could go some way to reducing the court’s reputation for being partisan”); Charles Krauthammer, *Why Roberts Did It*, WASH. POST, (June 28, 2012), [http://articles.washingtonpost.com/2012-06-28/opinions/35462722\\_1\\_obamacare-health-insurance-national-health-care](http://articles.washingtonpost.com/2012-06-28/opinions/35462722_1_obamacare-health-insurance-national-health-care) (“Roberts seems determined that there be no recurrence [of *Bush v. Gore*] with Obamacare.”); Adam Liptak, *Roberts Shows Deft Hand as Swing Vote on Health Care*, N.Y. TIMES, June 28, 2012, <http://www.nytimes.com/2012/06/29/us/politics/a-defining-move-for-chief-justice-roberts.html> (“[Roberts] chose compromise, or perhaps statesmanship.”); Shapiro, *supra* note 25 (“[Roberts’s] goal was the preservation of the Supreme Court’s ‘legitimacy’ . . .”).

<sup>30</sup> See Mayer *supra* note 25 (“[Roberts] was intimidated, if not by threats from [President Obama], then by threats from the leftist news media and left-liberal intellectuals . . . .”); Gene Smith, *What People Are Saying (About Themselves)*, THE FAYETTEVILLE OBSERVER, June 30, 2012, <http://fayobserver.com/articles/2012/06/30/1187726> (quoting the Heartland Institute, “The president intimidated Chief Justice John Roberts . . . . The rule of law is now dead.”).

<sup>31</sup> Franck, *supra* note 25.

<sup>32</sup> Robert Barnes, *Now It’s Conservatives Who Suspect a ‘Political’ Supreme Court*, WASH. POST, July 2, 2012, [http://articles.washingtonpost.com/2012-07-02/politics/35486257\\_1\\_elena-kagan-conservative-justices-political-decision](http://articles.washingtonpost.com/2012-07-02/politics/35486257_1_elena-kagan-conservative-justices-political-decision).

<sup>33</sup> See Postema, *supra* note 4, at 106.

<sup>34</sup> *Id.* at 107-09.

cannot be objective if it cannot be assessed by public deliberation, and no “common formation of judgment on the basis of the reasons and arguments on which it rests” is possible with regard to reasons that are withheld.<sup>35</sup> For a judgment to be objective, the publicly given reasons justifying a judgment must be “advanced sincerely” and made in “good faith,” which is per se not the case if Roberts lied about the reasons for his decision.<sup>36</sup> Legal objectivity does not require a recitation of the psychoanalyst’s “real reasons” (i.e., events in early childhood), but it does require a sincere statement of the public, legal justifications for the decision.

Further, if it is true that Roberts was materially influenced or intimidated by political forces, then his decision was not based on “normatively relevant reasons.”<sup>37</sup> It is the norm that judges should decide cases for legal, not political, reasons.<sup>38</sup>

### C. Was Roberts lying?

When we are forced to ask whether someone has lied, many problems are presented. On one hand, it is often quite important to know whether someone has lied. On the other, we cannot know for certain whether someone has lied. The only way we could know with practical certainty that Roberts lied in his opinion would be if he admitted it. And if he does not admit it, is it because he is persisting in the lie or because he actually told the truth? The question is thorny.

#### 1. The Presumption of Truthfulness

Yet, whether someone lied is a question we often answer to our practical satisfaction in legal contexts. Lawyers and judges must inquire into the truthfulness of witnesses. In some jurisdictions, every witness is presumed to testify truthfully.<sup>39</sup> In other jurisdictions, there is no presumption as to whether a witness testifies truthfully or falsely.<sup>40</sup> What kind of presumption should we make about a judge’s “testimony” to his own opinions?

If we were to evaluate the truthfulness of Roberts’s opinion as witness testimony, we might accord him a presumption of truthfulness. At worst, we would make no presumption about his truthfulness. We certainly would

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<sup>35</sup> Cf. *id.* at 117-18, 120.

<sup>36</sup> *Id.* at 119-20.

<sup>37</sup> Cf. *id.* at 118.

<sup>38</sup> See MODEL CODE OF JUDICIAL CONDUCT R. 2.4.

<sup>39</sup> 81 AM. JUR. 2d Witnesses § 994; see also 29 AM. JUR. 2d Evidence § 283.

<sup>40</sup> 81 AM. JUR. 2d Witnesses § 994; see also 29 AM. JUR. 2d Evidence § 283.

not make the cynical presumption that he was lying. But because he is a judge and not a mere witness, it is only sensible and practical to presume he is telling the truth. Judges are called on to weigh the credibility of witnesses and decide cases, all with the goal of dispensing justice.<sup>41</sup>

For such aspects of the justice system to be meaningful, we must presume judges' opinions are truthful. As a matter of dispensing justice, why would we ask someone to judge a case if we think he will lie to us in his decision? Such a judgment may allow for some social coordination (though this too would be undermined to a significant degree by inaccurate opinions), but not justice. Or such a judgment may be a raw exercise of power. But if that is all it is, why bother having the judge explain himself? As a raw exercise of power, a gun to the head needs no further explanation. So why do American judges write opinions? One reason is to explain the decision to the disputants. Another is to explain the decision to society. The explanation allows us to order our affairs in accordance with the given reasons. It also allows us to understand and assess the decision's merits, its correctness, reasonableness, fairness or justice. And all of this requires us to presume that judges give truthful statements of their opinions.

The word "presumption" is used loosely here. The point is not that it should be applied in courts during the cases that come before them (though participants in cases do seem to presume that judges are truthful when they speak in their official capacities). Rather, the presumption should apply to our political dialogue. The one who accuses a judge of lying, implicitly or explicitly, should have to overcome a heavy presumption that judges speak truthfully (if not necessarily correctly).

This seems conceptually obvious, yet it is typical to suggest judges are liars in exactly the terms that have been used to accuse Roberts: that judges' actions are political as opposed to legal.<sup>42</sup> Now, we must

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<sup>41</sup> See MODEL CODE OF JUDICIAL CONDUCT, Preamble ("An independent, fair and impartial judiciary is indispensable to our system of justice."). "Credibility, of course, occupies a vital place in our system of law. Dozens of evidentiary doctrines determine when a witness's lack of credibility may bar him or her from speaking." Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 792 (2000) (book review).

<sup>42</sup> See, e.g., LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 143 (2005); MARK W. SMITH, *DISROBED: THE NEW BATTLE PLAN TO BREAK THE LEFT'S STRANGLEHOLD ON THE COURTS* 11 (2006) ("Judges don't—and can't—check their ideology at the courtroom door; they often, by necessity, function as politicians wearing black robes."); Raju Chebium, *Will U.S. Supreme Court Justices Get Along in Bush v. Gore Aftermath?*, CNN (Dec. 14, 2000), <http://archives.cnn.com/2000/LAW/12/13/scotus.relations/index.html> ("The justices were accused of political partisanship."); Jerry Markon & Shailagh Murray, *Federal Judicial Vacancies Reaching Crisis Point*, WASH. POST, Feb. 8, 2011, at A01 (describing judicial vacancies and judgeships in terms of partisan control); Editorial, *Politics and the Court*, N.Y. TIMES, Feb. 5, 2011, at A16 (quoting Professor Lucas Powe as stating that Justice Scalia "is taking political partisanship to levels

distinguish between different meanings associated with calling judges political. There is a difference between a decision that is ideologically influenced and one that is crassly partisan:

[I]deological influence does not equal partisanship. Political scientists cloud this vital distinction when they loosely assert . . . that “[j]udges retain these partisan and ideological attachments when they ascend to the bench.” Judges do not ascend to the bench *tabula rasa*, wiped free of their moral, political, and economic views (blank slates would be incapable of rendering judgments of any kind). In this sense, they indeed retain their ideological attachments. But that is not partisanship. Partisanship is (when) . . . judges decide cases with a conscious . . . agenda driving their legal analyses.<sup>43</sup>

It is in references to alleged “partisanship” that we should presume judges’ opinions are truthful. Failure to do so undermines core notions of our judicial system as a neutral, independent arbiter of justice.<sup>44</sup>

## 2. Evidence of Roberts’s Truthfulness

But assume we were to assign Roberts the lower status of witness, witness to his own opinions. Should we believe what he has said? This, of course, is a question that must be answered frequently in legal cases. Is a witness credible? Is he truthful? Is he lying? Federal Rule of Evidence 608 allows for evidence about a witness’s reputation for truthfulness or untruthfulness, and FRE 405 permits evidence of truthfulness to be proved by testimony about a person’s reputation, by opinion about the person’s character, or, in some instances, by relevant specific instances. If we were to inquire along these lines into Roberts’s character for truthfulness, we would find that his reputation and character strongly suggest he is not a liar

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not seen in over half a century.” The editorial added that “Justice Thomas is not far behind.”); Jeffrey Toobin, *Supreme Court Riven by Partisan Politics*, CNN (Mar. 15, 2010), <http://www.cnn.com/2010/OPINION/03/15/toobin.court.partisan/index.html> (discussing the political effects of *Citizens United* and arguing that “the events of the last few weeks show that the Supreme Court is riven by the same partisan divisions as the rest of Washington”).

<sup>43</sup> Tamanaha, *supra* note 3, at 774-75; see also, Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV 16, 56-57 (2002). (“The purpose of objectivity is not to rid a judge of his past, his education, his experience, his belief, or his values. Its purpose is to encourage the judge to make use of all of these personal characteristics to reflect the fundamental values of the society as faithfully as possible.”).

<sup>44</sup> Tamanaha, *supra* note 3, at 759.

and that we should accept his statements about his own opinions as truthful.

There are a wide variety of witnesses to Roberts's truthful character. Roberts is frequently described as "fair," especially with reference to considering different legal arguments.<sup>45</sup> "Fair" may not analytically imply "truthful," but it seems unlikely that a judge known for issuing partisan opinions would be widely described as "fair."

