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Chief Justice John Roberts and the Affordable Care Act Decision

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I. Introduction

In the summer of 2012, the Supreme Court of the United States effectively held the Affordable Care Act to be Constitutional and paved the way for major health care reform in America. When the decision came down, there was shock and consternation among conservatives because the key Justice to the majority's decision was the conservative Chief Justice John Roberts. Seeming to break from his traditional grouping, the Chief Justice sided with the liberal members of the Court to uphold the signature legislation of a Democratic president. The question to be asked is whether the Chief Justice's opinion in the Affordable Care Act decision is an aberration that caught those following the Court off guard, or does it instead fit with John Robert's other decisions and overall judicial approach. To answer this question, it is first necessary to look at John Roberts' life before the Court; his childhood, his years in school, and the early influences that shaped his legal perspective. After this biographical overview, the Chief Justice's opinions prior to the Affordable Care Act decision will be analyzed in order to understand the jurisprudential framework he may have been following in writing that opinion. Next, the Affordable Care Act decision itself will be examined to see it indeed is in accord with John Robert's previous writings and reflects any of the biographical information also to be discussed below. Finally, the Chief Justice's opinions since the Affordable Care Act decision will be analyzed to determine if he has remained consistent in his approach.

II. John Roberts' Years Before the Court

John Glover Roberts was born on January 27, 1955 in Buffalo, New York. He was born to Rosemary and John Glover Roberts, Sr. and his father worked for Bethlehem Steel. John

Glover Sr.'s work required the family to move from Buffalo to Long Beach, Indiana, where he was to open up a new mill. The family moved to the town of only 1,500 residents when John Roberts Jr. was in the fourth grade and their first home there was situated along the shore of Lake Michigan. Shortly thereafter, the family of six, John Sr., Rosemary, John Jr., and his three sisters, moved away from the lakeshore to a split level home a few blocks away.[1]

Like other children from similar backgrounds, John Roberts Jr. had the benefit of an excellent education from his early years. He first went to school at Notre Dame and then went on to La Lumiere, an all-boys boarding school in nearby La Porte, Indiana.[2] There, John Roberts Jr. excelled academically and managed to be captain of the football team despite his mediocre athletic ability. He also found time to compete on the school's wrestling team and track squad while being involved in number of clubs. John Robert Jr. was impressive indeed. One of his school mates recalled the young Chief Justice's ability to make a unique argument, recalling that "[h]e could take an argument that was borderline absurd and argue for it so well that you were almost at the point of having to accept his stance even though it was intuitively obvious that it was absurd."[3] After speaking to another of John Robert's classmates, the New York Times found that in his senior year, "John Roberts went beyond a simple book-report assignment to pore through a dense set of seven philosophy tomes, then proceeded to hold forth for several class periods while some of his classmates struggled to fill a few minutes."[4] Furthermore, it was clear that John Roberts was well ahead of his peers. "When he got things wrong, people thought there

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[1] Todd S. Purdum, et al, Court Nominee's Life is Rooted in Faith and Respect for Law, New York Times (July 21, 2005), http://www.nytimes.com/2005/07/21/politics/-21nominee.html

[2] Id.

[3] Id.

[4] Id.

might be something wrong with the teacher, not with him, because he was so off the charts…[n]ot many people could keep up with him."[5]

After his stellar years at La Lumiere, John Roberts went on to excel at Harvard, where he graduated suma cum laude after only three years and magna cum laude from Harvard Law. His academic prowess was just as pronounced at Harvard as it had been in Robert's early years. One of his friends, Lazarus, reminisced that nothing short of perfection was good enough.[6] The Chief Justice did not however alienate those around him. Rather, "[b]y all accounts, during his Harvard years, Judge Roberts excelled academically but also stood out for his even-tempered nature and his ability to engage with people with many different viewpoints."[7]

