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HOW *NFIB V. SEBELIUS* AFFECTS THE CONSTITUTIONAL GESTALT*

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I. INTRODUCTION: DIRECT AND INDIRECT LEGAL EFFECTS

This Essay examines the effects of the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*,[1] in which the Court addressed the constitutionality of the Affordable Care Act.[2] More precisely, what effects will *NFIB* have on the law—especially constitutional law? We can divide these effects into two general categories, direct and indirect. "Direct legal effects" are those created by and through legal norms. They include the operation of legal orders (the mandate in an appellate opinion) and legal rules (stare decisis and the doctrine of law of the case). "Indirect legal effects" are mediated by causal processes that are not themselves instantiations of legal rules. For example, if a legal decision affects politics, and then the political change affects the law, that change would constitute an indirect legal effect.

The Supreme Court's decision in *NFIB v. Sebelius* has already had important direct legal consequences—The Patient Protection and Affordable Care Act (ACA) has gone into effect, but with a significant

** John Carroll Research Professor of Law, Georgetown University Law Center. I owe thanks to the participants at a conference of *NFIB* at Columbia University and a faculty workshop at Georgetown University. I am particularly grateful to Jonathan Adler, Randy Barnett, Benjamin Cain, Megan Degeneffe, Marc DeGirolami, Laura Donohue, Randy Kozel, David Law, Martin Lederman, Trevor Morrison, and Asher Steinberg for helpful comments, criticisms, and suggestions.

1. 132 S. Ct. 2566 (2012) [hereinafter *NFIB v. Sebelius* or *NFIB*].

2. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

alteration in the incentive provided to the states to expand Medicaid coverage and eligibility.[3] Via the doctrine of vertical stare decisis, *NFIB* could have direct effects in future lower-court cases involving the Anti-Injunction Act[4] and the spending power.[5] On the Commerce Clause and Necessary and Proper Clause issues, the direct legal effects are complex and likely to be disputed. The strongest argument for a Commerce Clause holding postulates that *NFIB* has stare decisis effects in cases in which another individual mandate (relevantly similar to the mandate in the ACA) is enforced by a criminal penalty—or other penalty that could not be fairly characterized as a tax via a saving construction.

Whatever direct legal effects the Court's decision ultimately produces, the thesis of this Essay is that the most important and far-reaching legal effects of *NFIB* are likely to be indirect. *NFIB* destabilizes what we can call the "constitutional gestalt"[6] regarding the meaning and implications of what is referred to as the "New Deal Settlement."[7] The idea of a

3. The primary effects of the spending power holding may be on the bargaining processes between states and the federal government over waivers from various requirements in the ACA. *See generally* Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 227 (Nathaniel Persily et al. eds., 2013).

4. 26 U.S.C. § 7421(a) (2006).

5. *See generally* Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861 (2013).

6. The phrase "constitutional gestalt" is used here in a technical or stipulated sense, as described below. *See infra* Part IV.C. The phrase itself has rarely been used in legal scholarship. *But see* Judith Resnik, *Detention, The War on Terror, and The Federal Courts*, 110 COLUM. L. REV. 579, 680 (2010); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1506 (1990). Subsequent to my articulation of this idea in drafts of this Article and blog posts, the notion of a "constitutional gestalt" has been discussed by other legal scholars. *See, e.g.*, Randy E. Barnett, *No Small Feat: Who Won the Obamacare Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331 (2013); Josh Blackman, *Back to the Future of Originalism*, 16 CHAP. L. REV. 325, 326, 332–34, 337–40 (2013).

7. The phrase "New Deal Settlement" (alternatively, "New Deal constitutional settlement" or "New Deal institutional settlement") can be used in different ways. Here, I use the phrase to refer to two different versions of the constitutional gestalt that frame our understanding of national legislative powers. The same phrase can also be used to refer to the historical events during a particular period. When used in that way, reference to the New Deal Settlement implicates the truth of particular claims about history. In this Essay, I do not make such claims, which may be problematic for a variety of reasons. For discussions of the validity of certain historical narratives and related issues, see G. Edward White, West Coast Hotel*'s Place in American Constitutional History*, 122 YALE L.J. ONLINE 69 (Sept. 24, 2012), http://yalelawjournal.org/2012/09/24/white.html. For uses of the phrase, *see, e.g.*, Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677, 685–87 (2005); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 880 (2003); Ernest A. Young, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 75 LAW & CONTEMP. PROBS., Issue 3, 2012 at 157, 186–87.

constitutional gestalt will be explored in depth below,[8] but the basic idea is that the gestalt is an interpretive framework that organizes our understanding of cases, theories, and narratives; we can think of the constitutional gestalt as a very general and abstract map of the constitutional landscape. Before *NFIB*, the consensus understanding was that the New Deal and Warren Court cases had established a constitutional regime of plenary and virtually unlimited national legislative power under the Commerce Clause,[9] although the regime might also contain narrow and limited carve-outs protective of the core of state sovereignty.[10] After *NFIB*, the constitutional gestalt is unsettled.

In *NFIB*, five Justices of the Supreme Court endorsed a view of the Commerce Clause[11] that is inconsistent with the prevailing understanding of the constitutional gestalt associated with the New Deal Settlement.[12]

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8. *See infra* Part IV.C.

9. *See, e.g.*, ARCHIBALD COX, THE COURT AND THE CONSTITUTION 166 (1987) (observing that since 1937, the Court has recognized "virtually unlimited congressional power to regulate business activities under the Commerce Clause"); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 857 n.255 (1995) ("[*Wickard*] construed Congress's commerce powers as virtually unlimited . . . ."); Matthew Adler, *What States Owe Outsiders*, 20 HASTINGS CONST. L.Q. 391, 431 (1992) ("Congress now has the power to promulgate every kind of regulation, including those that were once thought to lie within the state's exclusive 'police' power, because every kind of regulatory problem may concern out-of-staters."); David S. Bloch & William Robert Nelson Jr., *Defining "Health": Three Visions and Their Ramifications*, 1 DEPAUL J. HEALTH CARE L. 723, 728 (1997) (characterizing the commerce power as "an almost unlimited police power"); Kathleen A. Burdette, *Making Parents Pay: Interstate Child Support Enforcement after* United States v. Lopez, 144 U. PA. L. REV. 1469, 1477 (1996) ("Since the New Deal, Congress has had virtually unlimited power to regulate under the Commerce Clause . . . ."); Paul G. Kauper, *Supreme Court: Trends in Constitutional Interpretation*, 24 F.R.D. 155, 157 (1959–60) ("[T]he key decisions under the Commerce Clause . . . resulted in a great and apparently unlimited expansion of federal authority to deal with the nation's economic problems."); Stephen Chippendale, Note, *More Harm than Good: Assessing Federalization of Criminal Law*, 79 MINN. L. REV. 455, 460 (1994) ("[C]ongressional power under the Commerce Clause has emerged as virtually unlimited."); Alan N. Greenspan, Note, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND. L. REV. 1019, 1020–21 (1988) ("The rational basis test supports legislation that regulates purely local behavior for the purpose of promoting or protecting the public health, welfare, or morality. . . . Not only has the commerce clause become the source of federal police power, it has become an unlimited source.") (footnotes omitted); Kenneth S. Weitzman, Comment, *Copyright and Patent Clause of the Constitution: Does Congress Have the Authority to Abrogate State Eleventh Amendment Sovereign Immunity After* Pennsylvania v. Union Gas Co.*?*, 2 SETON HALL CONST. L.J. 297, 333 (1991) ("Pursuant to the commerce clause, congressional authority is extremely broad, if not virtually unlimited today, and nearly anything even remotely connected with interstate commerce is subject to Congress' plenary powers.").

10. *See infra* Part IV.D.1.

11. *See* NFIB v. Sebelius, 132 S. Ct. 2566, 2585–93 (2012) (opinion of Roberts, C.J.); *id.* at 2644–50 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

12. This constitutional gestalt can be called the "Dynamic New Deal Settlement." *See infra* Part IV.D.1. The core idea is that national legislative power is plenary and virtually unlimited and that the power will expand over time to accommodate novel assertions of power by Congress.

Endorsement of this view by a majority of the Court opens a fissure in constitutional politics, creating space for an alternative constitutional gestalt. The core idea of the alternative view is that the New Deal Settlement did not create plenary and virtually unlimited legislative power. Instead, the alternative understanding is that the New Deal and Warren Court cases establish only the constitutionality of particular federal programs, specific zones of federal power, and particular modes of federal regulation. The most important indirect effect of *NFIB* is that it enables constitutional contestation[13] over the content of the gestalt and the meaning of the New Deal Settlement.

The remainder of this Essay is organized as follows. Part II analyzes the structure of the opinions in *NFIB*, and Part III examines the direct legal effects that these opinions will produce. This discussion may seem dry and technical, even to Supreme Court enthusiasts. We will examine what is called the "mandate"—the direct legal command contained in the opinion of the Court and its implications for the vertical law-of-the-case effects of *NFIB.* We then will turn to the doctrine of vertical stare decisis, which will require us to examine the convoluted structure of the various opinions in the case. That will lead to the doctrine of horizontal stare decisis—the precedential effect of *NFIB* on future decisions of the Supreme Court itself.

* * *

Readers who are familiar with the complex structure of the opinions in NFIB may wish to proceed directly to Part III on page 16, discussing direct legal effects, including the vertical and horizontal stare decisis effects of the decision. Other readers may wish to proceed directly to Part IV on page 37, which discusses the effect of the decision on the constitutional gestalt.

* * *

The technical analysis in Part III leads to the conclusion that on the Commerce Clause issue, *NFIB* is unlikely to produce stare decisis effects that are clear and uncontested—one way or the other. That conclusion has

13. The phrase "constitutional contestation" is used infrequently in legal scholarship. For an early example, *see* Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 303 (2001). In this Essay, my use of the phrase is influenced by the account of constitutional contestation offered by Mariah Zeisberg. *See* MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY (2013).

an implication: *NFIB* opens up space for constitutional contestation. That space is then examined in Part IV, which is about the indirect legal effects of *NFIB.* We begin by examining the idea of a constitutional gestalt—a highly abstract feature of constitutional thought and discourse that unifies constitutional theories, narratives, and doctrines. We then turn to the effects of *NFIB* on the stability of the constitutional gestalt associated with the New Deal Settlement. This leads to the core idea of the essay—that *NFIB* destabilizes the constitutional gestalt, potentially (but not necessarily) enabling a constitutional gestalt shift. Part V integrates the discussion of direct and indirect effects and draws some speculative conclusions about the future of constitutional discourse and politics.

II. THE CASE AND THE OPINIONS

Before we examine the effects of the Supreme Court's decision of *NFIB v. Sebelius*, it is necessary to unpack the issues and opinions. The first step is the usual, but hopefully brief, recitation of the facts and procedural history.[14]

A. The Facts and Procedural History

The ACA was enacted by Congress in 2010. It is a complex statute—hundreds of provisions and some nine hundred pages in length. Two provisions of the ACA were challenged. The first was the individual mandate, which required certain individuals to purchase qualifying health insurance.[15] The second challenged provision was the Medicaid expansion, a portion of which effectively required states to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level by withdrawing all federal Medicaid funds from noncomplying states.[16]

The day the ACA was signed into law, thirteen states filed a complaint in the United States District Court for the Northern District of Florida. The original plaintiffs were later joined by an additional thirteen states, the

14. A detailed exploration of the history of *NFIB v. Sebelius* is provided by JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE (2013). An important source of scholarly commentary is found in a recent anthology edited by Nathaniel Persily, Gillian E. Metzger, and Trevor W. Morrison. *See* THE HEALTH CARE CASE, *supra* note 3. Another perspective on the history of the case if offered by a compilation of blog posts from the Volokh Conspiracy. *See* RANDY E. BARNETT ET AL., A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE (Trevor Burrus ed., 2013).

15. 26 U.S.C. § 5000A (Supp. IV 2010).

16. 42 U.S.C. §§ 1396a, 1396c (2006).

National Federation of Independent Business, and several individuals.[17] The District Court held that Congress lacked legislative power to enact the individual mandate, and that the mandate could not be severed—resulting in an order that struck down the Act in its entirety.[18] The United States Court of Appeals for the Eleventh Circuit affirmed the determination that Congress lacked legislative power to enact the individual mandate, but reversed the determination that the mandate was not severable.[19] The Eleventh Circuit also rejected the challenge to the Medicaid expansion provisions.[20] Two other circuits rejected challenges to the individual mandate. [21] One circuit held that the Anti-Injunction Act created a jurisdictional bar to the challenge.[22] The United States Supreme Court granted certiorari in the Eleventh Circuit cases.[23]

The Supreme Court held that the Anti-Injunction Act was not a barrier to the challenge to the mandate and upheld the related penalty provision of the ACA on the basis of the tax power.[24] In addition, a portion of Justice Roberts's opinion that was joined by Justices Breyer and Kagan,[25] in conjunction with the joint dissent by Justices Kennedy, Scalia, Thomas, and Alito,[26] effectively establishes the unconstitutionality of the ACA's Medicaid expansion provisions to the extent that these provisions threaten states with the loss of existing Medicaid funding.

Formally, there are four opinions in *NFIB v. Sebelius*, but different constellations of Justices join different portions of these four opinions. Functionally, we can identify seven distinct opinions—each joined by a different set of Justices. These seven functional opinions address five distinct issues. The clearest way to reduce the opinions' complexity is to outline their structure and relationship to the issues.

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17. NFIB v. Sebelius, 132 S. Ct. 2566, 2580 (2012).

18. Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1306 (N.D. Fla. 2011).

19. Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1328 (11th Cir. 2011).

20. *Id.* at 1268.

21. *See* Seven-Sky v. Holder, 661 F.3d 1, 15–20 (D.C. Cir. 2011); Thomas More Law Ctr. v. Obama, 651 F.3d 529, 549 (6th Cir. 2011).

22. Liberty Univ., Inc. v. Geithner, 671 F.3d 391, 414–15 (4th Cir. 2011).

23. *NFIB*, 132 S. Ct. at 2582 (citing Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 603 (2011)).

24. *Id.* at 2594–2600.

25. *Id.* at 2601–08 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.).

26. *Id.* at 2642–77 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

B. Functionally, Seven Opinions on Five Issues

The following overview will identify the seven opinions and the five issues. To understand the opinions, it is necessary first to identify the five issues addressed by the Court, presented as Table 1: Issues in *NFIB v. Sebelius.*

TABLE 1: ISSUES IN *NFIB V. SEBELIUS*

Issue	Question	Outcome
Anti-Injunction Act	Did the Anti-Injunction Act bar the challenge to the individual mandate?	No, holding in the opinion of the Court.
Commerce Clause	Was the individual mandate within Congress's Commerce Clause power?	Disputed. Five justices say "no."
Necessary and Proper Clause	Was the individual mandate within Congress's power pursuant to the Necessary and Proper Clause?	Disputed. Five justices say "no."
Tax Power	Was the individual mandate supported by Congress's tax power?	Yes, either directly or via a saving construction.
Spending Power	Was the requirement that states expand Medicaid or lose existing Medicaid funding supported by Congress's spending power?	No. Three justices join an opinion answering no, and five justices would strike the Medicaid provisions down in their entirety.