A particularly telling assessment of Roberts came from Jeffrey Rosen, professor of law at George Washington University and legal affairs editor for *The New Republic*: "(Roberts) earned the reputation of a legal craftsman who didn't come to cases with preconceived grand theories, but took positions based on the arguments and legal materials in each case."<sup>46</sup> Rosen went on to say that he was "impressed with [Roberts's] reverence for the law as something distinct from politics, his belief that courts should operate according to independent ideals of professionalism and neutrality."<sup>47</sup> In other words, Roberts is known to decide cases based on legal, *not* political arguments.

After Roberts was nominated to the Supreme Court by President George W. Bush, Democrats sought reasons not to confirm him.<sup>48</sup> Yet, no personal conflicts or scandals were attributable to Roberts.<sup>49</sup> In fact, it was noted that Roberts's life was "without blemish."<sup>50</sup> Explaining his vote in favor of Roberts's confirmation, Democratic Senator Herb Kohl cited Roberts's "sterling reputation as a lawyer and a judge."<sup>51</sup> And Democratic Senator Russell Feingold remarked after Roberts's testimony at his confirmation hearings that his "impeccable legal credentials, his reputation and record as a fair-minded person and his commitment to modesty and

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<sup>45</sup> See Justice Henry R. Horsey, Editorial, *Roberts Sets Bar High for Court Nominees*, ST. LOUIS POST-DISPATCH, September 24, 2005, available at 2005 WLNR 24300087 (describing Roberts as a person of "fair-mindedness, ethics and sterling professional reputation"); see also *Roberts Confirmed, Sworn in as Chief Justice of Supreme Court*, NAT'L POST, Sept. 30, 2005, available at 2005 WLNR 27811065 ("Many Democrats said Judge Roberts' [sic] reputation as a brilliant and fair-minded jurist overrode their concerns about his conservative leanings . . .").

<sup>46</sup> Jeffrey Rosen, *In Search of John Roberts*, N.Y. TIMES, July 21, 2005, <http://www.nytimes.com/2005/07/21/opinion/21rosen.html>.

<sup>47</sup> *Id.*

<sup>48</sup> Editorial, *In Search of Consensus*, AMERICA, Oct. 10, 2005, at 4.

<sup>49</sup> Seth Stern, *Senate Faces Next Nomination with Experience*, CQ TODAY, Oct. 5, 2005, available at 2005 WLNR 16164322.

<sup>50</sup> Horsey, *supra* note 45 (implying Roberts's life was without blemish because that is the requirement for Supreme Court nominees); see also LISA TUCKER MCELROY, JOHN G. ROBERTS, JR. 16, 21 (2006) (Roberts was known for his sincerity and "unquestioned integrity").

<sup>51</sup> Stern, *supra* note 49.

respect for precedent have persuaded me that he will not bring an ideological agenda.”<sup>52</sup>

What can we glean about Roberts’s character for truthfulness from these statements? The Model Rules of Professional Conduct prohibit lawyers from making false statements.<sup>53</sup> Thus, we can infer that one with a sterling reputation as a lawyer is not given to lying as part of his law practice. Moreover, the Model Code of Judicial Conduct prescribes that a judge shall conduct himself with honesty, integrity, and independence,<sup>54</sup> and that a judge “shall not be swayed by public clamor or fear of criticism” or permit political interests to influence his judgment.<sup>55</sup> Because Roberts has a sterling reputation as a judge, the inference should be that Roberts was not improperly influenced into issuing a dishonest opinion. This reputation extends to the Chief Justice’s career prior to joining the bench; Justice John Paul Stevens has described Roberts’s advocacy before the U.S. Supreme Court as “totally honest.”<sup>56</sup>

Consideration of the evidence of Roberts’s truthfulness would be incomplete without mentioning the infamous “leak” story by Jan Crawford. Crawford reported that Roberts “initially sided with the Supreme Court’s four conservative justices to strike down the heart of [the ACA], but later changed his position.”<sup>57</sup> Some commentators took this story as proof that Roberts’s opinion was, in fact, political.<sup>58</sup> But Crawford herself stated that her story never claimed that Roberts had “buckled to political pressure” and that some of her “sources flatly reject that notion.”<sup>59</sup> It should be obvious that changing one’s mind is not evidence of dishonesty or partisanship. What would be dishonest or political is to change one’s mind but still issue one’s initial opinion.

The accusation that Roberts lied in his opinion is unsupported by the evidence of Roberts’s reputation. It might be said that even a person with a “sterling” reputation may lie on occasion. But if one is to accuse a person

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<sup>52</sup> *In Search of Consensus*, *supra* note 48.

<sup>53</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3.

<sup>54</sup> MODEL CODE OF JUDICIAL CONDUCT R. 1.2 & cmt. 5.

<sup>55</sup> *Id.* at R. 2.4.

<sup>56</sup> JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 206 (2011).

<sup>57</sup> Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS, July 1, 2012, [http://www.cbsnews.com/8301-3460\\_162-57464549/roberts-switched-views-to-uphold-health-care-law/](http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/).

<sup>58</sup> Avik Roy, *The Inside Story on How Roberts Changed His Supreme Court Vote on Obamacare*, FORBES, July 1, 2012, <http://www.forbes.com/sites/aroy/2012/07/01/the-supreme-courts-john-roberts-changed-his-obamacare-vote-in-may/>.

<sup>59</sup> Jan Crawford, TWITTER (July 1, 2012, 2:16 PM), <https://twitter.com/JanCBS/status/219509856816734209>.

with a sterling reputation of lying on a given occasion, the burden of proof and persuasion must be the accuser's. One of the reasons for accusing Roberts of lying seems to be that his accusers disagree with his upholding of the ACA. But "if you disagree with me, you are a liar" is simply not an argument worthy of adult attention. The only evidence Roberts's accusers point to in this case is that Roberts's tax/penalty distinction is so implausible that it gives the lie. That argument will be addressed at length below. However it is simply implausible to suggest, based on Roberts's reputation and character, that he lied about or misrepresented his reasons for his decision in *NFIB v. Sebelius*.

### 3. *A Cynical Presumption?*

We simply have no reason to believe Roberts lied. We have good reasons to believe he did not, especially in the form of a host of witnesses to Roberts's good character. The practical response is obvious. We should accept that he told the truth. The only reason to do otherwise is if we favor a strong cynical presumption that judges lie to us in their opinions. But such a presumption proves too much to be accepted, for it undermines not only Roberts's opinion, but all attempts to communicate. If the Chief Justice of the United States, a man known for integrity, fairness, and honesty, is subject to the presumption that he is lying, a fortiori all people are subject to the same presumption, including those accusing Roberts of lying. And if it were presumed that all people are lying, all of our attempts to communicate, legally or otherwise, are a pointless, sinister farce. Such self-defeating principles should be abandoned.<sup>60</sup> We continue to talk as if there is something to discuss. We continue to make arguments before legal tribunals as if there is something to argue about, from which we can make the hopeful inference that we do not subscribe to the cynical presumption but instead to the presumption that our judges are truthful.

### 4. *Roberts's Truthfulness*

Having rejected the cynical presumption, should we presume anything about the truthfulness of judges' opinions? There are only two basic options remaining: to presume nothing or to presume truthfulness. By virtue of the position and task we have assigned judges in our legal system, it only makes sense to presume the truthfulness of their judgments.

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<sup>60</sup> Cf. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 68 (1980) (Explaining that one principle of "rationality in theoretical inquiries" is that "self-defeating theses [should] be abandoned").

Regardless of whether we generally presume judges are truthful, we can at least assess whether Roberts is. Can it be known with certainty that Roberts did not lie in his opinion? No. But can we evaluate whether it is likely that Roberts was truthful in his opinion? Yes, and the assessment is clear. We have little reason to believe Roberts was dishonest, and we have great reason to believe he was truthful, especially his widespread reputation for integrity, fairness, and honesty. The accusation that Roberts lied in his opinion must be dismissed.

### III. LUNATIC?

#### A. *The Accusation: Roberts's Opinion is Illogical*

Instead of calling Roberts a liar, some called him a lunatic.<sup>61</sup> At the fringes, it has actually been suggested that Roberts has mental problems:<sup>62</sup> “[A]t best, Roberts is insane.”<sup>63</sup> Of course, an inquiry into Roberts’s mental health is beyond the scope of this article. Instead, the alleged “lunacy” of Roberts’s opinion appears to be the best evidence available that Roberts lied. After all, liars’ statements tend to be implausible.<sup>64</sup> Commentators suggest that the reasoning in his opinion is so bad that Roberts cannot possibly have believed it. The illogic shows that he must believe something other than what he said. That is, he is a liar.

For example, *New York Times* columnist David Brooks said that Roberts “argued illogically and overly cleverly . . . [and] was really not very persuasive. But he had to get to a certain result, and he was going to find a way by hook or by crook.”<sup>65</sup> Another commentator said, “Roberts bent over backwards to find the law constitutional, most likely because he was loath to see the court attacked.”<sup>66</sup> Many wrote similarly.<sup>67</sup> Contorted,<sup>68</sup>

<sup>61</sup> See Mayer, *supra* note 25 (describing Roberts’s apparent “jurisprudential schizophrenia.”).

<sup>62</sup> Charles M. Blow, *Obama, for the Win!*, N.Y. TIMES, June 30, 2012, at A21 (quoting radio personality Michael Savage as suggesting Roberts’s epilepsy medication was causing evident “cognitive dissociation” in his written opinions).

<sup>63</sup> Smith, *supra* note 30 (quoting Anthony Martin of the *Conservative Examiner*).

<sup>64</sup> ALDERT VRIJ, DETECTING LIES AND DECEIT: THE PSYCHOLOGY OF LYING AND THE IMPLICATIONS FOR PROFESSIONAL PRACTICE 105 (2000).

<sup>65</sup> *Week in Politics: Health Care, Eric Holder*, NPR.ORG (June 29, 2012, 3:00 PM), <http://www.npr.org/2012/06/29/156005206/week-in-politics-health-care-eric-holder>.