As with all appointees to the nation's highest court, a major point of interest was John Robert's political leanings. While his academic record was clearly exemplar, the Chief Justice's standing as a conservative was far less pronounced, though it was obvious he was a Republican by 2005. There were no clear signs in his early years, in fact when asked about her son's conservatism, Rosemary Roberts remarked that while the family shared in her son's views, it was not the within the Roberts house from which this views germinated. "Asked how her son became a solid conservative, Rosemary Roberts said, "I don't know, only God will know," but she said her son's views are shared by other family members."[8] In his school years, John Roberts displayed conservatism in the traditional sense, rather than of the type more associated with today's political environment. "He had a sort of thoughtful respect for institutions, history, precedent, a willingness to consider change but not revolutionary. He believed in having some

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[5] Id.
[6] Id.
[7] Id.
[8] Id.

humility about one's ability to suddenly decree that those who came before you were wrong, but he was not a stick in the mud either."[9] Roberts was also described as displaying "a Midwestern reserve and quiet conservatism."[10]

John Robert's first job out of law school was a clerkship with Judge Henry Friendly, of the Second Circuit of Appeals. Roberts and Friendly were similar in many ways. Both were born in small upstate New York towns, both excelled academically, both had a love of history, and both attended Harvard.[11] As one individual commented, "Roberts shared Friendly's capacity for hard work and devotion to the law."[12] Judge Friendly was immediately impressed by Roberts, reportedly trusting the young lawyer after only one month and writing him a letter of recommendation for clerkships to the Supreme Court after such a short time."[13] While many details of John Roberts' time as Friendly's clerk are difficult to glean from the papers that remain, it is easy to surmise that Judge Friendly's approach to the bench would have great influence on John Roberts. As one commentator noted, "[f]rom Friendly, Roberts learned to take pride in judicial craftsmanship, to provide elaborate reasoning and bring intellectual rigor to each opinion, and to reason one's way to a result…[i]n many ways, Friendly remains Roberts's intellectual ideal."[14] Friendly himself had clerked for the one of the preeminent judicial minds of his own generation in Justice Brandeis before coming to the Second Circuit under the Eisenhower administration, where he was at times frustrated by what was in his view the judicial activism of the Warren Court. Furthermore, it was Judge Friendly who referred to the judge's

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[9] Id.
[10] Brad Snyder, The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts, 71 Ohio St. L.J. 1149, 1218 (2010).
[11] Id. at 1216, 1218.
[12] Id. at 1218.
[13] Id. at 1219.
[14] Id. at 1232.

role as that of an umpire in baseball; a refrain Roberts would later repeat in his confirmation hearings.[15]

After clerking for Judge Friendly, John Roberts moved on to a clerkship for then Justice Rehnquist. Rehnquist, considered the preeminent conservative in his time, stood out among a liberal Court. As one writer put it, "In those days, Rehnquist...was still "the Lone Ranger" intent on empowering the states at the expense of the federal government but usually without the votes to accomplish it."[16] John Roberts was no different. According to another Supreme Court clerk who served at the same time as Roberts, "[Roberts'] was "a very solid, rigorous, coherent view of very important social questions...about the relations between courts and legislatures, about the relationship between the federal government and the state, between the public sphere and the private.""[17] According to the same article, the fifteen clerks interviewed "offered a revealing portrait of an affable, ambitious and frankly conservative intellectual, much like his boss."[18] As the article notes however, little can be gleaned about Roberts' conservatism during his years a as clerk. It notes "[f]ew if any of the memorandums found...from Mr. Roberts's clerkship shed much light on his political leanings...[t]hey are, if anything, concise and reliant on procedural points."[19] Just as he did while in school, John Roberts' intellect made him stand out from his peers while clerking for Justice Rehnquist. As the article points out "many [of the Supreme Court clerks] would go on to enormous professional success, particularly in the academy...[b]ut even