Step two is to identify the distinct opinions. There are four formal opinions with six authors; they function, however, as seven distinct opinions. Justice Roberts authored an opinion, portions of which were the opinion of the Court. Justice Ginsburg authored an opinion, different parts of which were joined by different Justices. There was a joint dissenting opinion authored by Kennedy, Scalia, Thomas, and Alito. Finally, Justice Thomas had a separate dissenting opinion.[27]

27. Here is the official statement:

ROBERTS, C.J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III-C, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined; an opinion with respect to Part IV, in which BREYER and KAGAN, JJ., joined; and an opinion with respect to Parts III-A, III-B, and III-D.

This complex structure of the opinions can be unpacked as a table:

TABLE 2: STRUCTURE OF THE OPINIONS

Author	Parts of the Opinion	Joined by (Total, Names)		Issues	Formal Status
Roberts	I, II, III-C	5	Ginsburg, Breyer, Sotomayor, Kagan	Anti-Injunction Act Tax Power	Opinion of the Court
Roberts	Preface, III-A, III-B, III-D, Conclusion	1	None	Role of the Court Commerce Clause Necessary and Proper Clause Tax Power and the Avoidance Canon Relationship of Commerce Clause Analysis to Tax Power Holding The Court's Holding and Mandate	Separate Opinion
Roberts	IV	3	Breyer, Kagan,	Spending Power	Separate Opinion
Ginsburg	I, II, III, IV	4	Breyer, Kagan, Sotomayor	Commerce Clause Necessary and Proper Clause Tax Power	Concurring in Part, Concurring in the Judgment
Ginsburg	V	2	Sotomayor	Spending Power	Dissenting in Part
Joint Opinion	Entirety	4	Kennedy, Scalia, Thomas, Alito	Anti-Injunction Act Commerce Clause Necessary and Proper Clause Spending Power	Dissenting Opinion
Thomas	Entirety	1	None	Commerce Clause Necessary and Proper Clause	Dissenting Opinion

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GINSBURG, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which SOTOMAYOR, J., joined, and in which BREYER and KAGAN, JJ., joined as to Parts I, II, III, and IV. SCALIA, KENNEDY, THOMAS, and ALITO, JJ., filed a dissenting opinion. THOMAS, J., filed a dissenting opinion.

Id. at 2575 (syllabus).

C. The Seven Functionally Distinct Opinions

The next step is to summarize each of the seven functionally distinct opinions with respect to the five issues.

1. The Opinion of the Court

The opinion of the Court is contained in Parts I, II, and III-C of the opinion authored by Chief Justice Roberts. Part I is simply a summary of the facts and procedural history.[28] This part of the Court's opinion is not decisive in determing of the direct or indirect legal effects, with the obvious exception that the facts may limit the reach of the holding.

Part II addresses the Anti-Injunction Act, which provides, "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."[29] The Court's conclusion was straightforward: "The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act. The Anti-Injunction Act therefore does not apply to this suit, and we may proceed to the merits."[30] The only complexity to be noted is that the holding that the ACA was not a tax for purposes of the Anti-Injunction Act might be thought to be in some tension with the holding that the individual mandate was a tax for the purposes of Congress's tax power.

Part III-C of the opinion of the Court addresses the tax power. There are two steps to the argument: (1) the shared responsibility payment enforcing the individual mandates can be characterized as a tax supported by the power conferred by Article I, Section 8 of the Constitution;[31] and (2) so characterized, the provision is not a direct tax in violation of Article I, Section 9, Clause 4.[32] The upshot of Part III-C is that the shared responsibility payment associated with the individual mandate is within Congress's Article I legislative power.

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28. *Id.* at 2580–82.
29. 26 U.S.C. § 7421(a) (2006).
30. *NFIB*, 132 S. Ct. at 2584.
31. U.S. CONST. art. I, § 8, cl. 1.
32. U.S. CONST. art. I, § 9, cl. 4, *amended by* U.S. CONST. amend. XVI.

2. *Justice Roberts's Separate Opinion on the Commerce Clause and the Necessary and Proper Clause*

Some portions of Justice Roberts's opinion are entirely his own, joined by no other members of the Court. Structurally, these portions are contained in five distinct parts of his opinion:

1. a preface, addressing the role of the Supreme Court;

2. Part III-A, addressing the argument that the individual mandate is supported by the Commerce Clause and the Necessary and Proper Clause;

3. Part III-B, addressing the avoidance canon in relationship to the tax power;

4. Part III-D, addressing the necessity of the Commerce Clause and Necessary and Proper Clause analyses to the Court's disposition of the case; and

5. a conclusion, addressing the holding and mandate.

Three of these distinct parts are critical to understanding the legal effects of Justice Roberts's opinion. Part III-A contains his analysis of the Commerce Clause: he concludes that the individual mandate (construed as a legal requirement enforced by a penalty) is not a regulation of interstate commerce.[33] Justice Roberts articulated the key distinction between permissible regulations of activity and impermissible mandates premised on inactivity as follows:

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

33. *See NFIB*, 132 S. Ct. at 2584–93.

> regulation, and—under the Government's theory—empower Congress to make those decisions for him.[34]

In other words, because the individual mandate was not predicated on some form of activity, it did not qualify as a regulation of commerce.

Justice Roberts then turned to the government's Necessary and Proper Clause argument. Roberts's reasoning flows from the activity-inactivity distinction. The individual mandate provisions of the ACA do not regulate economic activity; instead they require individuals to engage in the purchase of health insurance:[35]

> Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. . . . The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.[36]

And if the mandate were constitutional:

> No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. Even if the individual mandate is "necessary" to the

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34. *Id.* at 2587.

35. The distinction between activity and inactivity was advanced by the plaintiffs, Brief for the Private Respondents on the Individual Mandate at 15, Dep't of Health & Human Servs., v. Florida, No. 11-398, 2012 WL 379586 (U.S Feb. 6, 2012) [hereinafter Private Respondents' Brief], as a basis for distinguishing the Supreme Court's prior decision in Wickard v. Filburn, 317 U.S. 111 (1942), on the basis of language in United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000). In those decisions, the Court had limited the substantial effects doctrine from *Wickard*, 317 U.S. at 127–29, to cases involving the regulation of economic activity. *See Lopez*, 514 U.S. at 559; *Morrison*, 529 U.S. at 619. Plaintiff's argued that the Affordable Care Act regulated "inactivity"—the failure to engage in the action of purchasing insurance, and hence that extension of cumulative effects doctrine was not *required* by *Wickard* as it had been limited by *Lopez* and *Morrison*. Private Respondents' Brief at 15, 22–25. For analysis of the activity-inactivity distinction, see John Valauri, *Baffled by Inactivity: The Individual Mandate and the Commerce Power*, 10 GEO. J. L. & PUB. POL'Y 51 (2012).

36. *NFIB*, 132 S. Ct. at 2592.

> Act's insurance reforms, such an expansion of federal power is not a "proper" means for making those reforms effective.[37]

Thus, the individual mandate was neither a regulation of interstate commerce nor a proper means of carrying other provisions of the ACA into effect.

3. *Justice Roberts's Separate Opinion on the Spending Clause, Joined by Justices Breyer and Kagan*

Part IV of Justice Roberts's opinion, addressing the Spending Clause issue, was joined by Justices Breyer and Kagan. The core of the reasoning is contained in the following passage:

> In this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"—it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that "further payments will not be made to the State." A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely "a relatively small percentage" of its existing Medicaid funding, but *all* of it. Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs. . . . The threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.[38]

Justice Roberts's opinion extends *South Dakota v. Dole*,[39] which upheld under the spending power a provision authorizing the Secretary of Transportation to withhold five percent of federal transportation funds from any state that failed to set its minimum drinking age at twenty-one.[40] Chief Justice Rehnquist's opinion for the Court stated, "[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[41]

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37. *Id.*
38. *Id.* at 2604–05 (internal citations omitted).
39. 483 U.S. 203 (1987).
40. *Id.* at 206, 211–12.
41. *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

There is already substantial controversy about the best reading of this portion of the opinion. Because four Justices would have held the Medicaid expansion provisions invalid in their entirety, this portion of Justice Roberts's opinion is clearly controlling under the narrowest grounds rule.[42] What is not so clear is what the vertical stare decisis effects will be—an issue that is discussed below.

4. Justice Ginsburg's Opinion on the Commerce Clause, Necessary and Proper Clause, and Tax Power Issues

The entirety of Justice Ginsburg's concurring and dissenting opinion was joined by Justice Sotomayor.[43] Parts I, II, III, and IV were also joined by Justices Breyer and Kagan[44]: these sections address the national power issues (Commerce, Tax, and the Necessary and Proper Clause). Justice Ginsburg's analysis of the national power issues begins with the Commerce Clause, about which she makes two observations: "First, Congress has the power to regulate economic activities 'that substantially affect interstate commerce.'"[45] And, "[s]econd, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation."[46] Applying these observations to the facts of *NFIB*, Ginsburg concludes:

> Straightforward application of these principles would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health-care products and services each year. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive care. Some have medical emergencies while away from home. Others, when sick, go to a neighboring State that provides better care for those who have not prepaid for care.[47]

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42. *See infra* note 95 and accompanying text.
43. *NFIB*, 132 S. Ct. at 2609.
44. *Id.*
45. *Id.* at 2616 (Ginsburg, J., concurring and dissenting) (quoting Gonzales v. Raich, 545 U.S. 1, 17 (2005)).
46. *Id.* (referring to *Raich*, 545 U.S. at 17).
47. *Id.* at 2617 (citations omitted).

Most of the remainder of her opinion consists of responses to and criticisms of the reasoning in Justice Roberts's opinion. But notably, in responding to Justice Roberts's contention that allowing Congress to mandate purchases is necessary to avoid an interpretation of the Commerce Clause that would be unlimited, Justice Ginsburg endorses the Court's decisions in *Lopez* and *Morrison* because they exclude "regulat[ion] [of] noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law" from the commerce power.[48]

Justice Ginsburg also argues that the individual mandate would be sustainable under the Necessary and Proper Clause, even if it were not itself a regulation of interstate commerce.[49] Part IV of her opinion addresses the larger implications of Justice Roberts's opinion:

> In the early 20th century, this Court regularly struck down economic regulation enacted by the peoples' representatives in both the States and the Federal Government. THE CHIEF JUSTICE's Commerce Clause opinion, and even more so the joint dissenters' reasoning, bear a disquieting resemblance to those long-overruled decisions.[50]

This portion of Justice Ginsburg's opinion suggests that the Chief Justice's approach undermines the New Deal Settlement—a theme to which we shall return below.[51]

5. Justice Ginsburg's Opinion on the Spending Power Issue

Part V of Justice Ginsburg's opinion, joined only by Justice Sotomayor, addresses the Medicaid expansion and the Spending Clause.[52] Of the nine members of the Court, only Ginsburg and Sotomayor would uphold the conditioning of Medicaid funds on state cooperation with the Medicaid expansion required by the ACA.[53]

One theme in this portion of Justice Ginsburg's opinion is cooperative federalism. In this context, the suggestion is that the alternative to conditional spending is federalization, which would provide a constricted

48. *Id.* at 2623 (citations omitted).
49. *Id.* at 2625–28.
50. *Id.* at 2628–29 (citations omitted).
51. *See infra* Part IV.D.
52. *NFIB*, 132 S. Ct. at 2629–42 (Ginsburg, J., concurring and dissenting).
53. *See id.* at 2630.

role for the states.[54] Ginsburg argues that the Court's conditional spending precedents do not support the Chief Justice's distinction between old and new Medicaid funds.[55] Justice Ginsburg also argues that coercion was not present because conditioned funds were only Medicaid funds (and not unrelated funds)[56] and because there is no judicially manageable standard for "coercion."[57]

6. The Joint Dissent

The joint dissenting opinion, authored by Justices Scalia, Kennedy, Thomas, and Alito, addresses the Commerce Clause, tax power, Anti-Injunction Act, and Medicaid expansion issues, as well as severability, concluding that the entire ACA should be struck down.[58]

The joint dissent argues that the individual mandate exceeds Congress's power under the Commerce Clause and the Necessary and Proper Clause for reasons that are similar to, but distinct from, those offered by the Chief Justice. Adopting the premise that Congress's legislative power must be limited, the joint dissent argues that extending the power to include mandates to participate in the market would create power without limits.[59] This limit applies to the Necessary and Proper Clause as well: "[T]he scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power."[60]

On the tax power issue, the joint dissent's key move is the argument that the penalty provision could not fairly be interpreted as a tax because it is triggered by a violation of the law.[61] On the Anti-Injunction Act, the joint dissent argued that its analysis of the tax power question essentially disposed of the jurisdictional question as well.[62] On the Medicaid expansion issue, the reasoning of the joint dissent is very close to that of the Chief Justice, emphasizing that the sheer size of Medicaid funding makes any condition on its receipt coercive.[63] The joint dissent's

54. *Id.* at 2632–33.
55. *Id.* at 2635–36.
56. *Id.* at 2634.
57. *Id.* at 2641.
58. *Id.* at 2677 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ., dissenting).
59. *Id.* at 2646.
60. *Id.*
61. *Id.* at 2651–52.
62. *Id.* at 2655–56.
63. *Id.* at 2662–64.

discussion of the severability issue is complex and will not be summarized here.[64]

7. Justice Thomas's Opinion

The final opinion was authored by Justice Thomas. The sole point of this opinion was to restate Justice Thomas's longstanding objection to the substantial effects doctrine and to express his belief that the reasoning of *Wickard v. Filburn*[65] should be explicitly repudiated by the Court.[66]

* * *

In summary, there are seven, functionally distinct opinions. These amount to an opinion of the Court on the Anti-Injunction Act and the tax power. Additionally, a majority of Justices align on the invalidity of the individual mandate under the Commerce Clause and the Necessary and Proper Clause, albeit in two distinct opinions. Given that a total of three Justices support the invalidation of conditioning of new funds on state acceptance of Medicaid expansion and that four Justices support the invalidation of so-conditioning any funds, it follows that seven Justices would support the narrower outcome (striking down the new funds condition) in the Chief Justice's opinion.

III. DIRECT LEGAL EFFECTS: THE MANDATE AND STARE DECISIS

What are the direct legal effects of *NFIB*? Direct legal effects are the legal norms created by the Supreme Court's decision and the Justices' opinions. We can divide direct effects into three categories. The first and most immediate legal effects are the result of what is called the "mandate" and the associated doctrine of law of the case.[67] A second set of legal effects is created by the doctrine of vertical stare decisis as it affects the lower federal courts and the courts of the several states.[68] A third set of

64. *See id.* at 2668–76.

65. 317 U.S. 111 (1942).

66. *See NFIB*, 132 S. Ct. at 2677 (Thomas, J., dissenting); *see also* United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring).

67. *See* James Wm. Moore & Robert Stephen Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 TEX. L. REV. 514 (1943).

68. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 823–24 (1994); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2025 (1994); Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 436–37 (1992). The doctrine of vertical stare decisis may have different implications for state courts, but it is clear that state courts are

legal effects is created by the doctrine of horizontal stare decisis—the doctrine of precedent applied by the Supreme Court to its own prior decisions.[69]

A. The Mandate and Law of the Case

The most direct legal effect of a Supreme Court decision is achieved via the mandate—the formal direction the Court gives to the lower federal courts in the case.[70] (The discussion that follows uses the term "mandate" in this sense—not to be confused with the "individual mandate," to which I shall always refer by using the whole two-word phrase.) In Supreme Court decisions, the mandate is a function of the judgment, which is announced at the end of the opinion.[71] Because of the fragmented nature of the opinions, the precise content of the mandate in *NFIB* requires a careful parsing of the various opinions. It has at least three distinct components: (1) affirming the Eleventh Circuit's rejection of the Anti-Injunction Act challenge to the district court's jurisdiction; (2) reversing the Eleventh Circuit's decision that the penalty provision enforcing the individual mandate of the ACA was beyond the legislative power of Congress; and (3) affirming in part and reversing in part the Eleventh Circuit's determination that the Medicaid expansion provision was within Congress's power. Formally, this portion of the opinion is expressed in the final passages of Justice Roberts's opinion, "The judgment of the Court of Appeals for the Eleventh Circuit is affirmed in part and reversed in part. *It is so ordered*."[72]

Because we need to refer to the various portions of Justice Roberts's opinion, it may be helpful to briefly summarize the sections in the form of a chart:

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bound by the decisions of the United States Supreme Court on questions of federal law. *See, e.g.*, Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490 (2012).

69. *See* William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey, Dickerson *and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 57–58.

70. When the Court exercises appellate or certiorari jurisdiction, its formal mandate binds the lower federal courts, but the Court does not address its orders to the parties. Trial courts can issue coercive orders to the parties, and the content of such orders may be controlled by the Supreme Court's mandate directed to lower courts.

71. *See, e.g.*, *NFIB*, 132 S. Ct. at 2609.

72. *Id.*

TABLE 3: STRUCTURE OF JUSTICE ROBERTS'S OPINION

Part of the Opinion	Topic Addressed	Status
Part I	Facts and Procedural History	Opinion of the Court
Part II	Anti-Injunction Act	Opinion of the Court
Part III-A	Commerce Clause and Necessary and Proper Clause	Justice Roberts
Part III-B	Tax Power	Justice Roberts
Part III-C	Tax Power	Opinion of the Court
Part III-D	Necessity of Part III-A	Justice Roberts
Part IV	Spending Power	Justice Roberts joined by Justices Breyer and Kagan

The first component of the mandate follows directly from Part II of Justice Roberts's opinion; this Part was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan and hence constitutes the opinion of the Court.[73] This Part directly affirms the Eleventh Circuit on the Anti-Injunction Act issue.[74] The second component of the mandate follows from Part III-C of Justice Roberts's opinion joined by the same four Justices, which reverses the Eleventh Circuit's decision insofar as it failed to adopt a saving construction of the individual mandate.[75] The third component of the mandate is more complex. Part IV of Justice Roberts's opinion, joined by Justices Breyer and Kagan, concludes that the Medicaid expansion, which threatened states with the loss of their existing Medicaid funding if they declined to comply with the provisions of the ACA that expanded the scope of the Medicaid program and increased the number of individuals the states must cover as a condition of their receipt of federal funds, violates the Constitution.[76] Because four Justices (Kennedy, Scalia, Thomas, and Alito) would have struck down the entire ACA,[77] Part IV of Justice Roberts's opinion would control in subsequent proceedings in the lower federal courts.[78] The consequence is that preexisting Medicaid funding cannot be denied to states that do not implement the Medicaid expansion provisions of the ACA.

73. *Id.* at 2575.
74. *Id.* at 2582–84.
75. *Id.* at 2594–2600.
76. *Id.* at 2601–08.
77. *See id.* at 2642–77.
78. This flows from the narrowest grounds rule, discussed below. *See infra* Part III.B.2 and Novak, *infra* note 98, at 760–61. *See also* Marks v. United States, 430 U.S. 188, 193 (1977).

The immediate legal effect of the mandate is accompanied by additional legal consequences that flow from the closely related doctrine called the "law of the case."[79] The law-of-the-case doctrine has two dimensions, which we can call "vertical" and "horizontal."[80] The vertical dimension of the law-of-the-case doctrine requires any lower court in subsequent proceedings in the *NFIB* case itself to follow the Supreme Court's determinations.[81] The horizontal dimension of the law-of-the-case doctrine would apply to the Supreme Court itself if any portion of *NFIB* should return to the Court on a subsequent appeal, but is not binding: the Court has the power to reverse itself on issues determined in a prior decision in the same case.[82]

The law-of-the-case doctrine (a cousin of the doctrine of issue preclusion or collateral estoppel) only applies to issues that were actually decided,[83] and hence has no relevance to issues not presented to the Court in *NFIB*, including, for example, the question of whether the penalty provision enforcing the individual mandate violates the Origination Clause of Article I.

In practice, the most important, direct, and immediate effects of the Supreme Court's decision in *NFIB* are produced by the mandate and the vertical law-of-the-case doctrine. As a consequence of the mandate, the penalty provisions will go into effect, absent the success of a legal challenge on some basis not considered by the Court in *NFIB.* If any state chooses not to accept Congress's offer of Medicaid funding for the new beneficiary classes, that state will not be subject to the possible withdrawal of funding for the pre-2010 classes of beneficiaries.[84]

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79. 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 134.23[1] (Matthew Bender 3d ed. 2011).

80. *See* Thomas L. Fowler & Thomas P. Davis, *Reconsideration of Interlocutory Orders: A Critical Reassessment of* Calloway v. Ford Motor Co. *and Whether One Judge May Overrule Another*, 78 N.C. L. REV. 1797, 1814 n.49 (2000).

81. *See* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 788 (2012).

82. Consovoy, *supra* note 69, at 57–59.

83. *See, e.g.*, Wilmer v. Bd. of Cnty. Comm'rs of Leavenworth Cnty., 69 F.3d 406, 409 (10th Cir. 1995) ("[O]nly matters actually decided, explicitly or implicitly, become law of the case . . . .") (citing Guidry v. Sheet Metal Workers Int'l Ass'n, Local 9, 10 F.3d 700, 705 (10th Cir. 1993)).

84. I owe thanks to Martin Lederman for this precise formulation of the effects of the mandate with respect to the Spending Clause.

B. Vertical Stare Decisis

Supreme Court decisions create a second kind of direct legal effect as a consequence of the doctrine of vertical stare decisis, or precedent. Vertical stare decisis operates with respect to issues of federal law and binds courts that are lower than the Supreme Court in the hierarchy of authority—that is, the lower federal courts and the courts of the several states. By contrast, horizontal stare decisis operates within a court. The Supreme Court is not bound by horizontal stare decisis—more on this below.[85]

In many cases, the precedential effect of a Supreme Court decision is relatively clear—the rule, as implied by the rationale necessary for the result, is stated unambiguously in a majority opinion, perhaps in a sentence that begins with the words, "we hold that." In other cases, the vertical stare decisis effect of a Supreme Court decision may be quite murky. There may be no "opinion of the Court" on a particular issue, and the relationship between elements of the reasoning and the outcome may not be clear. There is another factor that clouds the doctrine of vertical stare decisis: the content of the doctrine is contested both at the surface level of detail and the deep level of theory.[86]

In the case of *NFIB*, some of the vertical stare decisis effects are relatively clear. The Anti-Injunction Act holding, for example, would seem to apply to any financial exaction that Congress describes as a penalty and does not describe as a tax. It may be more difficult, however, to formulate the holding with respect to the unconstitutionality of conditioning "old" Medicaid funding to states on the states' compliance with the expansion of Medicaid benefits and eligibility criteria. Perhaps the withdrawal of funding of the same magnitude (ten percent of the states' total budgets) would be subject to the same restriction under a variety of reasonable formulations of the holding.[87]

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85. *See* discussion *infra* Part III.C.

86. *See infra* note 93.

87. *See generally* Bagenstos, *supra* note 5 (discussing effects of *NFIB*'s Spending Clause holding); Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283 (2013) (providing interpretation of the Medicaid expansion holding); Andrew B. Coan, *Judicial Capacity and the Conditional Spending Paradox*, 2013 WIS. L. REV. 339, *available at* http://wisconsinlawreview.org/wp-content/files/2-Coan-2.pdf (arguing that the Spending Clause holding of *NFIB* is unstable); Eloise Pasachoff, *Conditional Spending after* NFIB v. Sebelius*: The Example of Federal Education Law*, 62 AM. U. L. REV. 577 (2013) (arguing that the Spending Clause holding will have limited effects).

1. Vertical Stare Decisis Effects of the Opinion of the Court

The most difficult vertical stare decisis question concerns the Commerce Clause and the Necessary and Proper Clause.[88] The opinion of the Court contains a passage that, on the surface, asserts that the invalidity of the individual mandate under the Commerce Clause is part of the holding. The Court writes: "The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity."[89]

Repetition may be important for clarity: the passage quoted above is in the opinion of the Court, not the separate opinion of Justice Roberts. In the initial wave of reaction to *NFIB*, this passage went mostly unnoticed.[90] At a minimum, statements that use language like "the Court today holds" are evidence of what the holding actually is.[91] In practice, lower courts and brief writers frequently treat such statements as if they have enactment force that binds the lower courts.[92] Let's call such statements, "we-hold-that statements."

The fact that lower courts treat we-hold-that statements as having enactment force does not mean that they do. Because the mandate reverses the Eleventh Circuit on the congressional power issue, the we-hold-that statement, on the surface, appears to be unnecessary to the decision: the result (affirmance) flows from the opinion of the Court on the basis of its tax power reasoning. Hence, this statement seems to be obiter dictum.

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88. For a different analysis of the *stare decisis* effect of *NFIB*, see Gregory P. Magarian, *Chief Justice Roberts' Individual Mandate: The Lawless Medicine of* NFIB v. Sebelius, 108 NW. U. L. REV. COLLOQUY 15 (2013), http://colloquy.law.northwestern.edu/main/2013/07/chief-justice-robertss-individual-mandate.html.

89. NFIB v. Sebelius, 132 S. Ct. 2566, 2599 (2012).

90. *But see* Randy Barnett, *Quote of the Week*, VOLOKH CONSPIRACY (July 1, 2012, 12:41 PM), http://www.volokh.com/2012/07/01/quote-of-the-week/; Michael E. Rosman, *The Decision (with Apologies to Lebron James)*, POINTOFLAW.COM (June 28, 2012, 5:55 PM), http://www.pointoflaw.com/feature/archives/2012/06/the-decision-with-apologies-to-lebron-james.php; Ilya Somin, *A Simple Solution to the Holding vs. Dictum Mess*, VOLOKH CONSPIRACY (July 2, 2012, 3:47 PM), http://www.volokh.com/2012/07/02/a-simple-solution-to-the-holding-vs-dictum-mess.

91. *See* Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 188–89 (2006); *cf.* Bradley Scott Shannon, *May Stare Decisis Be Abrogated by Rule?*, 67 OHIO ST. L.J. 645, 685 (2006) (arguing that "we hold that" statements are not binding without discussion of evidentiary role of such statements).

92. *Cf.* David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice In Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2021 (2013) (reporting results of systematic empirical study showing "that lower courts hardly ever refuse to follow a statement from a higher court because it is dictum").

But things are more complicated than the surface of the opinion of the Court suggests. One complication arises from the incompletely theorized nature of the doctrine of vertical stare decisis. This is not the occasion for a full rehearsal of the current state of the law and the theoretical debates about the nature of stare decisis that raged in past decades.[93] I will simply observe that many important questions are not clearly resolved.

For present purposes, the important point is that the doctrine of vertical stare decisis is not as clear as many legal practitioners and academics may believe. There is, to be sure, a formalist version of the doctrine that is rooted in the idea of the ratio decidendi[94]: the holding of a case is the rule that is logically implied by the stated reasons necessary to the resolution of the case on the facts before the appellate court and the legal arguments presented by the parties. But there is another tradition of thinking about stare decisis that views the holding of a case as the rule that best predicts the future behavior of a court from the opinions expressed by the judges.[95] This predictive theory normally affords great weight to we-hold-that statements on the theory that judges themselves do not sign on to such statements unless they are willing to back them up in future cases. Judges may say other things, but many of these statements are "cheap talk" because they do not clearly communicate a commitment to future action.

If we return to the opinion of the Court in *NFIB*, the two theories seem, on the surface, to lead to different conclusions regarding the scope of the holding. If holdings are limited to the ratio decidendi, then the self-identified "holding" quoted above would be mere dicta—it was not necessary to the resolution of the congressional power issue. But if holdings are predictions, then the passage quoted could be important evidence that the Justices have committed themselves to the stated rule of law.

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93. For general discussions of the doctrine of precedent and controversies regarding its formulation and justification, see RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW (4th ed. 1991); NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT (2008); MICHAEL J. GERHARDT, THE POWER OF PRECEDENT (2008). On the history of stare decisis, see Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771 (providing a partial history of the doctrine of precedent).

94. *See* Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930) (elaborating theory of the ratio decidendi).

95. *See* Lawrence B. Solum, *Stare Decisis, Law of the Case, and Judicial Estoppel*, *in* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.03[4] (Matthew Bender 3d ed. 1997); *see also* Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87, 99, n.43 (1999); Jeremy B. Stein, Note, *The Necessary Language of Exceptions: A Response to Frederick Schauer's "Exceptions,"* 63 N.Y.U. ANN. SURV. AM. L. 99, 114 (2007).

Even under the predictive theory of holdings, the quoted passage may be outweighed by other evidence predictive of future behavior by the Justices who joined Part III-C. The quoted passage is isolated within Part III-C, which does not provide reasoning that would support the holding. That reasoning is provided in Part III-A, but that part is the opinion of Justice Roberts alone. Extrinsic evidence suggests that the four Justices who joined Roberts in Part III-C do not view themselves as committed on the Commerce Clause issue: Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, explicitly and forcefully expressed their disagreement with Justice Roberts's Commerce Clause reasoning. Of course, four other Justices (Kennedy, Scalia, Thomas, and Alito) authored the joint dissent that agrees in spirit with Part III-A. But they pointedly did not join Part III-A.

These complexities are likely to lead to speculation. For example, it is possible that the quoted passage was written on the assumption that Kennedy, Scalia, Thomas, and Alito would join Part III-A of Justice Roberts's opinion. If they had, that portion of the opinion would have been denominated an "opinion of the Court." But they did not join Part III-A. One might speculate that the quoted passage was left in the opinion by accident, or that Justices Ginsburg, Breyer, Sotomayor, and Kagan knowingly agreed to this passage—as part of a compromise reached with Justice Roberts. Of course, either of these scenarios would be odd. A compromise is unlikely given that the four Justices who joined the purported holding statement also joined a dissent on the very same point. A mistake is unlikely because Supreme Court Justices and their clerks surely know that we-hold-that statements are important. In any event, odd things do happen.

Some might think that the extrinsic evidence deprives the quoted passage of evidentiary value, and hence that it cannot serve as the basis of a prediction. That argument would be decisive if Justices Kennedy, Scalia, Thomas, and Alito substantially disagreed with the reasoning of Part III-A of Justice Roberts's opinion, but they do not. What they do say suggests that, functionally and substantively, they are mostly on board with Part III-A. From the perspective of the predictive theory, the extrinsic evidence actually supports the claim that the passage in the opinion of the Court predicts the future behavior of the Justices.