<sup>66</sup> Charen, *supra* note 29.

<sup>67</sup> E.g., Huckaby, *supra* note 25 (“[S]upporters of Roberts are left to wonder if he is merely crazy, or crazy like a fox.”); Krauthammer, *supra* note 29 (“Roberts seems determined that there be no recurrence [of *Bush v. Gore*] with Obamacare. Hence his straining in his Obamacare ruling . . . .”); see also John Fund, *The Flip that Will Flop?*, NAT’L REV. ONLINE (July 2, 2012, 4:00 AM), <http://www.nationalreview.com/content/flip-will-flop> (arguing that Roberts’s “sloppy reasoning” was evidence of the political nature of his opinion); Ireland, *supra* note 25 (“Roberts’ [sic] strained logic was a way for him to preserve an election-year issue without furthering Congress’s power to regulate

“tortuous,”<sup>69</sup> and “twisted”<sup>70</sup> were popular adjectives. It was argued that Roberts’s word play gave the lie:<sup>71</sup> “[T]he ‘mandate is merely a tax’ argument is a dodge, and a flimsy one at that.”<sup>72</sup>

## B. Roberts on Taxes and Penalties

### 1. The AIA Does Not Apply to the ACA

The locus of Roberts’s alleged illogic is in his reasoning that the individual mandate was a penalty for purposes of the AIA but a tax for purposes of its constitutionality.<sup>73</sup> Commentators particularly noted that it was implausible to consider the individual mandate a tax because Congress and the President both stated that the individual mandate was not a tax, but a penalty.<sup>74</sup>

In Section II of the majority opinion, Roberts addressed the legal issue of whether the Court had authority to hear the case.<sup>75</sup> The AIA prohibits lawsuits seeking to restrain the assessment or collection of any tax.<sup>76</sup> Taxes can only be challenged after they have been paid.<sup>77</sup> The ACA’s penalty for non-compliance with the individual mandate becomes enforceable in 2014,

commerce. That’s pretty shrewd.”); Mayer, *supra* note 25 (“Why did Roberts resort to such a convoluted interpretation of the mandate as a ‘tax,’ for some purposes, but not for all purposes? It’s obvious that he did so to avoid striking down ‘ObamaCare’ as unconstitutional – and thus to avoid all the criticism that would come from the left . . .”).

<sup>68</sup> Gene Fisher, *Call It a Tax*, YORK NEWS-TIMES, July 11, 2012, [http://www.yorknewstimes.com/editorial/call-it-a-tax/article\\_d6457df0-cb0d-11e1-9f11-001a4bcf887a.html](http://www.yorknewstimes.com/editorial/call-it-a-tax/article_d6457df0-cb0d-11e1-9f11-001a4bcf887a.html) (quoting Rep. Paul Ryan as saying Roberts “had to contort logic and reason to come up with this ruling”); David Opderbeck, *Christians and the Supreme Court’s Health Care Decision*, THROUGH A GLASS DARKLY, (July 2, 2012), <http://www.tgdarkly.com/blog/?p=2471> (quoting Edwin Meese as saying the Court’s decision “erred in contorting the statute to declare the penalty a tax”); Mike Rosen, *The Slippery Slope of Obamacare*, DENV. POST, July 5, 2012 at 18A (“Justice Roberts has been criticized . . . for his contortions of logic in saving Obamacare . . .”).

<sup>69</sup> Guy, *supra* note 24. (saying Roberts used “tortuous logic”); James V. Smith, Jr., *Obamacare Repeal? It’s Up to You, People*, GREAT FALLS TRIBUNE, July 15, 2012, at A6, available at 2012 WLNR 14754518 (calling Roberts’s logic both “tortuous and tortuous”).

<sup>70</sup> Morris, *supra* note 24 (“Roberts . . . employed some of the most twisted, shamelessly dishonest logic ever heard from the court.”); Smith, Jr., *supra* note 69 (saying Roberts “twisted his logic” in the opinion); *Justice Roberts Breaks the Tie on Health Care*, NPR.ORG (June 28, 2012, 3:00 PM), <http://www.npr.org/2012/06/28/155936589/justice-roberts-breaks-the-tie-on-health-care> (quoting professor Jeffrey Rosen as saying Roberts used “twistifications” in his opinion).

<sup>71</sup> Mayer, *supra* note 25 (Roberts “resorts to verbal *legerdemain* to avoid application of the Anti-Injunction Act . . . Logic be damned . . .”).

<sup>72</sup> Krauthammer, *supra* note 29.

<sup>73</sup> E.g., Goldberg, *supra* note 27; Rich Lowry, *The Umpire Blinks*, NAT’L REV. ONLINE (June 29, 2012, 12:00 AM), <http://www.nationalreview.com/content/umpire-blinks-0>; *The Roberts Rules*, WALL ST. J., July 2, 2012, <http://online.wsj.com/article/SB10001424052702304058404577494400059173634.html>.

<sup>74</sup> Lowry, *supra* note 73.

<sup>75</sup> Nat. Fed’n of Indep. Bus.v. Sebelius, 132 S. Ct. 2566, 2582 (2012).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

and the *NFIB* plaintiffs sought to restrain the future collection of the penalty.<sup>78</sup> Amici argued that the Internal Revenue Code treats the penalty as a tax, and thus the AIA barred the current suit.<sup>79</sup> So Roberts considered whether for purposes of the AIA the penalty should be considered a tax.<sup>80</sup> However, the issue is better cast as whether Congress intended the AIA to apply to the ACA,<sup>81</sup> because in this section of the opinion Roberts was not inquiring into the constitutional nature of the “penalty”; rather, he was asking whether Congress meant for the AIA to bar the current suit.

Roberts observed that Congress had called the exaction a penalty, not a tax.<sup>82</sup> Although he noted that Congress may not determine the nature of the exaction for constitutional purposes, he wrote further that as a matter of statutory interpretation, Congress’ labeling of the exaction as a penalty was significant.<sup>83</sup> Why?

It is significant because, although the Courts must decide whether a statute is constitutional, Congress has the authority to determine whether the AIA applies to the ACA. Roberts noted, “The Anti-Injunction Act and the Affordable Care Act, however, are creatures of Congress’ own creation. How they relate to each other is up to Congress, and the best evidence of Congress’ *intent* is the statutory text.”<sup>84</sup> Thus, Roberts’ task at this point was to determine Congress’ *intent*.

There are two propositions here. The first is that because the AIA and ACA were created by Congress, it is Congress’ decision how they relate to one another. This appears to be an application of the doctrine of legislative supremacy,<sup>85</sup> which arises from Article 1, § 1 of the Constitution: “All legislative Power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” Legislative supremacy means that

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 2583.

<sup>80</sup> *Id.*

<sup>81</sup> *Cf. id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (emphasis added). This principle of statutory interpretation is well-settled. *See, e.g., State ex rel. Kalal v. Circuit Court for Dane County*, 681 N.W.2d 110, 124 (Wis. 2004) (“We assume that the legislature’s intent is expressed in the statutory language.”); *Scottsdale Healthcare, Inc. v. Ariz. Health Care Cost Containment Sys. Admin.*, 206 Ariz. 1, 5, ¶ 10, 75 P.3d 91, 95 (2003) (“In interpreting a statute, we first look to the language of the statute itself. Our chief goal is to ascertain and give effect to the legislative intent.”); *State v. Barnes*, 986 P.2d 1160, 1165 (Or. 1999) (“... [T]he text of a statutory provision is the best evidence of legislative intent . . . .”); *McMillan v. Puckett*, 678 So.2d 652, 657 (Miss.1996) (“Whatever the legislature says in the text of the statute is considered the best evidence of the legislative intent.”).

<sup>85</sup> *See* REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 9 (1975).

the legislative branch exercises lawmaking power that takes precedence over the lawmaking powers respectively exercised by the executive and judicial branches.

. . . [W]ithin the domains of lawmaking in which they are constitutionally permitted to operate and within the differing means by which they make their pronouncements, any conflict between the legislative will and the judicial will must be resolved in favor of the former.<sup>86</sup>

Academic debate about legislative supremacy notwithstanding,<sup>87</sup> Roberts's application of the doctrine here is non-controversial.<sup>88</sup> Congress created the AIA and the ACA, and it is Congress' decision whether and how the AIA applies to the ACA. This is a different issue from whether Congress was authorized by the Constitution to impose the penalty, which would be an issue of "judicial supremacy."<sup>89</sup>

The second proposition is that the best evidence of whether Congress intended the ACA's penalty to be treated as a tax for purposes of the AIA is the language of the statute. This proposition is well-settled.<sup>90</sup> Roberts endeavors to show that Congress did not intend for the penalty to be treated as a tax for the purpose of the AIA. Little criticism has been

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<sup>86</sup> *Id.* at 7-8.

<sup>87</sup> See, e.g., Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129 (1992); William Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989).

<sup>88</sup> "In application, this analysis is fairly straightforward, if creative. The Tax Anti-Injunction Act is a statute enacted by Congress, and therefore Congress could set the rules of when and how it applies. By labeling the "tax" a penalty, Congress removed this portion of the ACA from the delayed challenge umbrella of the Tax Anti-Injunction Act. This labeling is made all the more significant because, throughout the ACA, other provisions expressly use the label "tax" as opposed to "penalty." Legally, this is a significant point. A legislative body has the ability to set its own definitions and determine how its own acts will be applied, including providing exemptions. Thus, by labeling the tax a penalty, Congress sought to exempt it from application of the Tax Anti-Injunction Act. The Court thus reached the merits by finding that the penalty associated with the Individual Mandate is not an exaction subject by the Act." Brian P. Kane, *Everyone Was Right and Everyone Was Wrong: The Subtle Echoes of The Supreme Court's Healthcare Reform Decision*, ADVOC. August 2012, at 54, 55 (citations omitted).