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[15] Id. at 1234.
[16] Id. at 1223.
[17] Adam Liptak, As Clerk for Rehnquist Nominee Stood Out for Conservative Rigor, New York Times (July 31, 2005) http://www.nytimes.com/2005/07/31/politics/-politicsspecial1/31roberts.html.
[18] Id.
[19] Id.

in that group, Mr. Roberts stood out."[20] One of the things Chief Justice Roberts professed to have learned from Rehnquist was brevity. He once recalled that, "one thing I learned from him was, I hope, to try to write crisply and efficiently, that a lot of extra stuff could be dispensed with."[21] Roberts also picked up from Rehnquist that it was necessary to make time for his family in the practice of law.[22]

Following his clerkship with Rehnquist, John Roberts embarked on illustrious career path. First, he served as Special Assistant to Attorney General William French Smith under the Reagan administration and then became associate White House Counsel before entering private practice at the DC firm Hogan and Hartson.[23] Roberts excelled in private practice; becoming partner just one year after starting and prevailing in his first argument before the Supreme Court in 1989. Roberts then moved on to become Principal Deputy Solicitor General in George H.W. Bush's White House. In 1993, he returned to private practice at Hogan and Hartson, where he stayed until 2001 and won twenty-five of thirty-nine arguments before the Supreme Court.[24] Chief Justice Roberts was sworn into the DC Circuit in 2003, and then in 2005 was nominated and confirmed as Chief Justice of the United States Supreme Court.

III. Roberts' Judicial Opinions

A. **Prior to the Affordable Care Act Decision**

In the five to six years prior to his opinion in the Affordable Care Act decision, Chief Justice Roberts approach to the law became clear. Generally speaking, Roberts gives great weight to Court precedent but does not dogmatically adhere to it. He also has a deep respect for

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[20] Id.
[21] Snyder, supra at 1224.
[22] Id.
[23] Id. at 1225, 1228.
[24] Id. at 1229, 1230.

the separation of powers and believes that the Court's role is limited, with judicial restrain being of primary importance. Roberts is also willing to look to the realities of a given statute and the effects of judicial decisions. Furthermore, his approach is detailed and often looks to rule as narrowly as possible.

In Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), the Chief Justice found that the Government failed to carry its burden under the Religious Freedom Restoration Act (RFRA) to show that it had a compelling interest in prohibiting a small religious sect with origins in the Amazon Rainforest (UDV) from partaking in communion by drinking a sacramental tea containing a substance regulated under the Controlled Substances Act (hoasca).[25]

In this early case, Chief Justice Roberts uses precedent to form his opinion and undercut the argument put forth by the Government without strictly limiting it to the facts of a case. He finds the Government's argument is foreclosed by the Court's decision in Ashscroft v. American Civil Liberties Union, 542 U.S. 656 (2004).[26] Roberts declines to limit Ashcroft to its facts as the Government argues he should, finding instead that although "[t]he fact that *Ashcroft* involved [a content based restriction on speech] was the reason the Government had the burden of proof at trial under the First Amendment, [that] in no way affected the Court's assessment of the consequences of having that burden for purposes of the preliminary injunction" and "[h]ere [while] the burden is placed...on the Government by RFRA rather than the First Amendment...the consequences are the same."[27] Additionally, Roberts does not find the

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[25] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418,423 (2006)
[26] In that case, the Court reasoned that "as the Government bears the burden of proof on the ultimate question of [the challenged Act's] constitutionality, respondents [the movants] must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than [enforcing the Act]." 546 U.S. 418 at 429
[27] 546 U.S. 418 at 429, 430.