The view that we-hold-that statements are particularly important in making predictions is a view about their evidentiary function. If there is contradictory evidence (and there is), the balance of evidence should control: we can call this idea, the "balance of evidence standard." The balance-of-evidence standard leads to another evidentiary heuristic for the

predictive theory—the so-called "rule of five."[96] If you can count five votes for a position, that position has predictive value. Of course, the quality of the evidence counts. One might attempt to predict the future behavior of the Court based on the general ideological characteristics of the individual justices. From the point of view of the predictive theory, that kind of evidence is likely to be unsatisfactory because this sort of prediction does not produce the level of confidence required by the predictive theory of precedent. Lower federal courts are not entitled to disregard Supreme Court holdings on the basis of educated guesses about the future behavior of the Supreme Court—the Court itself has said that.[97] The predictive theory of precedent requires that the predictions flow from strong evidence found within Supreme Court decisions. So the holding of a case is a prediction made from evidence that is internal to the opinions of the Justices.

2. Vertical Stare Decisis Effects of All the Opinions Under the Narrowest Grounds Rule

Once we have all the opinions in view, we need to consider the possible effects of the narrowest grounds rule.[98] The content of that rule is unclear,[99] but we can tease out some of the implications without a precise version of the rule. We are going to begin with the formalist version—the narrowest grounds rule as it would be formulated within the general approach of the ratio decidendi theory of precedent. The rule was stated in *Marks v. United States* as follows: "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[100] The Ninth Circuit suggested that *Marks* requires the lower

96. On the "rule of five," see Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court's Takings Cases*, 38 WM. & MARY L. REV. 1099, 1102 (1997); Mark V. Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763 (1995).

97. *See* de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

98. *See* Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 760–61 (1980) (discussing narrowest grounds rule); *see also* Marks v. United States, 430 U.S. 188, 193 (1977).

99. *E.g.*, Nichols v. United States, 511 U.S. 738, 745–46 (1994) (stating, "[I]t [is] not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.").

100. *Marks*, 430 U.S. at 193 (citation omitted).

federal courts to find the "legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree."[101] If there is no such opinion, "the only binding aspect of a splintered decision is its specific result."[102]

What are the criteria for "narrowest"? Michael Abramowicz and Maxwell Stearns suggest that narrowness is defined relevant to the effect produced:

> [w]hen the Court strikes down a law on constitutional grounds, the rule seeks the opinion consistent with the outcome that would strike down the fewest laws. Conversely, when the Court sustains a law against a constitutional challenge, the narrowest grounds opinion is that opinion consistent with the outcome that would sustain the fewest laws.[103]

How does the narrowest grounds rule apply to *NFIB*? Consider first the implications of Part III-D of Justice Roberts's opinion:

> Justice GINSBURG questions the necessity of rejecting the Government's commerce power argument, given that § 5000A can be upheld under the taxing power. But the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that § 5000A can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.
>
> The Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command.[104]

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101. United States v. Williams, 435 F.3d 1148, 1157 (9th Cir. 2006) (quoting Planned Parenthood v. Casey, 947 F.2d 683, 693 (3d Cir. 1991), *aff'd in part and rev'd in part on other grounds*, 505 U.S. 833 (1992)).

102. United States v. Rodriguez-Preciado, 399 F.3d 1118, 1140 (9th Cir.) (quoting Anker Energy Corp. v. Consolidation Coal Co., 177 F.3d 161, 170 (3d Cir. 1999)), *amended by* 416 F.3d 939 (9th Cir. 2005).

103. Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 VAND. L. REV. 1849, 1912 (2001).

104. NFIB v. Sebelius, 132 S. Ct. 2566, 2600–01 (2012) (citations omitted).

The ground articulated by Chief Justice Roberts would be narrowest, in that it would only sustain laws that were taxes or that could reasonably be construed as taxes, and it would not sustain laws that could only be upheld under the Commerce Clause. The rationale in Justice Ginsburg's opinion would be broader because it would sustain laws of both types.

Even if Justice Roberts's rationale is narrowest, is it necessary? One might argue that even given the ratio decidendi theory of the doctrine of vertical stare decisis, the Commerce Clause reasoning is in fact necessary to the validation of congressional power to enact the penalty provisions of the ACA. How would that argument go? It might begin with the observation that the reasoning concerning the Commerce Clause in Part III-A and Part III-D of Justice Roberts's opinion is necessary to the chain of reasoning that produced the outcome, because absent the Commerce Clause reasoning, Roberts would not have even reached the tax power issue.

This reasoning might be challenged by arguing that Justice Roberts would not have reached the Commerce Clause issue if he had used the modern version of the avoidance canon. Mark Tushnet made precisely this argument shortly after the decision in *NFIB* was made:

> There is a "canon" of statutory construction known as the "constitutional avoidance" canon. It comes in two versions, now labeled the "classical" version and the "modern" one. On the modern version, a judge faced with a statute that, most naturally read, raises difficult constitutional questions, should adopt instead a construction—if one is fairly available—that does not raise such questions. On the modern version, then, the Chief Justice didn't have to address the Commerce Clause question; all he needed to do was to note that the question was difficult and that construing the statute to impose a tax was an available reading.[105]

Tushnet's conclusion is that Chief Justice Roberts's Commerce Clause reasoning was unnecessary, but his argument for that conclusion is not fully developed. A fuller analysis requires a more precise formulation of what we can call the "necessity component" of the narrowest grounds rule.

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105. Mark Tushnet, *Did the Chief Justice Have to Decide the Commerce Clause Question in* NFIB*?*, BALKINIZATION (July 3, 2012, 8:45 PM), http://balkin.blogspot.com/2012/07/did-chief-justice-have-to-decide.html; *see also* Joel Alicea, *The Healthcare Ruling's Stare Decisis Conundrum—Part 1*, SCOTUSREPORT (July 2, 2012, 8:30 AM), http://www.scotusreport.com/2012/07/02/the-healthcare-rulings-stare-decisis-conundrum-part-1/; Joel Alicea, *The Two Versions of the Avoidance Canon*, SCOTUSREPORT (July 5, 2012, 9:52 AM), http://www.scotusreport.com/2012/07/05/the-two-versions-of-the-avoidance-canon/. Greg Magarian makes a similar argument. *See* Magarian, *supra* note 88.

This need arises because of the distinction between (1) reasons that are necessary to the result and (2) reasons that are necessary elements of a set of actually articulated reasons that are jointly sufficient to support the result.

This distinction may sound technical, but it is crucially important. Few reasons are absolutely necessary to a decision; in many cases the outcome could have been reached on the basis of many different reasons—and hence no single reason is necessary.

The alternative conception of necessity focuses on the actually articulated reasons and asks which of these are necessary members of a set of reasons that are jointly sufficient to justify the outcome. The alternative conception captures the ordinary lawyer's distinction between holding and obiter dictum. Of all the reasons presented, only those that are required to produce the outcome are eligible as "holdings"; reasons that are could be eliminated without changing the result are "dicta."

These two distinct conceptions of what "necessary" means can be translated into two formulations of the necessity component of the narrowest grounds rule.

For the purposes of the narrowest grounds rule, a reason is deemed "necessary to the outcome" if and only if:

> Formulation One: The outcome could not have been reached absent the reason.
>
> Formulation Two: The reason is actually articulated in one of the opinions, and the reason forms a necessary element of a set of reasons that are jointly sufficient to produce the result.

If holdings are limited by Formulation One, then the set of holdings will be very small indeed. For any given case, there will be a set of possible chains of reasoning, each of which would be sufficient to justify the outcome actually reached. If the fact that a given reason is not included in every possible outcome-justifying chain of reason entailed the conclusion that the reason was not "necessary" and hence not eligible for inclusion in the holding of the case, then many (and perhaps most or even all) cases would not have holdings at all, an obviously absurd consequence. The point of the reductio ad abdurdum is to show that the Formulation One of the necessity criterion for status as a holding cannot be correct.

For the ratio decidendi theory to be plausible, it must focus on the reasons actually provided; the theoretical availability of a reason not actually articulated in opinions of the judges in the case does negate the

necessity of a premise in the chain or reasons that are actually offered. Formulation Two is also consistent with an actual statement of the *Marks* rule: "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[106] It is the "position taken" and not "the narrowest position that could have been taken" that provides the holding. When more than one chain of reasoning is actually offered and sufficient to support the result, the result is alternative holdings. Formulation Two takes these complexities into account.

In light of these points about necessity, consider again the argument that the Commerce Clause reasoning in Justice Roberts's opinion is dicta because he could have relied on the modern version of the avoidance canon.[107] This argument works perfectly on Formulation One. Justice Roberts could have reasoned differently, by relying on the modern formulation of the avoidance canon, and therefore, this discussion of the Commerce Clause is dicta. But Formulation One suggests an even simpler basis for the argument that the interstate commerce reasoning is dicta. Justice Roberts could simply have accepted the tax power argument endorsed by Justice Ginsburg; if he had done that, he would not even have had to mention the Commerce Clause. By the same reasoning, the tax power discussion is also unnecessary, since Roberts could have decided the case on the basis of the Commerce Clause. Formulation One is very stringent indeed, and if we accept it, then it is not clear that there is any holding on the federal power issue in *NFIB*.

Formulation Two, on the other hand, suggests a more precise version of the argument that Roberts's Commerce Clause reasoning was necessary. The Commerce Clause reasoning in Part III-A and Part III-D of Justice Roberts's opinion is a necessary element in a chain of reasoning that was articulated and is itself sufficient to support the result. It is a necessary element because the chain of reasoning actually offered by Justice Roberts depends on it. That chain of reasoning (contained in Parts III-A, III-B & III-C) is sufficient to produce the outcome on the question of whether Congress had power to enact the ACA. Hence the Commerce Clause reasoning satisfies the standard set in Formulation Two.

There is another basis for the contention that the Commerce Clause reasoning in Parts III-A and III-D in Justice Roberts's opinion was necessary to the result in *NFIB*. What was the result? One way to

106. Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

107. *See supra* text accompanying notes 103–04.

characterize the result is that the Court upheld the individual mandate, but that characterization is only approximately correct. We can be more precise. What the Court actually did was to uphold the penalty provisions that enforced the individual mandate. It did this by adopting a saving construction of Section 5000A that negates the command (the mandate to purchase insurance) by construing the penalty as a tax (which does not create a legal obligation to purchase insurance). That there is a difference between the two is absolutely clear from the following two hypotheticals:

> Hypothetical One: Suppose that Congress had enacted a statute that explicitly stated that the penalty provisions were valid only if they enforced a legal obligation to purchase insurance.

Had Section 5000A been written this way, it would have been struck down because the saving construction would have been unavailable. Now consider the second hypothetical:

> Hypothetical Two: Suppose that Justice Roberts had concluded that the Commerce Clause did support the individual mandate as a legal obligation.

In that case, he would not have adopted the saving construction of Section 5000A and would instead have concluded that a legal obligation to purchase insurance (enforceable by a financial penalty or, hypothetically, by imprisonment) was within the scope of congressional power. The juxtaposition of the two hypotheticals makes it clear that the Commerce Clause reasoning was required to reach the precise result reached in *NFIB*.

But there is a counter-argument. One might argue that the difference between a saving construction that upholds the penalty as a tax but negates the legal obligation is merely formal because the saving construction is functionally equivalent to the result of a decision that upheld the legal obligation and the tax under the Commerce Clause. This argument can be elaborated via the "bad man" theory articulated by Justice Holmes.[108] From the perspective of the bad man, the only thing that matters is the penalty. The bad man does not care about obligations; he cares about consequences.

Of course, this move does not end the argument. The bad man theory of the nature of law is controversial, to say the least.[109] Alternative views

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108. *See* Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 993 (1997).

109. *See generally* David J. Seipp, *Holmes's Path*, 77 B.U. L. REV. 515, 552–58 (1997) (discussing reception of bad man theory); Henry M. Hart, Jr., Comment, *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 932 (1951) (criticizing bad man theory).

of the nature of law contend that legal obligations can have motivational force that is independent of legally prescribed rewards and punishments. These are deep waters, and the debates concerning the nature of law and their relationship to the bad man theory cannot be resolved in this essay. This much is clear: to the extent that the argument against viewing the Commerce Clause reasoning as part of the holding rests on the correctness of some version of the bad man theory, it cannot command consensus support among legal theorists or judges.

Even if one accepts the bad man theory, there is a strong argument that Justice Roberts's saving construction would (at least in some circumstances) make a difference to someone motivated only by rewards and punishments. Consider the following hypothetical:

> Hypothetical Three: Suppose that Congress amends the ACA, eliminating the financial penalty enforced by the Internal Revenue Service and substituting a criminal penalty enforced by the Department of Justice. The criminal penalty is then challenged in a district court, and the plaintiff argues that *NFIB* is controlling and that the criminal penalty is invalid.

Given this hypothetical, the bad man argument would no longer be available as the basis for the contention that there is no difference between Justice Roberts's saving construction and a decision that plainly upheld the mandate itself (and not just the penalty). The narrowest grounds rule would then come into play,[110] and Justice Roberts's reasoning that the tax power holding depends on the Commerce Clause holding, in conjunction with the joint dissent of Justices Kennedy, Scalia, Thomas, and Alito, would then operate with the doctrine of vertical stare decisis to bind the district court. Hypothetical Three strongly suggests that *NFIB* should be given vertical stare decisis effect, albeit an effect that is limited to relevantly similar mandates enforced by criminal penalties (or fines that are unambiguously not taxes). This idea might be expressed as follows: Justice Roberts's opinion does not uphold the "individual mandate" (the requirement to purchase insurance); instead, it upholds the penalty, not as an enforcement provision, but instead and soley as a tax.

There is yet another reason to reject the bad man argument. Ultimately, the bad man is interested in predictions about what the Court will do. As we have already seen, if one adopts a strongly realist understanding of the

110. *See* Novak, *supra* note 98 at 760–61; Marks, 430 U.S. at 193; *see also supra* text accompanying note 98.

doctrine of stare decisis, then the formalities do not matter at all. If holdings are just our best predictions of what courts will do, then we determine the holdings of the United States Supreme Court by the rule of five: the holding of a case is determined by counting votes. On that strongly realist conception, the key fact about *NFIB* would be that five members of the Court endorsed an understanding of the Commerce Clause that would invalidate the individual mandate, to the extent that its validity depends on that clause.

Recall that the role of the bad man theory in our present discussion is to undermine the argument that there is a difference between Justice Roberts's saving construction of the individual mandate and an alternative outcome in which the individual mandate was upheld without a saving construction. The realist theoretical underpinnings of the bad man theory undermine the realist argument that the Commerce Clause reasoning is unnecessary to the decision because legal obligations collapse into the rewards and punishments that enforce them. The application of the rule of five to Hypothetical Three makes this clear: given the current composition of the Court, the best prediction is that the Court would strike down an attempt by Congress to attach direct criminal penalties to the ACA.

Moreover, from the perspective of a realist, we might ask what the lower courts are actually likely to do with Commerce Clause arguments that cite Part III-B of Justice Roberts's opinion and the joint dissent by Justices Kennedy, Scalia, Thomas, and Alito. Given the highly convoluted nature of the theoretical arguments and the uncertain state of stare decisis doctrine, one might believe that different lower court judges are likely to reach different results on the stare decisis question, depending on their view of the merits of the Commerce Clause issue or even their view of the desirability of the statutory provision that is the subject of a Commerce Clause challenge. That is, from the realist perspective, one effect of *NFIB* is to enable litigators to cite the opinion of Justice Roberts and the joint dissent of Justices Kennedy, Scalia, Thomas, and Alito as binding authority (and in the alternative as persuasive authority[111]). Of course, judges who disagree with these five Justices may reject the argument that the authority is binding and find the arguments unpersuasive. Likewise, judges who agree with Roberts and the authors of the joint dissent may accept the argument that *NFIB* is binding on the Commerce Clause issue and also find the reasoning persuasive. This fact will become important when we consider the indirect effects of *NFIB.* From the realist

111. The persuasive effect of the opinions in *NFIB* is explored below. *See infra* Part IV.B.

perspective, the Commerce Clause reasoning of these five Justices creates an opening for constitutional contestation.