<sup>89</sup> Robert Justin Lipkin, *Which Constitution? Who Decides?: The Problem of Judicial Supremacy and the Interbranch Solution*, 28 CARDOZO L. REV. 1055, 1071 (2006) ("[J]udicial supremacy authorizes the courts to review . . . federal statutes . . . in order to ascertain whether they comport with the Constitution. If the statutes fail this test, the Court is authorized, according to this doctrine, to strike them down.").

<sup>90</sup> *Greenlaw v. United States*, 554 U.S. 237, 258 (2008) ("As always with such questions, the text of the relevant statute provides the best evidence of congressional intent."); see also *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991).

directed at this aspect of Roberts's opinion. Even the joint dissent agrees on this point, noting:

[W]e have no difficulty deciding that these suits do not have “the purpose of restraining the assessment or collection of any tax.” . . . What qualifies as a tax for purposes of the Anti-Injunction Act, unlike what qualifies as a tax for purposes of the Constitution, is entirely within the control of Congress.<sup>91</sup>

Notice that the dissenters' reasoning implicitly admits that whether an exaction is a tax may depend on whether the Court is construing a statute versus whether it is testing the statute's constitutionality. An exaction may be a tax for one purpose but not the other. The dissenters wrote that Congress “might have prescribed, for example, that a particular exercise of the taxing power ‘shall not be regarded as a tax for purposes of the Anti-Injunction Act.’”<sup>92</sup> One could imagine a critic claiming the dissenters asserted a contradiction: Congress can impose taxes that are not taxes. But the point would be facile. Their point is the same as Roberts's: For the purposes of the AIA, Congress can decide whether an exaction is a tax, but for purposes of a statute's constitutionality, the decision is the Court's. Ultimately, the dissenters disagreed with Roberts on whether the ACA's exaction is a tax for purposes of its constitutionality, but they agreed that such a determination is possible.

Having decided that the AIA does not bar the suit, Roberts, in Section III.A of his opinion, rejected the Government's arguments that the individual mandate is a proper exercise of Congress' powers under either the Commerce or Necessary and Proper Clauses. Those commentators cited above who criticized Roberts's opinion as political or illogical take no issue with his reasoning in this section of the opinion, perhaps because they agree with him.

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<sup>91</sup> Nat. Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2656 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting)..

<sup>92</sup> *Id.*

2. *The Enactment of the Individual Mandate and Shared Responsibility Payment Are Permissible Pursuant to Congress' Tax Power*

i. *Adopting a Constitutional Meaning*

At the heart of the matter is Roberts's opinion in Section III.B, in which he reasoned that the individual mandate and shared responsibility payment should be upheld as a proper exercise of Congress' power to "lay and collect Taxes."<sup>93</sup> After noting the non-controversial point that statutes can have more than one possible meaning, Roberts wrote that "it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so."<sup>94</sup>

This is a crucial juncture in Roberts's opinion.<sup>95</sup> This is Roberts's first move toward allegedly bending "over backwards to find the law constitutional,"<sup>96</sup> the beginning of the allegedly convoluted, contorted, illogical reasoning.<sup>97</sup> Unfortunately for his critics, at this point in the opinion, Roberts was merely reciting another well-settled legal principle. Roberts noted that the same rule was stated in 1830 by Justice Story and in 1927 by Justice Holmes,<sup>98</sup> and further citations could have been made.<sup>99</sup> Yet, one law professor wrote that Roberts deliberately chose a "weak" interpretation of the statute because "he wanted to avoid striking down the mandate if he could."<sup>100</sup> Perhaps the standard is weak, but it is generally

<sup>93</sup> *Id.* at 2593.

<sup>94</sup> *Id.* The question could also be put as whether it is "fairly possible" to interpret the penalty as a tax or whether the penalty is "susceptible" to being interpreted as a tax. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *Almendarez-Torres v. United States*, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting) (respectively).

<sup>95</sup> "Appreciation of this analytical lens is essential to understanding the Court's ultimate decision because it explains how, seemingly against common understanding, PPACA's penalties are not taxes for the purpose of the Anti-Injunction Act, but are taxes in a constitutional analysis." Bruce F. Howell & Michael A. Clark, "If It Quacks Like A Duck..." *An Analysis of the United States Supreme Court Decision in National Federation of Independent Business v. Sebelius*, 24 No. 6 HEALTH LAW. 18, 21 (2012).

<sup>96</sup> Charen, *supra* note 29.

<sup>97</sup> See *supra* notes 67-71.

<sup>98</sup> *Nat. Fed'n of Indep. Bus.*, 132 S. Ct. at 2593 (citing *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448-49 (1830); *Blodgett v. Holden*, 275 U.S. 142, 148 (1928) (Holmes, J., concurring)).

<sup>99</sup> See, e.g., *Clark v. Martinez*, 543 U.S. 371, 391 (2005); *Jones v. United States*, 526 U.S. 227, 239 (1999) (citing *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)); cf. *State v. Santee*, 82 N.W. 445, 447 (Iowa 1900).

<sup>100</sup> Eric R. Claeys, *Sebelius and the Election*, NAT'L REV. ONLINE (July 30, 2012, 4:00 AM), <http://www.nationalreview.com/content/sebelius-and-election>. Claeys also oddly claimed that Roberts refused to say whether "the tax reading was 'the most natural interpretation,'" *id.*, when Roberts himself clearly implied that it is not, *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2593 ("The most straightforward reading of the mandate is that it commands individuals to purchase insurance.").

described as an important way in which courts should defer to legislatures.<sup>101</sup> “[L]egislators want courts to interpret a statute in a way that makes it constitutional. If a court, faced with two possible interpretations, chooses the one that results in striking down the statute, the legislature’s policies become completely ineffective.”<sup>102</sup> Perhaps it is true that Roberts wanted to avoid invalidating the mandate, but other aspects of his opinion suggest otherwise.<sup>103</sup> The better assessment is that Roberts was aware of nearly 200 years of precedent that required him to ask whether the individual mandate and shared responsibility payment might be deemed constitutional. Call it what you will, this aspect of the opinion follows manifestly reasonable precedent.

The central argument is whether it is reasonable to interpret the “mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product.”<sup>104</sup> One might concede that Roberts was required to consider whether the mandate could be reasonably interpreted as a tax, but still believe that Roberts’s interpretation was unreasonable. It might be argued that Roberts effectively rewrote the statute, and that “courts may not by construction import words into an act, nor make a statute read otherwise than as the legislature intended.”<sup>105</sup> As Scalia wrote, perhaps Roberts was “confusing the question of what Congress *did* with the question of what Congress *could have done*.”<sup>106</sup> But the dissenters overstated the point, and Justice Scalia has himself noted elsewhere that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to

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<sup>101</sup> Cf. *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1928) (“[W]e all agree that to [declare an Act of Congress unconstitutional] is the gravest and most delicate duty that this Court is called on to perform.”); *Helena Rubenstein Int’l. v. Younger*, 139 Cal. Rptr. 473, 481-82 (Cal. Ct. App. 1977) (quoting *S.F. v. Indus. Accident Comm’n*, 191 P. 26, 28 (1920)) (“It is not [sic] small matter for one branch of the government to annul the formal exercise by another and coordinate branch of power committed to the latter, and the courts should not and must not annul, as contrary to the constitution, a statute passed by the legislature, unless it can be said of the statute that it positively and certainly is opposed to the constitution.”).

<sup>102</sup> *Correia*, *supra* note 87, at 1175.

<sup>103</sup> Roberts wrote, “We do not consider whether the Act embodies sound policies.” *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2577. It seems Roberts would not distance himself from the wisdom of such policies if he did think they were sound. Further, Roberts rejected the argument that the individual mandate was a proper use of Congress’s Commerce Clause power, in part, because such a broad reading of the Commerce Clause would sweep away the notion that our “National Government possesses only limited powers.” *Id.* at 2577; *see id.* at 2584-93.

<sup>104</sup> *Id.* at 2593.

<sup>105</sup> *State v. Santee*, 82 N.W. 445, 447 (Iowa 1900).

<sup>106</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2656 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

adopt the latter.”<sup>107</sup> If possible, the Court is to adopt a meaning for the statute that will render it constitutional. Thus, if what Congress *did* can reasonably be interpreted as something Congress *could have done*, the action should be deemed constitutional.

*ii. Form or function?*

Having determined that the Court must save the ACA from unconstitutionality if possible, the issue becomes whether the mandate and shared responsibility payment function more like a penalty or a tax. Because Congress was not authorized by the Commerce Clause to require individuals to purchase health insurance, it would also be improper for Congress to enact a tax on a person’s failure to purchase health insurance so burdensome that it had the effect of directly regulating the purchase of health insurance.<sup>108</sup> Although Congress’ power to tax “is often characterized as plenary,”<sup>109</sup> Congress’ ability to regulate using the tax power is not.<sup>110</sup> This proposition is central to the question of whether the shared responsibility payment was properly enacted pursuant to Congress’ tax power, especially since a majority of the Court agreed that it could not be enacted pursuant to the Commerce Clause. “[I]f no independent source of federal regulatory authority justifies a congressional tax, classification of the tax as a regulatory rather than a revenue measure may be determinative of its constitutionality.”<sup>111</sup> In other words:

Does the power to tax provide Congress with a way to regulate subject matter that is not covered by the other, specific grants of power in section 8? Or, to put the question another way: does the taxing power provide a route to federal regulation of activities that were intended to be within the purview of the states?<sup>112</sup>

In short, the answer is no. In some instances, the Court has held that a purported tax was actually a regulatory penalty. In *Bailey v. Drexel Furniture Co.*, the Court invalidated a tax on profits derived from child labor because the tax “was not a *bona fide* attempt to raise revenue, but

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<sup>107</sup> *Almendarez-Torres v. United States*, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting) (quoting *United States ex rel. Att’y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

<sup>108</sup> See ERIK M. JENSEN, *THE TAXING POWER* 2, 180-83 (2005).

<sup>109</sup> *Id.* at 2.

<sup>110</sup> See *id.* at 180.

<sup>111</sup> 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 844 (3d ed. 2000).