Government's use of older cases persuasive. He writes that "[t]hose cases did not embrace the notion that a general interest in uniformity justified a substantial burden on religious exercise; they instead scrutinized the asserted need and explained why the denied exemptions could not be accommodated."[28]

Roberts places RFRA's compelling interest standard in line with precedent set forth by Sherbert v. Verner and Wisconsin v. Yoder. He highlights that in those cases the "Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants."[29] He writes that, "there is no indication that Congress, in classifying DMT, considered the harms posed by the *particular use* at issue here" and furthermore, that "Congress' determination that DMT should be listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA."[30] It seems that in this case he believes precedential value is not limited to a case's facts but applies to its reasoning. So that reasoning on different facts can be used nonetheless as long as that reasoning can be applied in a consistent and particularized manner.

Also seen in Gonzalez is the Chief Justice's approach in dealing with statutes. Roberts relies on text and purpose in applying RFRA, but allows common sense to color its application. Reading the statute, Roberts finds that, "RFRA requires a more focused approach in which "the Government [must] demonstrate that the compelling interest test is satisfied through application of the challenged law to…the particular claimant whose sincere exercise of religion is being

[28] 546 U.S. 418 at 435.
[29] 546 U.S. 418 at 431.
[30] 546 U.S. 418 at 432.

substantially burdened."[31] Roberts also looks to the way in which RFRA came to be, stating that, "Congress's express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test."[32]

Furthermore, looking to the provisions of the CSA, he finds that it contains a provision the would allow the Attorney General to exempt certain people from its requirements and to the fact that an exemption to the CSA for the use of peyote by certain Native American tribes has existed for 35 years.[33] Applying his common sense, Roberts writes that, "[i]f such use is permitted in the face of the congressional findings in § 812(b)(1) for hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs."[34] Roberts states that, "RFRA…plainly contemplates that *courts* would recognize exceptions -- that is how the law works" and that it "makes clear that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress."[35]

Proof of the Chief Justice's desire for limited, particularized decisions can be seen in a case decided in the same year as Gonzalez. In Georgia v. Randolph, 547 U.S. 103 (2006), Roberts dissented because he found the standard created by the majority in enforcing the 4th Amendment rights of a homeowner far too unclear. He writes that "[the majority's rule] does not implement the high office of the Fourth Amendment to protect privacy, but instead provides

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[31] 546 U.S. 418 at 430, 431.
[32] 546 U.S. 418 at 430.
[33] Id.
[34] Id.
[35] Id.

protection on a random and happenstance basis"[36] According to Roberts, the Majority's position creates an exception that distorts an otherwise clear rule culled from the Court's precedent. He writes, "that the rule is so random in its application confirms that it bears no real relation to the privacy protected by the Fourth Amendment," but rather, "[w]hat the majority's rule protects is not so much privacy as the good luck of a co-owner who just happens to be present at the door when the police arrive."[37] He believes that, "[r]ather than draw such random and happenstance lines...the more reasonable approach is to adopt a rule acknowledging that shared living space entails a limited yielding of privacy to others, and that the law historically permits those to whom we have yielded our privacy to in turn cooperate with the government."[38]

What is more, according to Roberts, is that the Majority bases its opinion on the social expectation that when people who live together disagree over the use of their space, a resolution must come through voluntary accommodation.[39] He writes, "[t]he possible scenarios are limitless, and slight variations in the fact pattern yield vastly different expectations...[s]uch shifting expectations are not a promising foundation on which to ground a constitutional rule, particularly because the majority has no support for its basic assumption...beyond a hunch about how people would typically act in an atypical situation."[40] Roberts' desire for particularized inquiries requires that the Court base its approach on strong evidence rather than the type of shifting social considerations used by the Majority in this case.

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[36] Georgia v. Randolph, 547 U.S. 103, 127 (2006).
[37] 547 U.S. 103 at 137.
[38] Id.
[39] 547 U.S. 103 at 129.
[40] 547 U.S. 103 at 130.