Have the lower courts treated *NFIB* as binding authority on the Commerce Clause issue? It is too early to draw conclusions from the handful of reported decisions. In *United States v. Henry*,[112] the Ninth Circuit noted the existence of a controversy concerning the question of whether the Commerce Clause reasoning in *NFIB* was holding or dicta.[113] In *United States v. Cabrera-Gutierrez*, the same circuit rejected a challenge to the Sex Offender Registration and Notification Act based on the theory that it constituted an "individual mandate," but did not comment on the status of the commerce clause discussion in *Sebelius*.[114] In *United States v. Rose*, the Sixth Circuit treated the commerce clause discussion in *NFIB* as a holding, stating "The Court determined that the mandate 'cannot be sustained' under Congress's Commerce Clause power because it forces into commerce individuals who have elected to refrain from such commercial activity, which goes beyond Congress's Commerce Clause powers."[115] In *United States v. Robbins*, the Second Circuit assumed (arguendo) that the the activity-inactivity distinction from *NFIB* was controlling but found that the challenged statute did regulate "activity" and hence was within Congress's Commerce Clause power.[116]

Further, a number of district court opinions seem to assume that Justice Roberts's Commerce Clause reasoning in *NFIB* does provide a holding. In *United States v. Moore*,[117] the Eastern District of Washington issued an opinion that was far from clear, but on its surface the opinion seems to read *NFIB* as creating a rule placing regulation of "compelled" activity outside the Commerce Clause.[118] The District of South Carolina in *McElveen v. Mike Reichenbach Ford Lincoln, Inc.*[119] characterized *NFIB* as holding that "because the Commerce Clause permits power over 'activity,' it does not support the individual mandate in the Affordable Care Act because it would permit Congress to regulate inactivity rather

112. 688 F.3d 637 (9th Cir. 2012).

113. *Id.* at 641–42 n.5; *see also* United States v. Roszkowski, 700 F.3d 50, 58 n.3 (1st Cir. 2012) (citing *United States v. Henry* and declining to opine of precedential status of Commerce Clause discussion in *NFIB*).

114. U.S. v. Cabrera-Gutierrez, 718 F.3d 873, 2013 WL 2378574 (9th Cir. 2013).

115. 714 F.3d 362, 371 (6th Cir. 2013).

116. 729 F.3d 131, 135–36 (2d Cir. 2013).

117. No. CR-12-6023-RMP, 2012 WL 3780343 (E.D. Wash. Aug. 31, 2012).

118. *Id.* at *2.

119. C/A No. 4:12-874-RBH-KDW, 2012 WL 3964973 (D.S.C. Aug. 22, 2012).

than existing commercial activity."[120] In *United States v. Williams*,[121] the Southern District of Florida stated "the Court [in *NFIB*] found Congress's attempt to require everyone to buy health insurance exceeded its power under the commerce clause . . . ."[122] A recent decision by the Western District of Pennsylvania reviewed several lower-court decisions discussing the status of the commerce-clause discussion in *NFIB* and concluded that the Court held that the "Commerce Clause permits Congress to regulate intrastate activities that have a substantial effect on interstate commerce, but may not do so by compelling those activities."[123]

In addition, some commentators have assumed that the Commerce Clause reasoning constitutes a holding; for example, Pamela Karlan wrote, "in *NFIB*, a five-Justice majority took an exit ramp, holding that the Affordable Care Act's minimum coverage provision—§ 5000A, which requires that a large proportion of Americans carry health insurance—exceeded Congress's power under the Commerce Clause."[124]

Our analysis so far suggests that the Commerce Clause reasoning in Justice Roberts's opinion is part of the holding in *NFIB*—on either a realist or formalist understanding of the doctrine of vertical stare decisis. But even if the analysis is not correct, it may nonetheless be the case that many lower courts will believe that they are bound by the Commerce Clause reasoning, as suggested by many of the federal district court cases decided to date. None of these opinions actually invalidated a federal statute, and district court opinions do not have stare decisis force in any event. However, the reported cases provide evidence that the lower federal courts take the Commerce Clause reasoning in Justice Roberts's opinion seriously—as either a holding or as functionally the equivalent of a holding. This analysis is confirmed by Bradley Joondeph, who writes, "the five justices' conclusion that the individual mandate exceeds Congress's commerce power seems quite likely to operate as a holding in practice."[125]

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120. *Id.* at *3.

121. No. 12-60116-CR-RNS, 2012 WL 3242043 (S.D. Fla. Aug. 7, 2012).

122. *Id.* at *3.

123. United States v. Stacey, Slip Copy, 2013 WL 1891342, at *3 (W.D.Pa. May 6, 2013).

124. Pamela S. Karlan, *The Supreme Court 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 43–44 (2012) (footnotes omitted); *see also* Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 188 n.54 (2013) (noting "Commerce Clause holding" in *NFIB*); Elizabeth Weeks Leonard et al., *Employers United: An Empirical Analysis of Corporate Political Speech in the Wake of The Affordable Care Act*, 38 J. CORP. L., Winter 2013, at 217, 253 (characterizing *NFIB* as "holding" that "that the ACA's minimum essential coverage requirement is unconstitutional under the Commerce Clause . . . ."); David L. Sloss, Kiobel *and Extraterritoriality: A Rule Without a Rationale*, 28 MD. J. INT'L L. 241, 253 n.75 (2013) ("In *Sebelius*, the Court created a new, unprecedented constitutional limitation on Congress' Commerce Power.").

125. Bradley W. Joondeph, *The Affordable Care Act and the Commerce Power: Much Ado About*

Even so, it is not clear that the doctrine of vertical stare decisis will make a practical difference to the outcome of future Commerce Clause litigation. Whatever the Commerce Clause holding of *NFIB* is, it is narrow, applying only to individual mandates or regulations predicated on forced participation in economic activity. Indeed, part of the litigation strategy of the plaintiffs in *NFIB* was to argue that the individual mandate was unprecedented—precisely in order to avoid the impression that a decision invalidating the mandate would require the wholesale reversal of New Deal precedent expanding the scope of Congress's power under the Commerce Clause.

But suppose that a lower federal court did, properly or plausibly, rely on *NFIB* to strike down a statute that could not be upheld as a tax—in a case like that in Hypothetical Three, in which a statute is enforced by an explicitly criminal penalty of imprisonment. The Supreme Court is almost certain to grant certiorari in such a case, and once the case is in the Supreme Court, the doctrine of vertical stare decisis no longer applies. Instead, the issue becomes one of horizontal stare decisis.

C. Horizontal Stare Decisis

A third form of direct legal effect for Supreme Court decisions is horizontal stare decisis. Some courts afford binding effect to their own prior decisions. For example, several of the circuits of the United States Court of Appeals follow a rule that requires three-judge panels to follow circuit law but allows the en banc court (or en banc panels of the court) to overrule a prior decision of the circuit.[126] The United States Supreme Court does not consider itself bound by its own prior decisions but does take the position that they have legal force.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[127] the Court described its practice as follows:

> [I]t is common wisdom that the rule of *stare decisis* is not an "inexorable command," and certainly it is not such in every constitutional case. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule

(Nearly) Nothing, 6 J. HEALTH & LIFE SCI. L., Feb. 2013, at 1, 23.

126. *See, e.g.*, Miller v. Gammie, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc) (stating that an en banc court may overrule a panel decision).

127. 505 U.S. 833 (1992).

> of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[128]

Given this extraordinarily flexible standard, it seems unlikely that *NFIB* would stand in the way of a Supreme Court majority with strongly held views of the merits. But this does not entail that the holdings in *NFIB* could not play an important role. The conventions that govern briefing and argument in the Supreme Court make it likely that holdings and disputes over holdings would play a substantial role in shaping the presentation of the case. And it is certainly possible that a given Justice who was persuaded that an issue was decided in *NFIB* would consider that fact to be important and perhaps decisive, if the Justice would otherwise have been on the fence.

The possible role of *NFIB* in the Supreme Court can be illustrated by additional hypotheticals involving three possible worlds in which the Supreme Court has different members with different reactions to briefs that cite *NFIB.* The three hypotheticals can be stated as follows, with "liberal" and "conservative" used as proxies for expansive and restrictive understandings of the Commerce Clause, respectively.

> Hypothetical Four: Suppose that one of the Justices who joined the joint dissent resigns and is replaced by a liberal Justice. A case comes before the Court in which the party challenging the legislation argues that the outcome is controlled by the reasoning of Justice Roberts's opinion on the Commerce Clause issue. The five liberal Justices reject this argument and reason that even if *NFIB* had precedential value, it should not control under the *Casey* standard.

> Hypothetical Five: Suppose that one of the Justices who joined Justice Ginsburg's opinion resigns and is replaced by a conservative Justice. A case comes before the Court, and the government argues

128. *Id.* at 854–55 (citations omitted).

that Justice Roberts's opinion on the Commerce Clause issue is obiter dictum and that Justice Ginsburg's opinion correctly states the law. The six conservative Justices reject the government's argument and reason that *NFIB* has precedential value under the narrowest grounds rule and that under the *Casey* standard, the *NFIB* holdings on the Commerce Clause and Necessary and Proper Clause should control.

Hypothetical Six: Suppose that one of the Justices who joined the joint dissent resigns and is replaced by a moderately conservative Justice. A case comes before the Court in which the party challenging the legislation argues that the outcome is controlled by the reasoning of Justice Roberts's opinion on the Commerce Clause issue. The new Justice is on the fence about the merits of the Commerce Clause claim but is convinced that *NFIB* has precedential force, and this tips the balance against the government and for the plaintiff.

All three hypotheticals are plausible. Of course, partisans of an expansive Commerce Clause are likely to believe that the reasoning in Hypothetical Four is correct, and the reasoning in Hypotheticals Five and Six is incorrect—and vice versa for partisans of a restrictive reading of the Clause. The most important "take away" point is that the doctrine of horizontal stare decisis in *Casey*, when juxtaposed with the opinions in *NFIB*, creates the space for constitutional contestation of Commerce Clause doctrine in the Supreme Court.

* * *

NFIB clearly has already had important direct legal effects on the validity and implementation of the ACA. And *NFIB* may have some important vertical stare decisis effects with respect to the Anti-Injunction Act and conditional spending issues. A strong case can be made that the Commerce Clause reasoning in Justice Roberts's opinion should have vertical stare decisis effect in a narrow range of possible future cases, but it is less clear that its vertical stare decisis effects will have practical importance for future Commerce Clause disputes. In the long run, the Commerce Clause implications of *NFIB* will be decided in the Supreme Court, and the fragmented opinions in *NFIB* are not likely to be decisive. But not all legal effects are direct. The most important legal consequences of *NFIB* may be its indirect legal effects.

IV. INDIRECT LEGAL EFFECTS: A CONSTITUTIONAL GESTALT SHIFT

Supreme Court opinions have indirect effects on constitutional practice. These indirect effects can be mediated in a variety of ways. A Supreme Court decision may trigger a constitutional backlash that mobilizes popular opinion against the result in the case. Or the decision might play a role in changing social norms, with a subsequent feedback loop into future judicial decisions. In this Article, we will focus on a particular kind of indirect legal effect—which we will call a "constitutional gestalt shift."

A. Constitutional Contestation as a Complex Argumentative Practice

The indirect consequences of Supreme Court decisions is illuminated by the idea that, as a descriptive matter, constitutional adjudication and decision is constituted in part by a complex argumentative practice.[129] That practice is governed by a set of norms. Some of those norms are like rules—they are relatively hard and fast with bright lines and hard edges. You cannot argue to a district court that it should overrule a recent decision of the United States Supreme Court—the move is "off the wall", out of bounds, and beyond the pale. Some of the norms can be reconstructed as standards—soft and loose, vague and ambiguous. You can argue, in some circumstances, that the Supreme Court should overrule one of its prior decisions, but it is difficult to know in advance when this move will be encouraged and when the Court will shut it down. At any given time, some Supreme Court decisions are canonical—any doctrinal theory must count such decisions as correctly decided. Other decisions are anticanonical—they are paradigm cases of error.[130] You might be able to argue today that *District of Columbia v. Heller*[131] or *Wickard v. Filburn*[132]

129. For implicit and explicit developments of the idea of law as a complex argumentative practice, see PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982); Mitchell N. Berman, *Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 269 (Matthew D. Adler & Kenneth E. Himma eds., 2009); *see also* Lawrence B. Solum, *We Are All Originalists Now*, *in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTONAL ORIGINALISM: A DEBATE 1, 76 (2011) (discussing constitutional law as a complex argumentative practice). The general idea that law is a complex argumentative practice is developed by Dennis Patterson. *See* DENNIS PATTERSON, LAW AND TRUTH 128–50 (1996).

130. *See generally* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011) (discussing the idea of anticanonical cases).

131. 554 U.S. 570 (2008).

132. 317 U.S. 111 (1942).

was wrongly decided, but not *Brown v. Board of Education*[133] or *Marbury v. Madison*.[134] You cannot argue that *Lochner v. New York*[135] was decided correctly. The norms that govern the complex practice of constitutional argument are dynamic, changing over time in response to both politics and developments within the practice itself.

B. Persuasive Authority

Before we turn to the idea of a constitutional gestalt, we should note the existence of another particular kind of move in the complex argumentative practice that structures constitutional contestation. The concept of persuasive authority is not well theorized, but the intuitive idea is clear. Dicta in cases and the reasoning of nonauthoritative sources may persuade judges to adopt legal rules, but the force of persuasive authority is nonbinding. Persuasive authority has four distinct but related components: (1) persuasion by reasons, (2) persuasion by epistemic authority, (3) persuasion by predictive authority, and (4) persuasion by legitimating authority. Consider each of the four components.

First, persuasion by the independent force of reasons is independent of the person or institution that provides the reasons: in this regard, the reasons of Supreme Court Justices are, in principle, capable of being no more persuasive than the same reasons when provided by a student law review note. Each of the nonbinding opinion segments in *NFIB* can be a source of persuasion by reasons.

Second, consider persuasion by epistemic authority. Of course, most of us are inclined to regard what is written by a Supreme Court Justice or eminent academic authority as more persuasive than what is written in student notes, even though it is the case that the latter are sometimes correct when they disagree with either of the former. In part, this is because we regard some persons or institutions as epistemic authorities.