<sup>112</sup> See JENSEN *supra* note 108, at 180.

represented an effort by Congress to bring within its control matters reserved to the States.”<sup>113</sup> Similarly, in *United States v. Constantine*, the Court invalidated a “tax” on liquor dealers who were in violation of state law, determining that the “tax” was actually a “penalty” and “an invasion” of the State’s police powers.<sup>114</sup>

But a tax can have a regulatory effect. “[A]lmost any tax will achieve an ancillary regulatory effect by increasing the costs of the taxed activities . . . .”<sup>115</sup> The Court has upheld exercises of the tax power despite the clear existence of a regulatory purpose.<sup>116</sup> For example, in *United States v. Doremus*, the Supreme Court upheld the Narcotics Drug Act of 1914 as a valid exercise of the Tax Power despite the legislation’s apparent purpose to regulate the sale of narcotics.<sup>117</sup> And in *United States v. Kahriger*, the Supreme Court upheld the constitutionality of a tax on bookmakers despite the regulatory purpose of suppressing wagering and the fact that the revenue generated was “negligible.”<sup>118</sup> Elsewhere, the Court has said “a tax is not any the less a tax because it has a regulatory effect.”<sup>119</sup>

How then do we distinguish between an improper regulatory penalty and a tax with a permissible regulatory effect? First, let’s dispense with one tempting, but incorrect, approach illustrated by the dissenters in *NFIB v. Sebelius*. In *NFIB v. Sebelius*, the dissenters seemed to believe that the question should be answered based on whether Congress named the exaction a tax or a penalty. As they noted, “the statute repeatedly calls it a penalty,” saying “we have never—*never*—treated as a tax an exaction

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<sup>113</sup> EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 42 (Harold W. Chase & Craig R. Ducat, eds., 14th ed. 1978) (citing *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922)).

<sup>114</sup> *See id.* (citing *United States v. Constantine*, 296 U.S. 287 (1935)).

<sup>115</sup> TRIBE, *supra* note 111, at 843-44.

<sup>116</sup> *See* JENSEN, *supra* note 108, at 181-82.

<sup>117</sup> *United States v. Doremus*, 249 U.S. 86, 93-95 (1919) (“And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. . . . The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. . . . It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right.” (citations omitted)).

<sup>118</sup> *United States v. Kahriger*, 345 U.S. 22, 27-28 (1953) (overruled on other grounds) (“It is conceded that a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed. Nor is the tax invalid because the revenue obtained its negligible. Appellee, however, argues that the sole purpose of the statute is to penalize only illegal gambling in the states through the guise of a tax measure. As with the above excise taxes which we have held to be valid, the instant tax has a regulatory effect. But regardless of its regulatory effect, the wagering tax produces revenue. As such it surpasses both the narcotics and firearms taxes which we have found valid.”).

<sup>119</sup> *Sonzinsky v. United States*, 300 U.S. 506, 512 (1937).

which . . . explicitly denominates the exaction a ‘penalty.’”<sup>120</sup> But despite its superficial appeal (and the fact that the “never—*never*” assertion is wrong<sup>121</sup>), the Court’s precedents are clear that reading the exaction’s label is not how to decide whether it is a tax or penalty. Roberts wrote

It is of course true that the Act describes the payment as a “penalty,” not a “tax.” . . . That choice does not, however, control whether an exaction is within Congress’s constitutional power to tax.

. . . We thus ask whether the shared responsibility payment falls within Congress’s taxing power, “[d]isregarding the designation of the exaction, and viewing its substance and application.” *United States v. Constantine*, 296 U.S. 287, 294 (1935); cf. *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (“[M]agic words or labels” should not “disable an otherwise constitutional levy” (internal quotation marks omitted)); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (“In passing on the constitutionality of a tax law, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it” (internal quotation marks omitted)); *United States v. Sotelo*, 436 U.S. 268, 275 (1978) (“That the funds due are referred to as a ‘penalty’ . . . does not alter their essential character as taxes”).<sup>122</sup>

*Drexel Furniture* illustrates the principle that an exaction’s label does not determine whether it is a penalty or a tax. In *Drexel Furniture*, the Court considered the constitutionality of the “Child Labor Tax Law.” The law was entitled, “An act to provide revenue and for other purposes,” and the heading of the title read, “Tax on Employment of Child Labor.”<sup>123</sup> The law required that every person employing children under the age of sixteen in certain kinds of labor pay “an excise tax,” and in other places referred to

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<sup>120</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2651, 2653 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). *But see id.* at 2595 n.7.

<sup>121</sup> Roberts notes that this contention appears to be refuted by *United States v. Sotelo*, 436 U.S. 268, 275 (1978). *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2595 n.7.

<sup>122</sup> *NFIB v. Sebelius* at 2594-95 (parallel citations omitted).

<sup>123</sup> *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 34 (1922).

the exaction as a tax.<sup>124</sup> The Court asked, “Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?”<sup>125</sup> Despite the extensive labeling of the exaction as a tax, the Court said that, for purposes of the Constitution, it was a penalty.<sup>126</sup> Roberts is clearly correct that the Court’s precedents hold that the label Congress affixes to an exaction does not determine whether an exaction is a penalty or a tax for purposes of its constitutionality. And if an exaction’s label does not determine whether it is a penalty or tax, what is determinative? It can only be how the exaction *functions*.

The function-over-label principle should be kept in mind. The dissenters were highly distracted by the labeling, writing that the Court had “never held—*never*—that a penalty imposed for violation of the law was so trivial as to be in effect a tax.”<sup>127</sup> But whether Congress called the shared responsibility payment a penalty is not determinative. If the penalty is trivial, it is not a penalty because it is not prohibitory.<sup>128</sup> The dissenters argued that the Court cannot “rewrite the statute to be what it is not.”<sup>129</sup> But that seems to depend on what it means to “rewrite” the statute. The Court should not judicially construe a statute to *do* something different than it did prior to judicial review. “[W]e should assume that Congress would not want courts to rewrite a 2.5% tax to make it a 3.5% tax.”<sup>130</sup> But the Court can determine that what has been written as a penalty actually functions as a tax.

The dissenters insisted that the ACA’s scheme is described as “a mandate that individuals maintain minimum essential coverage, enforced by a penalty,”<sup>131</sup> writing

So the question is, quite simply, whether the exaction here is imposed for violation of the law. It unquestionably

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<sup>124</sup> *Id.* at 34-35.

<sup>125</sup> *Id.* at 36.

<sup>126</sup> *Id.* at 38.

<sup>127</sup> *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2651 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting). It is a legal tautology to describe a penalty as imposed for violation of a law. “[A] penalty . . . is an exaction imposed by statute as punishment for an unlawful act.” *Id.* at 2596 (quoting *United States v. La Franca*, 282 U.S. 568, 572 (1931)).

<sup>128</sup> *Id.* at 2595-97.

<sup>129</sup> *Id.* at 2651 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

<sup>130</sup> David Orentlicher, *Constitutional Challenges to the Health Care Mandate: Based in Politics, Not Law*, 160 U. PA. L. REV. 19, 28 (2011).

<sup>131</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2651 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

is. . . . It commands that every “applicable individual *shall* . . . ensure that the individual . . . is covered under minimum essential coverage.” And the immediately following provision states that, “[i]f . . . an applicable individual . . . fails to meet the *requirement* of subsection (a) . . . there is hereby imposed . . . a *penalty*.”<sup>132</sup>

Yet, the dissenters also seemed to indicate that “Congress had the *power* to frame the minimum-coverage provision as a tax . . . .”<sup>133</sup> As described by Professor David Orentlicher:

Instead of describing the 2.5% levy as a penalty for failure to buy insurance, one can readily characterize the 2.5% levy as an income tax that will help cover the costs of health care for the indigent, with people qualifying for an exemption from the tax if they purchase a health insurance policy.<sup>134</sup>

How would such a tax *function* differently from a mandate enforced by a penalty? Would the effect of such a tax not be exactly the same as a mandate enforced by a penalty? In both cases, a person must choose whether to buy certain health insurance. If he chooses not to do so, he must pay money to the U.S. Treasury. The mandate-penalty functions exactly like a tax, which the dissenters admit Congress could have imposed.

According to the Chief Justice, a “tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.”<sup>135</sup> Roberts argued that the exaction functions like a tax, not a penalty. The shared responsibility payment is paid like a tax. It is “paid into the Treasury by ‘taxpayer[s]’ when they file their tax returns.”<sup>136</sup> Its amount is determined based on taxable income, number of dependents, and joint filing status.<sup>137</sup>

<sup>132</sup> *Id.* at 2652 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (citations omitted).

<sup>133</sup> *Id.* at 2651 (“Of course in many cases what was a regulatory mandate enforced by a penalty *could have been* imposed as a tax upon permissible action; or what was imposed as a tax upon permissible action *could have been* a regulatory mandate enforced by a penalty.”). While the dissenters seemed to indicate that Congress had the power to frame this provision as a tax, they found that the exercise of that power was mutually exclusive with framing the minimum coverage provision as a penalty. *Id.*

<sup>134</sup> Orentlicher, *supra* note 130, at 26.

<sup>135</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2651.

<sup>136</sup> *Id.* at 2594 (quoting 26 U.S.C. § 5000A(b)).

<sup>137</sup> *Id.*

The exaction is found in the Internal Revenue Code and is collected like taxes by the IRS.<sup>138</sup> More importantly, comparing the shared responsibility payment to the penalty in *Drexel Furniture* suggests it is a tax, not a prohibitory penalty. The penalty in *Drexel Furniture* was 10 percent of a company's annual net income, "an exceedingly heavy burden."<sup>139</sup> But the shared responsibility payment appears to be about 2%-2.5% of an individual's annual income.<sup>140</sup> Health insurance will often be two-to-six times more expensive than paying the shared responsibility payment.<sup>141</sup> This is especially significant because it means that individuals may reasonably choose to forgo buying insurance and instead pay the shared responsibility payment; it will cost them significantly less to pay the "penalty" than to buy insurance. It is not so expensive that it will effectively regulate individuals into purchasing health insurance, and four million people are expected to choose to pay the shared responsibility payment rather than purchase the ACA's specified minimum essential health insurance.<sup>142</sup> Unlike the penalty of 10 percent in *Drexel Furniture*, the shared responsibility payment is not "prohibitory."