The idea of epistemic authority is related to a general approach to knowledge known as social epistemology (or "epistemics") that is strongly associated with the philosopher Alvin Goldman.[136] Whereas individual epistemology (or "epistemology") "identif[ies] and evaluate[s] psychological processes that occur within the epistemic subject," the related inquiry of social epistemology aims to "identify and evaluate social

133. 347 U.S. 483 (1954).
134. 5 U.S. 137 (1803).
135. 198 U.S. 45 (1905).
136. *See generally* ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD (1999).

processes by which epistemic subjects interact with other agents who exert causal influence on their beliefs."[137] In the sense I am using the term, an "epistemic authority" is some person or institution to whom or which others defer because of the authority's expertise.[138]

The opinions of Supreme Court Justices may be viewed as epistemic authorities because of the belief in the legal expertise of the Justices. The relationship that creates epistemic authority might be viewed as dyadic—a relationship between a pair consisting of the possibile epistemic authority and the individual who might defer to the epistemic authority. A given lower court judge, say Learned Hand, might not view a given Supreme Court Justice, say Tom Clark, as an epistemic authority or even as an epistemic peer or equal. But many judges, lawyers, and scholars are likely to view Supreme Court Justices as epistemic authorities, at least on some topics.

Third, opinions of the Justices may persuade because of their predictive value. We have already examined the realist or predictive view of vertical stare decisis above. Now we consider the premises of that theory from a different angle—not as a theory of precedent, but as a theory of persuasive authority. Lower court judges may view the opinions of the Supreme Court as persuasive because they provide a basis for predicting the future behavior of the Court and hence the likelihood that the Court would reverse a lower court's decision. Lower court judges may wish to avoid reversal, even if they reject the bad man theory of law.[139]

Fourth, opinions of the Justices may have what we might call "legitimating authority." Given our legal culture, legal arguments may be viewed as requiring sources that confer legitimate authority. A constitutional argument is legitimate if it is sound or cogent and premised on the constitutional text or the holding of a Supreme Court case. On the other hand, a constitutional argument that reasoned from the writings of Karl Marx or Ayn Rand might be thought to lack legitimacy. Given our legal culture, arguments based on Supreme Court dicta or on concurring or dissenting opinions of individual Justices are legitimating—these are legitimate sources of authority within the complex argumentative practice of law.

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137. Alvin Goldman, *Social Epistemology*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Aug. 18, 2006), http://plato.stanford.edu/archives/sum2010/entries/epistemology-social/.

138. *See generally* Robert Pierson, *The Epistemic Authority of Expertise*, 1 PSA: PROC. OF THE BIENNIAL MEETING OF THE PHIL. OF SCI. ASS'N 398 (1994).

139. *See supra* text accompanying notes 108–11.

Putting these pieces together, we might postulate that the full persuasive authority of a nonbinding Supreme Court opinion is a complex function of the reasons it provides, the epistemic authority of the author and those who join the opinion, the predictive value of the opinion, and its legitimating effect. Different judges may have different "persuasion functions"—some may count reasons heavily and predictive value lightly, or vice versa. Nonetheless, it seems reasonable to believe that reasons supported by recent opinions joined by five Supreme Court Justices will be viewed as having epistemic authority, predictive value, and legitimating authority—at least, *pro tanto*.

In the discussion that follows, we will be examining the relationship between the opinions in *NFIB* and the constitutional gestalt. That discussion will be based on the role of those opinions in the complex practice of constitutional argument and the relationship between that practice and constitutional politics. The legal effect of the Commerce Clause reasoning of the Chief Justice and the joint dissent is likely to be disputed.[140] Holdings are not merely persuasive; they are binding on lower courts. There are arguments for the assertion that the reasoning of Chief Justice Roberts and the joint dissent on the Commerce Clause gives rise to a holding. But these arguments can be contested, and in the dialectical process of argumentation, the fallback position of litigants that rely on the Commerce Clause reasoning is likely to be that it constitutes persuasive authority. In that process, the epistemic authority of the Justices, the predictive value of five votes, and the legitimating authority of the institutional role of the Justices are all likely to play a role. Of course, persuasive authority is only persuasive—it can be overcome by the balance of reasons. But the combination of epistemic, predictive, and legitimating authority can change the context in which reasons are evaluated, making reasons that would be "off the wall" without such persuasive authority into reasons that are "on the wall" and hence potentially warrant changes in the law.[141] And it is unquestionably true that in cases of first impression, the lower federal courts can change the law, by resolving an unsettled question in a way that sets a precedent for future cases.

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140. *See supra* Part III.B.

141. JACK M. BALKIN, CONTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 174–225 (2011); Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012, 2:55 PM), http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040.

C. Constitutional Gestalts

When viewed from a distance, the system of norms that govern the complex practice of constitutional argument can be seen as organized into large-scale patterns. These patterns can be represented in various ways, including doctrinal summaries, normative theories, and narratives. Further, particular cases may be considered canonical: the canonical cases are paradigms; their reasoning and outcomes can be used as premises in constitutional argument.[142]

At any given time, there may be a dominant constitutional gestalt—an overall picture of the constitutional landscape, either as a whole or in some particular domain. It is important to understand that the constitutional gestalt does not settle all constitutional questions. Given the dominant constitutional gestalt, some territory may be mapped as disputed—subject to contestation in constitutional litigation and in interactions between the various branches of government. Given the same dominant constitutional gestalt, other territory may be mapped as beyond dispute—outside the bounds of constitutional contestation because of settled constitutional norms.

It may be helpful to provide a visual representation of the idea of a constitutional gestalt in terms of three related ideas: (1) constitutional doctrines, (2) normative constitutional theories, and (3) constitutional narratives:

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142. The notion of a constitutional gestalt should be distinguished from the idea of a "paradigm" or "constitutional paradigm." Although the word "paradigm" in its primary sense is simply that of an example or central case, there is a related idea of paradigms that is derived from the work of Thomas Kuhn in the philosophy of science. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996). A Kuhnian paradigm consists of "consensus on exemplary instances of scientific research," that in turn gives rise to an agreement on such further fundamentals as particular theories, procedures, instrumentation, and scientific language. Alexander Bird, *Thomas Kuhn*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Aug. 11, 2011), http://plato.stanford.edu/archives/fall 2013/entries/thomas-kuhn/. In the legal context, the analogue of a Kuhnian paradigm would be a case, or set of cases, that serves as the focal point of agreement among the community of legal practitioners. Agreement on a set of canonical cases could in turn give rise to agreement on other basic ideas, including legal-argument types, styles of opinion writing, and citation practices. Although there are affinities between the notion of a constitutional paradigm and a constitutional gestalt, the two concepts have distinct content and functional expressions. For discussion of Kuhn's idea of a paradigm and constitutional interpretation, see Ian Bartrum, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 FLA. ST. U. L. REV. 259 (2013).

FIGURE 1: CONSTITUTIONAL GESTALTS

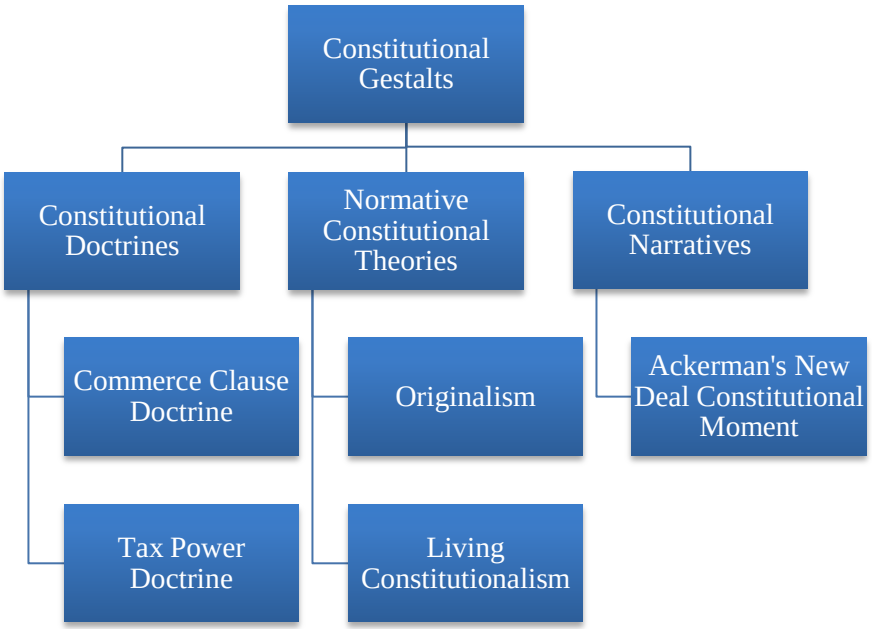

Figure 1 represents the relationship between gestalt, doctrine, theory, and narrative as a hierarchy of abstraction. Constitutional gestalts are highly abstract representations of the content of constitutional doctrines, theories, and narratives. (For the purpose of this discussion, the phrase "constitutional doctrine" is used in an inclusive sense that incorporates both judicially created doctrines and constitutional norms and practices that arise outside the courts.)

Consider the subset of constitutional doctrine that defines national legislative power. The content of the doctrine as a whole is the conjunction of the content of a multitude of particular constitutional rules. That content can itself be described at various levels of generality. At the level of detail, there will be highly particularized rules governing specific kinds of legislative action (e.g., rules defining an excise tax). At the highest level of abstraction, there will be rules that attempt to capture the structural features of the detail (e.g., the rational basis test). The constitutional gestalt is not a theory of the doctrine—although such theories may be

supported or undermined by the gestalt. Rather, the gestalt organizes our perception of cases, rules, and doctrinal theories.[143]

Similarly, we can construct constitutional narratives about the development of national legislative power. One such narrative prominently features the resolution of the conflict between President Roosevelt and the Supreme Court. This version emphasizes 1937, telling a story of the events that led to the Supreme Court's decision in *NLRB v. Jones and Laughlin Steel Corp.*[144] and to subsequent decisions (e.g., *Wickard v. Filburn*[145]) and assertions of national legislative power (e.g., the Great Society[146]). Such narratives can be vindicating or debunking. A vindicating narrative tells a story that places a vector of constitutional development in a normatively favorable light, whereas a debunking narrative tells the story in a way that puts the vector in a normatively unfavorable light. The same set of events could be the subject of clashing narratives, some of which are vindicating, while others are debunking.[147]

Vindicating and debunking narratives are normatively charged, but there is another category of narrative, which we might dub "causal," that focuses on causal relationships between actions and events—although a causal narrative might also have normative implicatures.[148] A constitutional gestalt is not a narrative, but it may make some narratives salient and plausible and other narratives beside the point or implausible.

Finally, we can construct normative constitutional theories. Originalism is such a theory: in one prominent version, it argues that constitutional practice should be constrained by the original public meaning of the text.[149] In the context of the Commerce Clause, most versions of originalism are critical of the basic contours of current

143. My understanding of the relationship between the constitutional gestalt and doctrines is indebted to Duncan Kennedy's account of the phenomenology of judging. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE (1998); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, *in* CRITICAL LEGAL STUDIES 45 (James Boyle ed., 1992).

144. 301 U.S. 1 (1937).

145. 317 U.S. 111 (1942).

146. "The Great Society" is the name given by Lyndon Johnson to his legislative agenda. *See* JOHN A. ANDREW III, LYNDON JOHNSON AND THE GREAT SOCIETY (1998).

147. There is a third possibility: constitutional history could be neutral. On the role of constitutional narratives, see Lawrence B. Solum, *Narrative, Normativity, and Causation*, 2010 MICH. ST. L. REV. 597.

148. Implicature refers to saying one thing but meaning something else. *See* Wayne Davis, *Implicature*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 22, 2010), http://plato.stanford.edu/archives/spr2013/entries/implicature.

149. *See* Solum, *We Are All Originalists Now*, *supra* note 129, at 1–36.

doctrine.[150] But one prominent public meaning originalist, Jack Balkin, provides a normative defense of the kind of Commerce Clause doctrine offered in Justice Ginsburg's opinion in *NFIB*.[151]

Normative constitutional theories come in many shapes and sizes, ranging from Ronald Dworkin's theory of law as integrity, which sees constitutional law as a function of the normative theory that best fits and justifies the law as a whole,[152] to meso- or micro-level normative accounts of particular clauses, statutes, regulations, or cases. Constitutional gestalts are not normative constitutional theories, but such theories may be more or less consistent with the constitutional gestalt. During periods in which there is a dominant constitutional gestalt, the plausibility of normative theories will depend, in part, on their consistency with the gestalt. Normative theories that justify all or most of the constitutional gestalt will be seen as more likely to be true or at least reasonable; theories that call for radical revisions of the gestalt are likely to be seen as false and unreasonable.

Constitutional gestalts operate at a level of abstraction that floats above doctrines, theories, and narratives. You might think of a constitutional gestalt as the big picture that integrates a high-level description of doctrine with vindicating narratives and justifying normative theories. Gestalts organize our perceptions of particulars, but the content of the gestalt is not identical to the content of the particulars. A gestalt view of national legislative power relates generalizations about *constitutional doctrine* (e.g., the commerce power is virtually plenary and subject to rational basis scrutiny) to *normative theories* (e.g., the scope of national power should be decided by an elected body) and *vindicating narratives* (e.g., expansive Commerce Clause doctrine emerged from a conflict between an antidemocratic Supreme Court and a President and Congress vested with extraordinary constitutional authority by 'We the People').

Gestalts organize the content of doctrines, theories, and narratives—they frame our perceptions. Because a gestalt is not the content it frames, it is difficult to capture a gestalt as an explicit set of propositions. Slogans

150. *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105–06 (2001); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 189–91 (1996); Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1199 (2003).

151. JACK M. BALKIN, LIVING ORIGINALISM 138–82 (2011); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010). For a critique of Balkin's theory, see Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce,"* 2012 U. ILL. L. REV. 623.

152. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105–30 (1977); RONALD DWORKIN, LAW'S EMPIRE 379–99 (1986).

may be useful, even when the slogan is obviously wrong at the level of detail: for example, the statement "Commerce Clause power is virtually unlimited" is a good slogan but not a helpful description at a fine-grained level of detail. Metaphors may also be useful: for example, "islands of state sovereignty in a sea of federal power."[153] Slogans and metaphors can represent the gist of a constitutional gestalt, but the gestalt itself is a mental or conceptual construct that organizes perceptions of the legal materials.

The idea of a constitutional gestalt can be clarified by invoking the familiar distinction between the internal and external point of view.[154] Imagine a hypothetical judge, Alice, whose perceptions of constitutional doctrine are shaped by a constitutional gestalt. When Alice engages in constitutional practice (e.g., deliberates in the course of deciding a case), she can and characteristically will engage the legal materials (cases and clauses) from the internal point of view—and that point of view will have been shaped by the constitutional gestalt. Now imagine a hypothetical scholar, Ben, who wants to explain Alice's decisions. Ben can attempt to reconstruct the constitutional gestalt that shaped Alice's understandings of the law from the external point of view. For Ben, the constitutional gestalt is a feature of Alice's cognitive apparatus. Ben can reconstruct the content of the gestalt by taking up Alice's point of view as a participant observer in constitutional practice.

Some of the most interesting developments in constitutional practice occur during periods of gestalt shift—when one picture gives way to another. The mechanisms by which such shifts occur may be various. A constitutional gestalt shift might sneak up on the community of constitutional actors—their perception of the overall pattern might gradually change without their even noticing. But constitutional gestalt shifts can also be the subject of intense constitutional contestation. Such contestation may occur in constitutional litigation, or it might occur through the articulation of constitutional visions outside the courts. In some cases, perhaps typically, a constitutional gestalt shift will be the subject of contestation in multiple locations. Arguments may occur in the public sphere, in the legal academy, in legislative and executive forums within both state and national political institutions, and in the courts of law.

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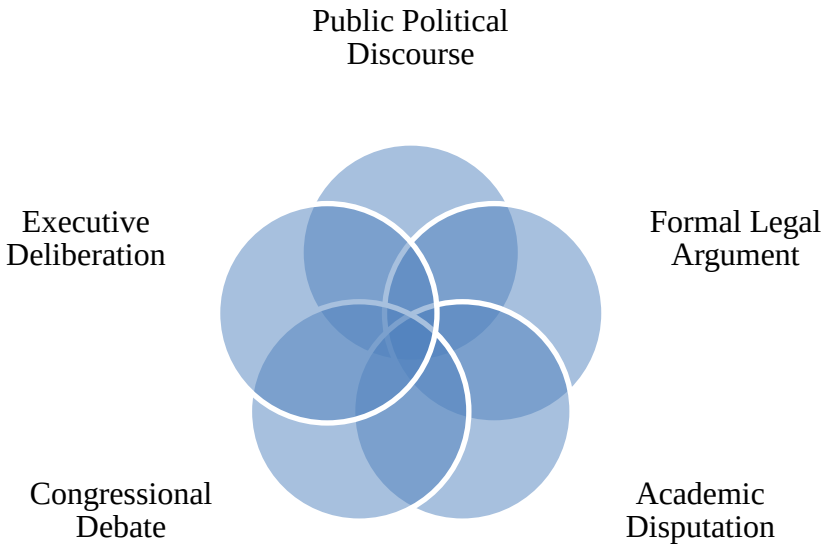
153. Randy E. Barnett, Commentary, *William Rehnquist*, CATO INSTITUTE (Sept. 6, 2005), http://www.cato.org/publications/commentary/william-rehnquist.

154. *See* H. L. A. HART, THE CONCEPT OF LAW 89–91 (2d ed. 1994).

We can represent the process of constitutional contestation visually as the relationship between overlapping fields (or arenas) of discourse:

FIGURE 2: THE FIELD OF CONSTITUTIONAL CONTESTATION

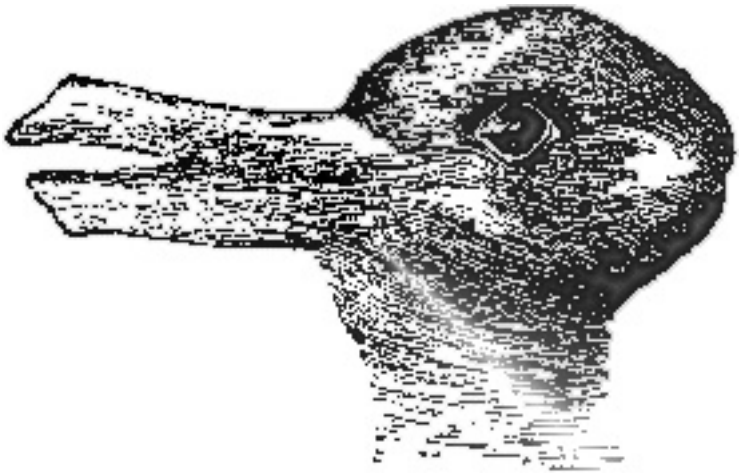


The influence of a judicial opinion, such as *NFIB*, on the process of contestation will vary with the context; different fields of discouse may be governed by different norms. For example, contestation via formal legal arguments presented to courts will be heavily influenced by judicial opinions because the conventions of the complex argumentative practice give substantial weight to precedent, especially the decisions of the Supreme Court on constitutional issues. In other forums, Supreme Court opinions may play a less direct or less constraining role, such as in public political discourse among citizens, where the opinions of the Supreme Court may be ignored or subject to intense criticism. Constitutional contestation can be structured by a dominant constitutional gestalt, but when the gestalt itself is contested, there may be a complex relationship among constitutional arguments presented within the various sites of constitutional contestation.

When a gestalt shift occurs, our big picture view of the constitutional landscape changes. Contested territory becomes settled. Undisputed norms

are questioned. Constitutional arguments that once passed the laugh test become subject to ridicule. Arguments that once were "off the wall" are now seen as "on the wall." A familiar visual image conveys the notion of a gestalt shift vividly:[155]

FIGURE 3: DUCK RABBIT



This is the "duck rabbit," which appeared in *Popular Science*,[156] was made famous by Ludwig Wittgenstein in the *Philosophical Investigations*[157] and has been memorialized in popular culture as the theme of sitcom episodes[158] and on beer labels.[159] When perceptions of the image move from duck to rabbit or vice versa, a gestalt shift has occurred.

Constitutional gestalt shifts are more complex than the simple duck-to-rabbit or rabbit-to-duck image shift. The relevant objects of constitutional perception are multitudinous in number and complex in structure. Indeed, if the relevant constitutional data (bits of constitutional text, arguments by lawyers, reasons in opinions, pronouncements by nonjudicial officials, and

155. The image is available via Wikimedia Commons. *File:Kaninchen und Ente.png*, WIKIMEDIA COMMONS (Aug. 7, 2012, 4:35 PM), http://commons.wikimedia.org/wiki/File:Kaninchen_und_Ente.png.

156. Joseph Jastrow, *The Mind's Eye*, 54 POPULAR SCI. MONTHLY 299, 312 (1899).

157. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 194 (G. E. M. Anscombe trans., Basil Blackwell 1963).

158. *How I Met Your Mother: Rabbit or Duck* (CBS television broadcast Feb. 8, 2010).

159. THE DUCK-RABBIT CRAFT BREWERY, http://www.duckrabbitbrewery.com (last visited Oct. 21, 2013).

so forth) are viewed one-by-one as particulars, the resulting mass of relevant inputs into the practice of constitutional argument is both vast and chaotic. Constitutional gestalts (supported by doctrinal theories, normative constitutional theories, and narratives) organize multitudinous, complex constitutional particulars into relatively simple pictures composed of a manageable set of elements.

D. Competing Constitutional Gestalts: Understandings of the New Deal Settlement

In *NFIB*, the United States Supreme Court heard six hours of oral argument over three days.[160] The plaintiff-respondents argued that the Supreme Court should affirm the Eleventh Circuit and invalidate the ACA, arguably the most important piece of social legislation since the Great Society programs of the 1960s. When the litigation began, almost all observers argued that this challenge bordered on the frivolous, perhaps even triggering Rule 11 sanctions.[161] After oral argument, perceptions had changed, and many observers predicted that the challenge to the ACA would prevail.[162]

What happened? Undoubtedly, many things. Jack Balkin has observed that politics and political parties played an important role, perhaps the crucial role, in combination with intellectual and social movements.[163] But the role of political institutions is mediated by constitutional understandings that help to shape the space within which politics can operate. The constitutional challenge to the ACA began its journey to the Supreme Court in an intellectual environment shaped by a constitutional

160. BLACKMAN, *supra* note 14, at xxiii.

161. *See* BLACKMAN, *supra* note 14, at 185; David A. Hyman, *Why Did Law Professors Misunderestimate the Lawsuits Against PPACA?*, 2013 U. ILL. L. REV. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2224364; Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 10 n.50 (2011), http://yalelawjournal.org/2011/04/26/koppelman.html; Akhil Reed Amar, Op-Ed., *Constitutional Showdown: A Florida Judge Distorted the Law in Striking down Healthcare Reform*, L.A. TIMES, Feb. 6, 2011, at A25; Randy Barnett, *A Weird Victory for Federalism*, SCOTUSBLOG (June 28, 2012, 12:56 PM), http://www.scotusblog.com/2012/06/a-weird-victory-for-federalism/; Ezra Klein, *Reagan's solicitor general: 'Health care is interstate commerce. Is this a regulation of it? Yes. End of story.'*, WASH. POST WONKBLOG (Mar. 28, 2012, 1:09 PM), http://www.washingtonpost.com/blogs/wonkblog/post/reagans-solicitor-general-health-care-is-interstate-commerce-is-this-a-regulation-of-it-yes-end-of-story/2011/08/25/gIQAmaQigS_blog.html.

162. *See, e.g.*, Sarah Kliff, *Neal Katyal on defending Obamacare*, WASH. POST WONKBLOG (Mar. 28, 2012, 2:36 PM), http://www.washingtonpost.com/blogs/ezra-klein/post/neal-katyal-on-defending-obamacare/2012/03/28/gIQAHpksgS_blog.html.

163. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 141, 174–225; Balkin, *From Off the Wall to On the Wall*, *supra* note 141.

gestalt that structured the field of constitutional argument. This journey ended with the Supreme Court itself caught in the midst of a potential gestalt shift.

1. Gestalt One: The Dynamic New Deal Settlement

The New Deal Settlement is a familiar trope in constitutional discourse,[164] sometimes associated with footnote four in *United States v. Carolene Products Co*.[165] The New Deal Settlement was the product of a complex set of actions and events, including legislation, presidential speeches, and judicial decisions. One might think of the New Deal Settlement as constitutional doctrine, articulated in Supreme Court decisions and further refined in legal scholarship and lower court opinions. But for the purposes of this Article, I want to look at the New Deal Settlement as a central organizing idea within a constitutional gestalt—the big picture and not the doctrinal details. One might limit the New Deal Settlement chronologically to the Roosevelt presidency, perhaps with an extension for Truman. But for our purposes, we will focus on an extended period that begins with 1937 and extends to include Warren and Burger Court decisions and Great Society legislation. Finally, we shall focus only on congressional power pursuant to the Commerce Clause and the Necessary and Proper Clause, although the New Deal Settlement also includes positions on individual rights and separation of powers.

During the period covered by the extended New Deal Settlement, Commerce Clause doctrine was fairly complex. The constitutional gestalt was much simpler. The core idea of the gestalt was that Congress had plenary and virtually unlimited legislative power—subject, of course, to the limits imposed by the individual rights provisions of the Constitution.[166] The gestalt was a summary (though not necessarily an accurate summary[167]) of many particular doctrines, their interactions, and

164. *See* Charles H. Clarke, *Supreme Court Assault on the Constitutional Settlement of the New Deal:* Garcia *and* National League of Cities, 6 N. ILL. U. L. REV. 39, 79 (1986); Kenneth T. Cuccinelli, II, et al., *Why the Debate over the Constitutionality of the Federal Health Care Law Is About Much More than Health Care*, 15 TEX. REV. L. & POL. 293, 323 (2011); Norman R. Williams, *The People's Constitution*, 57 STAN. L. REV. 257, 281–82 (2004) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)).

165. Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 14 (2001); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

166. *See supra* note 9 (collecting references to Congress's virtually unlimited power).

167. I owe special thanks to Laura Donohue for emphasizing the idea that the gestalt may be based on an inaccurate account of the doctrine or a factually incorrect constitutional narrative. Given the nature of a constitutional gestalt, this possibility is not surprising. Gestalts are simplifying pictures and not complete and accurate historical narratives.

the effects they produced. These doctrines included the presumption of constitutionality, the rational basis test, and the cumulative effects test articulated in *Wickard v. Filburn*.[168] The gestalt provided a heuristic for interpreting the individual doctrines and their interrelationships. Because of its very nature, the gestalt was a simplifying representation of the state of the doctrine. The gestalt was formulated in terms of "virtually unlimited" national legislative power. It might turn out that the general picture of plenary and virtually unlimited power was inaccurate as to some details. The fabric of national legislative power might have a rip here and a tear there, but such gaps were viewed as contestable anomalies. Arguments for minor alterations in doctrine that would mend the tears were on the table. However, arguments for the wholesale expansion of these holes in the fabric of plenary and unlimited power were "off the wall." Therefore, we can characterize the constitutional gestalt as the "Dynamic New Deal Settlement" with doctrine growing and changing so as to accommodate expansions in national power. Expansions were initiated by Congress and the President and then ratified by the Supreme Court in the event they were challenged.

The New Federalism cases decided by the Rehnquist Court posed a challenge to the constitutional gestalt that read the New Deal Settlement as creating plenary and unlimited national legislative power. In particular, *United States v. Lopez*[169] and *United States v. Morrison*[170] reasoned from premises that were inconsistent with the then prevailing constitutional gestalt. Before these cases were decided, the prevailing view was that these challenges would fail, and after the challenges succeeded, the predominant reaction was to fit them into the gestalt. One strategy was to characterize these decisions as incoherent and hence, as without generative force.[171] Another strategy was to suggest that these cases were merely symbolic reminders by the Supreme Court to Congress of the theoretical limits on legislative powers.[172] A third approach was to characterize *Gonzales v. Raich*[173] as depriving *Lopez* and *Morrison* of generative

168. 317 U.S. 111 (1942).
169. 514 U.S. 549 (1995).
170. 529 U.S. 598 (2000).
171. *See, e.g.*, Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of* United States v. Lopez *and* United States v. Morrison, 68 TENN. L. REV. 605, 616 (2001) (stating that "lower courts are left to decipher an incoherent and unworkable rule under the standards articulated in *Lopez* and reiterated in *Morrison*").
172. *See, e.g.*, Louis H. Pollak, *Foreword*, 94 MICH. L. REV. 533, 541, 553 (1995) (suggesting that *Lopez* may be "merely anecdotal").
173. 545 U.S. 1 (2005).

force,[174] while a fourth and final strategy characterized these decisions as exceptional carve-outs from the general rule of unlimited congressional power.[175] One version of this latter strategy emphasized that any limits imposed by *Lopez* and *Morrison* could be circumvented via the spending power.[176]

The attitude of the conventional constitutional gestalt to the New Federalism decisions can be expressed metaphorically. Imagine a sea of federal power that spans the globe. The New Federalism decisions of the Rehnquist Court created islands of state power, including the anti-commandeering principle of *Printz v. United States*[177] and *New York v. United States*,[178] the expanded Eleventh Amendment sovereign immunity doctrine of *Pennhurst State School and Hospital v. Halderman*,[179] and the *Lopez* and *Morrison* limits on the Commerce Clause. Thus, the prevailing gestalt underwent modification—the ocean of federal power was dotted with isolated islands of state sovereignty—but the basic pattern (the sea of federal power) remained intact.[180]

2. Gestalt Two: The Frozen New Deal Settlement

But there is another way to understand the New Federalism decisions. Although the dominant constitutional gestalt postulated virtually unconstrained national legislative power, Congress had never exercised most of the power that was theoretically available to it. State law continued to govern most of life, for individuals and institutions. Even after the New Deal, the pervasive nature of state power is exemplified in

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174. *See, e.g.*, Thane Rehn, Note, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 COLUM. L. REV. 1991, 2018 (2008) ("[L]ower courts have tended to interpret [*Gonzales v. Raich*] as removing any significant limits on congressional power that might have been put in place by *Lopez* and *Morrison*.").

175. *See, e.g.*, Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 765 (2003) (describing *Lopez* and *Morrison* as "carving out areas of state sovereignty").

176. *See* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1974–75 (1995); Richard E. Levy, *Federalism: The Next Generation*, 33 LOY. L.A. L. REV. 1629, 1643 (2000); *see also* Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 116 ("[A]ny time that Congress finds itself limited by [its] delegated regulatory powers . . . Congress need only attach a condition on a federal spending grant that achieves the same (otherwise invalid) regulatory objective.").

177. 521 U.S. 898, 933 (1997).

178. 505 U.S. 144, 188 (1992).

179. 451 U.S. 1 (1981).