Further, the Child Labor Tax law included a scienter requirement, and the *Drexel Furniture* Court noted that "[s]cienters are associated with penalties, not with taxes."<sup>143</sup> But the ACA's scheme has no scienter requirement, suggesting that it is a tax.<sup>144</sup> And violations of the Child Labor Tax law were punishable in a variety of ways, including imprisonment,<sup>145</sup> whereas the shared responsibility payment can only be collected by the IRS, and "the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution."<sup>146</sup>

One aspect of *Drexel Furniture* cuts against Roberts's reasoning that the shared responsibility payment is a tax. The *Drexel Furniture* Court noted that Congress had suggested the illegality of employing child labor by "adopting the criteria of wrongdoing and imposing" consequences "on those who transgress its standard."<sup>147</sup> Other cases in which an exaction was deemed a tax, not a penalty, have lacked "detailed specifications of a

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 2595.

<sup>140</sup> *Id.* at 2596, n. 8.

<sup>141</sup> *Id.*

<sup>142</sup> *See id.* at 2597.

<sup>143</sup> *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922).

<sup>144</sup> *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2596.

<sup>145</sup> *Drexel Furniture*, 259 U.S. at 35.

<sup>146</sup> *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2596.

<sup>147</sup> *Drexel Furniture*, 259 U.S. at 38.

regulation of a state concern and business with a heavy exaction to promote the efficacy of such regulation.”<sup>148</sup> The ACA does seem to have the specificity to constitute a regulation of the purchase of health insurance. Yet the “heavy exaction” is missing, as are other indicia that failure to purchase health insurance is criminal.<sup>149</sup> There is some argument that the exaction is a penalty, but the balance of the reasoning in *Drexel Furniture* favors Roberts’s argument over the dissenters’.

The dissenters also argue that the ACA “commands” individuals to purchase health insurance.<sup>150</sup> This point favors the argument that the law is best *read* as a mandate enforced by a penalty. Roberts concedes as much.<sup>151</sup> Such a reading is offset by the non-prohibitory nature of the “penalty” and the lack of any other effort to criminalize the failure to purchase health insurance, but that is beside the point. How the law *reads* is not the question. The question is whether the law may reasonably be interpreted as a tax. This article has noted and the dissenters have conceded that Congress could write a tax law that functionally does the same thing as the ACA’s mandate-penalty scheme. And function, not label, is determinative.

The function argument is also responsive to the dissenters’ contention that “the fact that Congress (in its own words) ‘imposed . . . a penalty,’ for failure to buy insurance is alone sufficient to render that failure unlawful.”<sup>152</sup> Again, the dissenters are distracted by the labeling, writing that “Eighteen times in § 5000A itself and elsewhere throughout the Act, Congress called the exaction in § 5000A(b) a ‘penalty.’”<sup>153</sup> Even if labeling were the issue, the dissenters might lose the argument.<sup>154</sup> But Congress’ “own words” are not determinative. The question that must be answered is whether the shared responsibility payment functions like a

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<sup>148</sup> *Id.* at 42.

<sup>149</sup> “Perhaps the most critical part in this analysis was distinguishing from PPACA the penalties at issue in *Constantine* and *Drexel Furniture*, which were struck down largely because of their intent to punish unlawful activity.” Howell & Clark, *supra* note 95, at 22.

<sup>150</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2652 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

<sup>151</sup> *See id.* at 2593 (“The most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals “shall” maintain health insurance.”).

<sup>152</sup> *Id.* at 2652 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (internal citations omitted).

<sup>153</sup> *Id.* at 2653 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

<sup>154</sup> Cf. Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Constitutional Compromise*, 120 YALE L.J. ONLINE 407, 409 (2011) (“It takes a particularly obstinate—even hostile—reading of the [individual responsibility requirement] provision to find that it is not labeled a ‘tax.’ True, the result of a failure to obtain insurance is in some places called a ‘penalty.’ But the letter *t* is followed by the letters *a* and *x*, in that order, forty-five times in the section of the Tax Code setting out the insurance requirement alone.”).

penalty. It is conclusory and circular to argue that Congress called the exaction a penalty, which indicates the triggering conduct is illegal, which demonstrates that the exaction is a penalty. Whether Congress made the failure to purchase health insurance illegal is an indicia of whether the exaction is a penalty. But this article has noted that the ACA does not appear to make the failure to purchase health insurance illegal, which indicates that the exaction is a tax.

The dissenters also argue that § 5000A must be a mandate enforced by a penalty and not a tax because “some [people] are exempt from the tax who are not exempt from the mandate.”<sup>155</sup> Again, taking the functional approach prescribed by precedent, Congress could accomplish exactly the same thing with a tax. Certain persons could be exempted from the tax altogether, while others could be subject to the tax but made to owe nothing based on other factors (i.e., limited income). Or, more simply, all of the categories of people who are either exempted from the mandate or exempted from the exaction under the current scheme could simply be exempted from the tax. The result is identical, and that is the point. The shared responsibility payment functions just like a tax.

The dissenters also make a policy argument. Taxes should not be imposed by the judiciary because the judiciary is not accountable to the people.<sup>156</sup> Instead, taxes must originate with the legislative body most responsive to the people, the House of Representatives.<sup>157</sup> But long prior to the Court’s opinion, commentators were calling the ACA a tax.<sup>158</sup> Some “suggest that the tax label will create some additional political constraint, perhaps on the theory that the label will increase the salience of the burden on the public. [But] . . . there is no evidence that decreasing the salience of

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<sup>155</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2653 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

<sup>156</sup> *Id.* at 2655 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

<sup>157</sup> *Id.* (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

<sup>158</sup> See, e.g., Jonathan Riskind, *Health-Care Reform Could Vex GOP, Too*, COLUMBUS DISPATCH, Dec. 19, 2010, at 5G, available at 2010 WLNR 25043411 (quoting House Speaker John Boehner as saying “The individual mandate at the heart of Obamacare puts the federal government in the business of forcing you to buy health insurance and taxing you if you don’t.”); Cal Thomas, *Supreme Court Will Decide Whether Obamacare is Constitutional*, OLYMPIAN, Dec. 20, 2010, available at 2010 WLNR 25069595 (“[T]he Affordable Care Act, also known as ‘Obamacare,’ unconstitutionally imposes a requirement that everyone carry health insurance or be taxed for not doing so . . . .”); Michael Young, *The Real Costs of Obamacare*, WASH. TIMES, Dec. 28, 2010, at B01 (“We also reject Obamacare because it imposes \$500 billion in new taxes”).

a tax eases its passage.”<sup>159</sup> “[P]eople have not been shy about opposing new taxes, whatever they are called.”<sup>160</sup>

Some argued that if the shared responsibility payment is a tax, then it is a direct tax in violation of Article I, § 9, clause 4 of the Constitution.<sup>161</sup> Even the dissenters did not endorse this argument.<sup>162</sup> But Roberts addresses it, noting that the Court has always had a narrow view of what constitutes a direct tax.<sup>163</sup> Direct taxes appear to encompass only head taxes, taxes on real estate and personal property, and taxes “imposed on property as such.”<sup>164</sup> The choice not to purchase health insurance cannot be characterized as property, and is better characterized as a “circumstance.”<sup>165</sup> There appears to be little serious argument that the shared responsibility payment is a direct tax.

The shared responsibility payment does not seem to have the characteristics of a penalty. It also has the crucial characteristic of a tax: It raises revenue for the government.<sup>166</sup> In *Kahriger*, the Court upheld a tax on persons taking wagers that was meant to discourage gambling, because “regardless of its regulatory effect, the wagering tax produce[d] revenue.”<sup>167</sup> The shared responsibility payment is expected to raise \$4 billion in revenue.<sup>168</sup>

The ACA’s scheme functions much more like a tax than a penalty. Like a tax, it generates revenue. Unlike a penalty, it is not prohibitory and it lacks other indicia that would suggest the failure to purchase health insurance is considered illegal. And, even the dissenters concede that Congress could have passed a tax that functions exactly like this alleged penalty. Among the dissenters, Scalia has often been accused of formalism

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<sup>159</sup> Galle, *supra* note 154, at 411.

<sup>160</sup> Stewart Jay, *On Slippery Constitutional Slopes and the Affordable Care Act*, 44 CONN. L. REV. 1133, 1208 (2012).

<sup>161</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2598.

<sup>162</sup> *Id.* at 2655 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

<sup>163</sup> *Id.* at 2598 (majority opinion).

<sup>164</sup> *TRIBE*, *supra* note 111, at 843; see *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2598-99.

<sup>165</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2599.

<sup>166</sup> *Id.* at 2651 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

<sup>167</sup> *United States v. Kahriger*, 345 U.S. 22, 28 (1953) (overruled on other grounds) (“It is conceded that a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed. Nor is the tax invalid because the revenue obtained is negligible. Appellee, however, argues that the sole purpose of the statute is to penalize only illegal gambling in the states through the guise of a tax measure. As with the above excise taxes which we have held to be valid, the instant tax has a regulatory effect. But regardless of its regulatory effect, the wagering tax produces revenue. As such it surpasses both the narcotics and firearms taxes which we have found valid.”).

<sup>168</sup> *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2594.

and “placing undue weight on labels.”<sup>169</sup> But here the dissent’s emphasis on labels is explicitly contrary to the Court’s precedents. “In passing on the constitutionality of a tax law, [the Court is] concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.”<sup>170</sup> The legal question for the Court with regard to the ACA was whether the shared responsibility payment can be reasonably interpreted as a tax. It appears that it can be.

Based upon these factors,<sup>171</sup> it seems apparent that although the “tax” was shrouded as a penalty, the shroud is easily torn off when examined under the Congress’ taxing power. Many have expressed disbelief at this analysis, but it seems a fairly routine legal premise that a legislative body can craft a definition of one thing for statutory purposes, only to have it interpreted differently constitutionally. For this reason, it is often practical to examine a statute for constitutional authority prior to its effect on statutory authority.<sup>172</sup>

Contrary to Roberts’s critics’ allegations that the opinion was so illogical that it gave the lie, the “conclusion to the bitterly fought healthcare battle was quite ordinary in some ways. Roberts hewed to a traditional Supreme Court principle that if the justices can find any constitutional grounds on which to uphold a law, they should do so.”<sup>173</sup> Roberts seems to be correct in his opinion, and many scholars agree with his analysis.<sup>174</sup> But the purpose of reviewing this argument here is to prove a different point. One allegation against Roberts was that his reasoning was so illogical, so contorted, so twisted that he could not have believed what he said about the “penalty” being a “tax.” He must have been acting politically; his opinion must be a lie. But the premise of this argument is

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<sup>169</sup> Tuan Samahon, *Blackmun (and Scalia) at the Bat: The Court’s Separation-of-Powers Strike Out in Freytag*, 12 NEV. L.J. 691, 700-01 (2012); e.g. Glenn S. Koppel, *The Fruits of Shady Grove: Seeing the Forest for the Trees*, 44 AKRON L. REV. 999, 1045 (2011).

<sup>170</sup> *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (internal quotation marks omitted).

<sup>171</sup> “1. Paid into treasury when taxes are paid; 2. Does not apply to individuals who do not pay federal income taxes; 3. Amount determined by taxable income, dependents, filing status; 4. Requirement is found in IRS Code; 5. Enforced by the IRS; and 6. Yields revenue (estimated \$4 billion).” Kane, *supra* note 88, at 55.

<sup>172</sup> *Id.*

<sup>173</sup> Joan Biskupic, *Analysis: Why Roberts Saved Obama’s Healthcare Law*, REUTERS, June 29, 2012, available at <http://www.reuters.com/article/2012/06/29/us-usa-healthcare-court-roberts-idUSBRE85S02U20120629>.

<sup>174</sup> See Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012); Galle, *supra* note 154, at 408; Symposium *Our Pending National Debate: Is Health Care Reform Constitutional?*, 62 MERCER L. REV. 605, 622, 635 (2011) (quoting Dean Erwin Chemerinsky as saying “there is a very strong argument that this is a tax rather than a penalty, and as a tax, it becomes permissible,” and quoting Professor Gillian Metzger as saying the “tax power argument is strong.”); Orentlicher, *supra* note 130, at 25.

false. Roberts's reasoning is not illogical. Perhaps it is labyrinthine, but like many things in life, law can be complex. What is far more significant than its complexity is that at every important juncture, Roberts's reasoning is explicitly guided by the Court's precedents. In fact, his opinion appears to correctly follow the relevant precedent – or at least better than the dissenters'. And even if one were persuaded that the dissenting opinion is better, Roberts's arguments are not unreasonable or illogical, as shown above. We can think Roberts is wrong, but we should not believe the accusation that he is a liar or a lunatic.

#### IV. LEGITIMATE

It has been alleged that Roberts's opinion was political or illogical in a way that undermines its legitimacy. These allegations have been dispatched above. We will now consider whether Roberts's opinion satisfies the standards of a legitimating legal objectivity.

In order to assess the objectivity of Roberts's opinion, this article will apply the following rubric. For a legal judgment to be considered objective, certain criteria must be met:<sup>175</sup> (1) the judgment must be independent; (2) it must be capable of being assessed for correctness; and (3) it must be intersubjectively invariant.<sup>176</sup> Each of these criteria will be defined and elaborated below. These features of objectivity apply to any domain of inquiry, including law.<sup>177</sup> When these general features of objectivity are applied to legal discourse, legal objectivity requires that

(1) [p]articipants in the deliberative process conduct their deliberation only with normatively relevant reasons and arguments in view and assess the merits of the arguments only by normatively relevant standards; and (2) their participation is governed by the overarching aim of achieving reasonable common formation of judgment on the basis of the reasons and arguments publicly offered.<sup>178</sup>

Extensive discussion of these criteria is available elsewhere.<sup>179</sup> As these criteria are applied in this article, they will be explained as necessary.

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<sup>175</sup> Elsewhere I have argued in favor of this description of legal objectivity. Ching, *supra* note 6.

<sup>176</sup> Postema, *supra* note 4; *see also* Ching, *supra* note 6.

<sup>177</sup> Postema, *supra* note 4, at 105-108.

<sup>178</sup> *Id.* at 118.

<sup>179</sup> *Id.*

These criteria often overlap, and this article will organize its discussion of the objectivity of Roberts's opinion based on the first three criteria: independence, standards of correctness, and intersubjective invariance.

#### A. Independence

Legal objectivity requires independence, meaning that the reasons for a legal judgment must transcend the subjectivity of the person engaged in the activity of judging.<sup>180</sup> It must not be the product of improper factors like bias, idiosyncrasy or ideology.<sup>181</sup> Rather, it should be the product of proper, normatively relevant reasons.<sup>182</sup>

This need for independence explains why it was necessary to demonstrate that Roberts's opinion was not political in the partisan sense. A legitimating objectivity cannot attach to a judgment that was the product of a partisan agenda. This is because we expect cases to be decided on legal, not political, grounds. This article has already refuted the allegation that Roberts's opinion was political.

The criterion of independence is also why this article attempted to show that each controversial aspect of Roberts's opinion was based on the Court's precedents.<sup>183</sup> In our legal system, precedent is a normatively relevant reason for a decision.<sup>184</sup> Further, it is external to a judge. It is an object. Anyone can look it up and read it for themselves.<sup>185</sup> These aspects of precedent are also relevant to "standards of correctness," which will be discussed in the next subsection.

It appears that Roberts's decision was not the product of improper subjective factors like politics. Instead, it was the product of proper,

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<sup>180</sup> *Id.* at 105. "Domains of discourse that aspire to objectivity provide us with modes of inquiry, argument, and judgment, not merely modes of self-expression or communication." *Id.* at 113.

<sup>181</sup> *Id.* at 106. "Ideology" in this sentence is better thought of as "partisanship," which this article has distinguished from ideological influence above. Tamanaha, *supra* note 3. Postema would agree with this distinction; he notes that "objectivity is achieved not by abandoning one's experience or perspective and taking up an alien one, but by expanding the circle of one's interlocutors." *Cf.* Postema, *supra* note 4, at 126.

<sup>182</sup> Postema, *supra* note 4, at 106.

<sup>183</sup> *Id.* at 124 ("[Law] anchors the public justification of decisions and actions of officials and citizens alike to past decisions and actions of the community.").

<sup>184</sup> "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Adhering to precedent is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." Payne v. Tennessee, 501 U.S. 808, 827(1991) (citations omitted) (internal quotation marks omitted).

<sup>185</sup> For deliberation to be objective "[a]ll reasons uttered publicly must be accessible to and assessable by all participants." Postema, *supra* note 4, at 119.

normatively relevant reasons, especially the Court's own precedents. Roberts's opinion deserves to be called independent.

*B. Standards of correctness*

It is implied in our practice of arguing cases that "our reasoning can be held to standards of good performance. We assume that there is a difference between badly conducted inquiries and well-conducted ones."<sup>186</sup> Thus, "[f]or a legal judgment to be capable of being assessed for correctness, . . . there must be standards for assessing a judgment's correctness, and these standards cannot simply be a judging subject's belief or opinion. . . . [J]udgments must be conclusions of a process of deliberative reasoning."<sup>187</sup>

Regarding "standards of correctness," again, precedent takes center stage.<sup>188</sup> The primary standard of correctness in Roberts's opinion is the Court's past decisions. His decision that the shared responsibility payment was a tax was not just his personal opinion or even based on his own unique reasons. Roberts relied on the principles stated in previous cases and applied them to the questions in *NFIB v. Sebelius*. He analyzed whether the shared responsibility payment was more like exactions the Court had deemed taxes or those it had deemed penalties.

The sections of Roberts's opinion considered above are particularly strong in regard to reasoning by reference to standards of correctness. Each step in his argument follows well-established legal principles. In finding that the AIA did not apply to the ACA, Roberts noted, and the dissent agreed, that Congress decides the relationship between the statutes it creates. Roberts relied on the very well-settled proposition that if a statute is susceptible to two possible meanings, one of which violates the Constitution, the Court should adopt the meaning that does not violate the Constitution. Roberts relied on the Court's precedents that state that whether an exaction is a tax or penalty does not depend on its label, but its functions. It is actually the dissent who seemed to depart from the Court's precedents, insisting continually that the statute's labeling was determinative. Roberts relied on *Drexel Furniture*, inter alia, to demonstrate that the shared responsibility payment functions more like a

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<sup>186</sup> *Id.* at 113.

<sup>187</sup> Ching, *supra* note 6, at 69 (citing Postema, *supra* note 4, at 107).

<sup>188</sup> Postema, *supra* note 4, at 124 ("Legal arguments typically take the form of reasons for extending or delimiting a rule used and established by a past decision. The reasons are developed through the exploration of analogies with competing lines of cases . . . . Disputes in the present are resolved . . . by arguments drawn from analogies to past decisions.").

tax than a penalty. All of Roberts's crucial reasoning was done with reference to standards of correctness, especially the Court's precedents. This is an important sense in which his judgment is objective. His opinion is an object located in a "framework of reasons."<sup>189</sup> By using a public deliberative process based on standards of correctness to produce his opinion, Roberts objectified his opinion.

### C. Intersubjective Invariance

Intersubjective invariance means there is the possibility of different judging subjects confirming or disconfirming a judgment based on the reasons and standards discussed above.<sup>190</sup> Reasons and standards play a slightly different role here than above. We have discussed how reasons and standards guide a judge in making his judgment. Here, reasons and standards are the parameters that allow others to confirm or disconfirm that judgment. Without them, the discourse would be a free-for-all without any way to intelligibly<sup>191</sup> confirm or disconfirm the judgment, like "playing tennis without a net."<sup>192</sup> But if we have reasons and standards, there are rules to the game.