180. As stated, the metaphor does not account for zones of concurrent state and federal power. We can modify the metaphor by specifying that the ocean of federal power is the zone in which Congress has power to act, or we might add marshes and swamps to represent zones of concurrent power.

the fields of criminal law, common law tort, property, and contract, family law, corporate law, and insurance regulation. Moreover, there was a mismatch between the big picture gestalt and the micro-level details of constitutional doctrine. For example, New Deal and Warren Court opinions continued to pay lip service to the scheme of limited and enumerated powers in Article One of the Constitution.[181] These anomalies constituted the raw materials from which an alternative constitutional gestalt could be wrought.

From the perspective of the conventional constitutional gestalt, it might appear that the alternative gestalt would necessarily involve a return to the so-called "Constitution in exile":[182] in the context of national legislative power, that would imply the invalidation of much of the New Deal and Great Society legislation that constitutes the contemporary regulatory state. That is a possible alternative constitutional program, but it is radically implausible as an alternative gestalt. The constitutional gestalt is a simplifying picture of constitutional practice, as it exists. As such, it must incorporate the facts that form the basis of the narrative of the New Deal Settlement.[183]

For this reason, the alternative gestalt must somehow incorporate the broad outlines of constitutional doctrine and the existing structure of constitutional practice. The alternative gestalt must accept the legal rules generated by the New Deal Settlement, as those rules currently exist. But the alternative gestalt is not required to endorse a dynamic understanding of the content of the settlement. The resulting alternative can be summarized as a slogan, "[t]his far, and no farther."[184] The most radical

181. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183, 196 (1968) (Warren Court case stating "the power to regulate commerce, though broad indeed, has limits"); Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U.S. 453, 466 (1938) (New Deal era case stating "The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several states.").

182. Randy Barnett, Academic Reaction to Oral Argument on the ACA Challenge, VOLOKH CONSPIRACY (Apr. 30, 2012, 10:55 AM), http://www.volokh.com/2012/04/30/academic-reaction-to-oral-argument-on-the-aca-challenge/; Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAG., Apr. 17, 2005, *available at* http://www.nytimes.com/2005/04/17/magazine/17CONSTITUTION.html?_r=1; Jeffrey Rosen, *How New Is the New Textualism?*, 25 YALE J.L. & HUMAN. 43 (2013).

183. Of course, the current constitutional gestalt can be challenged. Thus, Justice Thomas argued in his separate dissenting opinion that the substantial effects doctrine of *Wickard v. Filburn* should be overruled. *See supra* Part II.C.7; *see also* NFIB v. Sebelius, 132 S. Ct. 2566, 2677 (2012) (Thomas, J., dissenting). Likewise, originalists may argue that the New Deal Settlement is consistent with the original meaning of the constitutional text. *See* Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 1013 n.159 (2012) ("[M]any modern originalists accept much of the Warren Court's corpus but are comfortable revisiting the New Deal settlement, which tended to rein in the Fourteenth Amendment's jurisgenerative capacity.").

184. *See* Randy Barnett, *"This Far and No Farther": Baselines and the Individual Insurance Mandate*, VOLOKH CONSPIRACY (Jan. 22, 2012, 3:00 PM), http://www.volokh.com/2012/01/22/this-

New Deal cases (e.g., *Wickard v. Filburn*[185]) are seen as wrong in principle but settled in practice. The New Federalism cases are seen as a substantial correction in the course of constitutional doctrine and not as mere symbols or carve-outs. The constitutionality of preexisting New Deal and Great Society legislation is taken as a given, but the constitutionality of new federal programs is not taken for granted.

Returning to our oceanic metaphor, the alternative gestalt admits the existence of a great sea of federal power but insists that there are whole continents of exclusive state authority above the high tide line. Of course, the shape of the continents is largely the result of historical accident. The coastlines are not smooth geometric shapes. There are peninsulas of state authority almost surrounded by federal power. There are great bays and fjords, where federal authority extends deep into the reserves of state power. Preserving the status quo is not a matter of elegant doctrines constituted by a few distinctions rooted in a general theory of federalism. At the doctrinal level, the alternative gestalt sanctions and encourages categorical distinctions that may seem arbitrary if evaluated in isolation, one by one. From the perspective of the alternative constitutional gestalt, these seemingly arbitrary categorical distinctions make sense when viewed from a distance. They freeze the New Deal Settlement, as it exists here and now—this far, but no farther.

What is the relationship of the alternative constitutional gestalt to originalism? Originalism itself is really a family of constitutional theories.[186] Nonetheless, we can identify two ideas at the core of the various versions of originalism: (1) the thesis that the communicative content of the Constitution was fixed at the time each provision was framed and ratified (the "fixation thesis"); and (2) the principle that constitutional doctrine and practice should be constrained by the original meaning of the Constitution (the "constraint principle").[187]

Many originalists believe that the New Deal cases expanded Congress's Commerce Clause power beyond the limits of original meaning.[188] But as a political matter, it would be all but impossible and

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far-and-no-farther-baselines-and-the-individual-insurance-mandate.

185. 317 U.S. 111 (1942).

186. *See* Solum, *We Are All Originalists Now*, *supra* note 129, at 35–36.

187. Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 156 (2012) (reviewing JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011) and JACK M. BALKIN, LIVING ORIGINALISM (2011)).

188. *See generally* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

certainly costly to undo New Deal and Great Society legislation or to amend the Constitution to authorize those programs.

Given that a thoroughly originalist jurisprudence is infeasible (at least in the short to medium run), some originalists endorse the idea that there can be an "originalist second best": given the practical impossibility of the first-best originalist interpretation of the Commerce Clause, the originalist might argue for doctrines that limit departures from original meaning to those required by practical necessity.[189] Such doctrines mitigate the damage done to original meaning by precedent and practice. Therefore, the alternative gestalt, the Frozen New Deal Settlement, would stand in a relationship of mutual support with a normative constitutional theory that supports freezing the limits of national legislative power as a constitutional second best.

E. NFIB *and the Possibility of a Constitutional Gestalt Shift*

We have hypothesized two competing constitutional gestalts. The dominant gestalt postulates plenary and unlimited national legislative power; the alternative gestalt endorses the notion of enumerated and limited congressional powers but acknowledges the irreversibility of the New Deal and Great Society legislative programs.

Constitutional gestalts do not play a direct role in constitutional litigation. You cannot cite a gestalt in a brief. The Supreme Court has never directly referred to the New Deal Settlement—no court has used the phrase in a reported decision. Constitutional gestalts shape our perceptions of constitutional argument, but they are not arguments themselves. Given the dominant constitutional gestalt, arguing that the individual mandate was unprecedented should not have counted for much: on the conventional account, unprecedented assertions of federal power should be accommodated within the Dynamic New Deal Settlement. Given the

189. John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1748–51 (2010); Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 311–12 (2008) (discussing the general idea of a constitutional second best). *Cf.* Adrian Vermeule, *The Supreme Court 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 63 (2009) (discussing idea of second-best for consequentialist originalists). The notion of an originalist second-best can be applied to both outcomes and reasoning. The second-best outcome would be the outcome in the feasible choice set that most closely approximates the outcome that would be reached on originalist grounds. The second-best reasoning would be the reasoning in the feasible choice set that most closely approximate originalist reasons. The feasible choice set could be defined in terms of the outcomes and reasoning that can command a majority of the judges on a particular court. I am grateful to Megan Degeneffe for the distinction between second-best outcomes and second-best reasoning.

alternative narrative, arguing that the individual mandate was unprecedented was an important move, establishing the predicate for a categorical rule that would invalidate the ACA. By contrast, from the perspective of the conventional gestalt, the challenge to the individual mandate was frivolous. From the alternative perspective, an attack on the ACA had a real possibility of success.

Justice Roberts's opinion in *NFIB* is curious. On the one hand, his discussion of the taxing power fits the dominant conventional gestalt. The individual mandate should be upheld because policy choices are reserved for democratic politics and not for the courts. Even if the ACA is best understood as a regulation and not a tax, the Court should adopt a saving construction that avoids the constitutional problem. On the other hand, Justice Roberts's discussion of the Commerce Clause fits the alternative gestalt. The individual mandate is beyond the Commerce Clause power because it is unprecedented, and the theories under which it is upheld imply that national legislative power is virtually unlimited. Justice Roberts looks at the picture and sees both a duck and a rabbit.

The eight remaining members of the Court see either a duck or a rabbit, but not both. Justice Ginsburg's opinion (joined by Breyer, Sotomayor, and Kagan) affirms the dominant constitutional narrative—national legislative power is almost unlimited, subject to narrow categorical exceptions defined by *Lopez* and *Morrison*. The joint dissent authored by Justices Kennedy, Scalia, Thomas, and Alito adopts the alternative gestalt's core principle of limited and enumerated federal powers, emphasizing the unprecedented nature of the mandate and framing the Rehnquist Court's New Federalism decisions as establishing a new gestalt (and not merely as narrow categorical exceptions to the rule).

V. CONCLUSION: A POSSIBLE SHIFT IN THE CONSTITUTIONAL GESTALT

What will the effects of *NFIB* be? What are the implications of the unusual pattern of opinions and reasons offered in this supremely important case? The direct legal effects have already begun to emerge. In future constitutional litigation over the spending power, *NFIB* sets an important precedent and opens the door to future challenges of Congress's power to influence the states through conditional spending. In future litigation over national legislative power, the various opinions on the Commerce Clause are sure to be cited and their precedential force is sure to be disputed. However these disputes are resolved, the grounds of constitutional contestation will have changed—the dominant constitutional gestalt has become open to challenge through formal legal argument in

ordinary litigation and through academic disputation.[190] From there, the influence of the opinions is likely to extend to congressional debate and executive deliberation and ultimately to public political discourse.

There is some evidence that a shift in the constitutional gestalt is already underway. In a Fourth Circuit oral argument on Liberty University's challenge to the Obama administration's rule that most employers provide contraceptives in their employee health plans, Judge Diana Gribbon Motz reportedly stated, "The Supreme Court opinion puts a new light, it seems to me, on the Commerce Clause. . . . It sounds like we're in a new regime [post] NFIB."[191] Motz's remark is brief, but it is not a stretch to interpret "new regime" as some version an alternative constitutional gestalt. Greg Magarian recently characterized Justice Roberts's opinion as "by far the Court's most aggressive posture against federal power since the Justices struck down core elements of the New Deal seventy-five years ago."[192]

The current state of the Court with respect to the constitutional gestalt could hardly be more evenly divided. Four and one-half Justices adhere to the conventional gestalt; four and one-half affirm the alternative view of the big picture. Half the Court endorses the dynamic reading of the New Deal Settlement; the other half sees the New Deal Settlement as frozen. The Court as an institution and Justice Roberts as an individual are caught in the exact moment of a constitutional gestalt shift—seeing the rabbit at one moment and the duck in the next. But this moment cannot last. The constitutional gestalt must eventually settle—one way or the other, dynamic or frozen.

Before the constitutional challenge to the individual mandate, the constitutional gestalt seemed settled—not to everyone but to the mainstream community of constitutional practitioners and scholars. The New Federalism cases had been absorbed into the conventional picture of plenary and unlimited national legislative power, now subject to very limited categorical exceptions. The challenge to the ACA took advantage

190. *Cf.* Joondeph, *supra* note 125, at 35 (stating that the decision in *NFIB v. Sebelius*, "suggests that the Roberts Court—in another case, presenting different issues—might well be willing to curtail Congress's commerce power significantly.").

191. Jennifer Haberkorn, "Liberty University pivots in health law challenge," POLITICO (May 17, 2013, 5:04 AM), http://www.politico.com/story/2013/05/liberty-pivots-in-health-law-challenge-91515.html; *see also* Josh Blackman, "Judge Motz: NFIB "puts a new light" on the Commerce Clause," JOSH BLACKMAN'S BLOG (May 17, 2013), http://joshblackman.com/blog/2013/05/17/judge-motz-nfib-puts-a-new-light-on-the-commerce-clause/ (stating "I think Judge Motz's characterization of our "new regime" after NFIB is accurate. Her comment is a different way of describing what Larry Solum has referred to as our shifted 'constitutional gestalt.'").

192. *See* Magarian, *supra* note 88.

of ambiguities in the cases and doctrines organized by the conventional gestalt. The plaintiffs argued that the mandate was unprecedented, the New Deal cases distinguishable, and the categorical distinctions in the New Federalism cases ("economic activity") were controlling. The United States argued that the mandate had precedents, the spirit of the New Deal cases controlled, and the New Federalism cases were distinguishable. If the Supreme Court had rejected the challenge by a vote of eight to one, as some predicted,[193] the conventional gestalt would have been decisively affirmed. Had the unthinkable happened and the Court had sustained the challenge by a similarly lopsided vote, the announcement of the decisions would have resounded like a thunderbolt from the heavens, and a constitutional revolution of the same magnitude as 1937 would have begun.

But on what was truly the main issue, *NFIB* did not result in an eight-to-one decision, or seven-to-two, or six-to-three, or even five-to-four. With respect to the constitutional gestalt, the outcome was four and one-half to four and one-half, an evenly divided Court. That leaves constitutional law in a peculiarly unsettled state. For the partisans of unlimited national power, the old gestalt prevails, and hence the old rules govern the complex practice of constitutional argument. For them, Justice Roberts was clearly right on the tax power and clearly wrong on both the Commerce Clause and the spending power; *NFIB* can be cited for its tax power holding, but the Commerce Clause discussion is obiter dictum. For them, the lesson of *NFIB* is clear—the dike held, the barbarians were held at the gate, and the banner yet waves.

For the partisans of limited and enumerated powers, the fact that five Justices embraced the alternative gestalt with respect to the Commerce Clause in the context of a challenge to an important piece of social legislation is profoundly significant. For them, the fact of an equally divided Court creates the space for constitutional contestation. A whole set of arguments that were "off the wall" is now on the table. *NFIB* can be cited in the lower courts on Commerce Clause issues—five Justices are as good as a holding for that purpose. For them, *NFIB* may even be binding Commerce Clause precedent, albeit in a narrow class of cases. For them, the game is on. Having fought to a draw on the most unfavorable terrain imaginable, they look forward to the next match on a level playing field.

193. *See* BLACKMAN, *supra* note 14, at 185 (recounting prediction by Douglas Laycock of 8–1 vote); Scott Whitlock, *Cocky Journalists Declared ObamaCare Would Be Upheld, Maybe by a 8–1 Vote*, NEWSBUSTERS (June 27, 2012, 10:48 PM), http://newsbusters.org/blogs/scott-whitlock/2012/06/27/cocky-condescending-journalists-declared-obamacare-would-be-upheld-m.

NFIB has opened the space for constitutional contestation—and that space is already being occupied, in the blogs, at academic conferences, in position papers, water cooler discussions, e-mail exchanges, briefs, and judicial opinions. Competing doctrinal arguments, theories, and narratives are already in play.

And then what? A shift in the constitutional gestalt requires more than arguments in constitutional litigation or theories propounded in law review articles, although they may play a role. A shift in the gestalt can only occur with supporting developments in constitutional politics off and on the Court. The current state of constitutional equipoise is a product of the transitory composition of the current Court and a divided government reflecting deep political fissures. Things could go one way, or they could go another. The dominant gestalt could hold, or we could look back on *NFIB* as a pivotal moment in a constitutional gestalt shift that started with the Rehnquist Court's New Federalism cases.