"Intersubjective invariance acts like a test for whether a judgment is based on proper reasons and standards of correctness."<sup>193</sup> "The important general point to record here is that it must be possible for other [judges] to assess a judgment, and confirm or disconfirm it, if it is to count, even at the limit, as objective in principle."<sup>194</sup> Note that a judgment could be objective even when other people look at it and "disconfirm it."<sup>195</sup>

This highlights that the conception of objectivity being applied here is *methodological*. This conception of objectivity is about *process*. Objectivity in this sense arises from arriving at judgments through a public, deliberative process. If we subject our judgments to this process, they become *objects*, things that other people can observe.<sup>196</sup> And we can make

<sup>189</sup> *Id.* at 107.

<sup>190</sup> *Id.* at 108-09.

<sup>191</sup> "Because discourse is conducted by reference to standards, both agreement and disagreement are intelligible (as opposed to mere mute assertions of opposition)." Ching, *supra* note 6, at 69-70 (citing Postema, *supra* note 4, at 107).

<sup>192</sup> *Robert Frost*, THE NORTON ANTHOLOGY OF MODERN POETRY 244 (Richard Ellman & Robert O'Clair eds., 2d ed. 1988).

<sup>193</sup> Ching, *supra* note 6, at 70.

<sup>194</sup> Postema, *supra* note 4, at 109.

<sup>195</sup> *Id.* "One can make an incorrect objective judgment and one's judgment can be correct, while failing standards of objectivity . . ." *Id.* at 112.

<sup>196</sup> *Id.* at 124 ("Clashes in public over the proper and reasonable understanding of past decisions . . . are signs that the products of the system can claim the right to be taken seriously as products of a credible structure of public practical deliberation").

objective judgments observable by others, who can in turn confirm or disconfirm them. But their disconfirmation does not change that the judgment is the result of an objectifying process. So, what is central to “intersubjective invariance” is not actual agreement among judges,<sup>197</sup> but a process or method of publicly offering reasons and arguments to others.

Further, it is a *public* process. It would be a problem if, instead of issuing a public opinion based on publicly available reasons and standards, the Court simply told us the votes: 5-4. An objective judgment must be public so that it can be assessed.<sup>198</sup> Here, we can all see for ourselves how Roberts got to his result; the reasoning is not hidden. Public reasoning furthers the project of “securing . . . agreement among all participants in the domain.”<sup>199</sup> Because of this process of public reasoning, Roberts was required to issue an opinion that explains itself publicly. It was not like going to the voting booth. He could not have voted however he wanted, no questions asked. Roberts was forced to write his opinion so as “to justify [his judgment] *to others*.”<sup>200</sup> Consequently, Roberts could not have justified his opinion in a biased, idiosyncratic manner because such a judgment could not hope to secure others’ agreement. By deliberating in public, Roberts was disciplined to reason to a decision that might be accepted by all.<sup>201</sup>

Further, four other Supreme Court Justices agreed with Roberts’s reasoning. A judgment “would lack something in credibility if others viewing the object from the same parametric position could not see what this subject sees.”<sup>202</sup> Here, a majority of the Court, as well as many scholars, have publicly affirmed that they could “see” what Roberts “saw.” Roberts’s opinion satisfies the criterion of intersubjective invariance.

#### *D. Actual Correctness*

This is not to say that we know Roberts’s reasoning was correct, only that it was objective.<sup>203</sup> But saying that a judgment is objective is not an “argument stopper”; rather, it is an invitation to “reasoned argument.”<sup>204</sup>

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<sup>197</sup> Elsewhere, I do argue that this process must result in some amount of actual agreement over time: either a preponderance of agreement or else increasing agreement during a reasonable period of time. Ching, *supra* note 6, at 90. It is worth noting that all of the aspects of Roberts’s opinion considered here did secure the “agreement” of a majority of the Court.

<sup>198</sup> Postema, *supra* note 4, at 124.

<sup>199</sup> *Id.* at 119.

<sup>200</sup> *Id.*

<sup>201</sup> *See id.* at 119-120.

<sup>202</sup> *Id.* at 109.

<sup>203</sup> *See id.* at 110, 121.

<sup>204</sup> *Id.* at 112.

There is a high degree of transparency to this process, and it invites anyone to intelligibly demonstrate why a judgment is incorrect.<sup>205</sup> And isn't this one of the best signs that someone is objective: that he admits he could be wrong? When we say someone is objective, we do not mean that he is always correct. Nor do we mean that he is omniscient. Nor do we mean that he is not bound by contingencies. Rather, we mean that he is properly open on a given subject.<sup>206</sup>

Accordingly, an objective judgment must be open to dissent and even correction.<sup>207</sup> For a judgment to be properly open, there must be "structured opportunities for dissent" and "opportunities, resources, and structures for reopening the issue for further deliberation later."<sup>208</sup> Thus, it is significant that the Court issues dissenting opinions and does, occasionally, reverse its decisions. Again, the public nature of the Court's deliberative process is important. Reasons and arguments publicly stated can be debated, criticized, and even rejected. It may be the case that eventually we accept the dissent's argument that the labeling of the statute should take precedence over its function. Objective reasons and judgments are "defeasible and open to criticism."<sup>209</sup> And the dialectic between competing legal arguments helps secure objectivity. "[O]bjectivity is achieved not by abandoning one's experience or perspective and taking up an alien one, but by expanding the circle of one's interlocutors."<sup>210</sup> Who doubts that if Roberts is wrong that someone like Scalia isn't the person to prove it?<sup>211</sup> We cannot know for certain that Roberts's opinion was not influenced by improper factors, but the "willingness to entertain challenges from others . . . may expose the objectivity failures" and protect against the "influence of distorting factors."<sup>212</sup>

Roberts's opinion may be wrong, but it bears the marks of independence, standards of correctness, and intersubjective invariance. It has achieved a legitimating objectivity.

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<sup>205</sup> Ching, *supra* note 6, at 70 (citing Postema, *supra* note 4, at 107) ("Standards for assessing correctness allow one judging subject to *explain* that his judgment satisfies the standard *and* another judging subject to *explain* why it does not.").

<sup>206</sup> Postema, *supra* note 4, at 105 ("Ordinarily, to say that a judgment is objective is to say that the person making the judgment is open in an appropriate way to the subject matter of the judgment.").

<sup>207</sup> Ching, *supra* note 6, at 69 (citing Postema, *supra* note 4, at 107) ("The structuring feature of 'correctness' has three implications. First, it implies the possibility of mistake.").

<sup>208</sup> Postema, *supra* note 4, at 120.

<sup>209</sup> *Cf. id.* at 120 (listing requirements for public deliberation).

<sup>210</sup> *Id.* at 126.

<sup>211</sup> *Cf. id.* at 122 ("Challenge, vigorous dissent, and articulate, dogged disagreement, these are the analogues of tough love in practices and institutions governed by the ideal of strong deliberative consensus.").

<sup>212</sup> *Cf. id.* at 122-23 (listing these as demands of objective public discourse).

## CONCLUSION

What is at stake here? Chief Justice Roberts needs little defense. He has a lifetime appointment to the pinnacle position of his profession. Rather, what needs to be repudiated is a cynical practice that undermines our aspiration to be governed by laws and not men. How else are judges to execute their duties but by giving us reasonable, legal opinions? If they do so, and we then assume they are partisan liars, we are undermining our entire legal system.<sup>213</sup>

In a liberal democracy, there must be a practice of respectfully considering opinions that differ from our own.<sup>214</sup> To reject that practice is to embrace the cynical vision that law is only power and those who wield such power are usually hypocritical partisans. Of course, the cynical interpretation may be correct. But if Roberts's opinion is any indication, it appears not to be. The best interpretation of Roberts's opinion seems to be that it is a principled, *legal* opinion. Roberts probably thinks Obamacare is bad policy. He definitely thought that Congress' attempt to enact it pursuant to the Commerce Clause was a fundamental violation of our form of government.<sup>215</sup> In his personal capacity, he might have preferred that the law be repealed.<sup>216</sup> But his job required something else. It required him to follow precedent and legal principles. And he did this, step by step, for all to see, until he reached the conclusion that the enactment of the individual mandate and shared responsibility payment was permissible under Congress' Tax Power. This does not appear to be a "political" decision. It is how a principled judge should behave.

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<sup>213</sup> In such a system, judicial decision making would be "consummately political. That would spell the demise of the law." Tamanaha, *supra* note 3, at 778.

<sup>214</sup> Objective deliberation requires "willingness on the part of each of the participants to reconsider their views and arguments, to admit error where error is reasonably shown." Postema, *supra* note 4, at 120.

<sup>215</sup> Howell & Clark, *supra* note 95, at 20 ("[T]he Chief Justice bristled at the Government's apparent articulation of an unbridled version of the Commerce Clause . . ."); Kane, *supra* note 88, at 55 ("A claim of limitless power should immediately set off warning bells with any student of our nation's meticulous and ingenious system of checks and balances. It was precisely the limitless claim of commerce power that ultimately doomed it as a justification for the individual mandate. As the Chief Justice recognized, 'The Framers gave Congress the power to *regulate* commerce, not to *compel* it.' In holding that the individual mandate could not be upheld under the Commerce Power, Chief Justice Roberts definitively recognized limits thereto" (citations omitted)).

<sup>216</sup> Chief Justice Roberts "highlighted flaws in the administration's arguments and stressed the majority was not commenting on the wisdom of the law." James Vicini, Jonathan Stempel & Joan Biskupic, *Top Court Upholds Healthcare Law in Obama Triumph*, REUTERS, June 28 2012, available at <http://www.reuters.com/article/2012/06/28/us-usa-healthcare-court-idUSBRE85R06420120628>.