In Roberts' view the Court's prior cases established that co-occupants assume the risk that one or the other may share access to their information, papers, or places.[41] Therefore, "someone who shares a place with another cannot interpose an objection when that person decides to grant access to the police, simply because the objecting individual happens to be present."[42] Roberts writes that "In *Illinois* v. *Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990), this Court stated that "[w]hat [a person] is assured by the Fourth Amendment . . . is not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable" and that one element that can make such a search reasonable is voluntary consent."[43] He finds further support in United States v. Matlock, 415 U.S. 164 (1974).[44] Furthermore, Roberts' review of precedent reveals that the Court has not looked to such expectations in deciding questions of consent in similar cases.[45] He notes that, "the social expectations concept has not been applied to all questions arising under the Fourth Amendment, least of all issues of consent."[46]

Roberts disagrees with the majority's suggestion that "widely shared social expectations are a constant element in assessing Fourth Amendment reasonableness" because the cases cited by the majority refer to a legitimate expectation of privacy, and this, in his view, is not the social expectation the majority is attempting to protect with its decision in Georgia v. Randolph.[47] Citing United States v. Jacobsen, 466 U.S. 107 (1984) Roberts writes that, "[i]f two friends

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41 547 U.S. 103 at 128.
42 Id.
43 Id.
44 This case found that,"[a] warrantless search is reasonable if police obtain the voluntary consent of a person authorized to give it...[c]o-occupants have "assumed the risk that one of their number might permit [a] common area to be searched." Id.
45 Id.
46 Id.
47 547 U.S. 103 at 131.

share a locker and one keeps contraband inside, he might trust that his friend will not let others look inside…[b]ut by sharing private space, privacy has "already been frustrated" with respect to the locker-mate."[48] Roberts believes that prior cases reflect the understanding that "[a] wide variety of often subtle social conventions may shape expectations about how we act when another shares with us what is otherwise private…[t]he Constitution, however, protects not these but privacy, and once privacy has been shared, the shared information, documents, or places remain private only at the discretion of the confidant."[49] He also cites Unite States v. White.[50] The same analysis was used in Frazier v. Cupp, 394 U.S. 731 (1969) to cover a jointly used duffle bag and in Coolidge v. New Hampshire, 403 U.S. 443 (1971) to common areas where one inhabitant held contraband and the other delivered it to the Police.[51]

Roberts believes that the majority is altering established Fourth Amendment rules to justify their position and creates a new "consent plus good reason" rule.[52] Roberts further thinks that the majority's bending and twisting is all for very little. He states that, "[c]onsidering the majority's rule is solely concerned with protecting a person who happens to be present at the door when a police officer asks his co-occupant for consent to search, but not one who is asleep in the next room or in the backyard gardening, the majority has taken a great deal of pain in altering Fourth Amendment doctrine, for precious little (if any) gain in privacy."[53] Roberts then concludes that "[t]he end result is a complete lack of practical guidance for the police in the field,

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[48] Id.
[49] Id.
[50] According to Roberts, here the Court held that one speaker to a conversation can consent to government eavesdropping and the entire conversation will be admissible because the risk that one coconspirator is reporting back to the police is inherent in the contemplation of illegal activities. 547 U.S. 103, 132.
[51] 547 U.S. 103 at 132, 133.
[52] Id.
[53] 547 U.S. 103 at 141.

let alone for the lower courts."[54] Roberts belies the Majority's use of precedent as missing the mark, or worse, distorting it to fit their position.

In his short concurrence in eBay Inc. v. MercExchange, L.L.C., 547 US 388 (2006) the Chief Justice agrees with the majority's decision that the District Courts have equitable discretion over whether to grant or deny injunctive relief, and that discretion must be exercised consistent with established principles of equity. He writes separately however to emphasize his concern that the Court align its decision with its historical practices. He states that "[f]rom at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases."[55] Roberts also looks to highlight his belief that while the Court does have discretion in these matters, that discretion has limits and should be used with an eye to the Court's prior decisions. He writes that "there is a difference between exercising equitable discretion pursuant to the established four-factor test and writing on an entirely clean slate" and furthermore, that "[w]hen it comes to discerning and applying those standards, in this area as others, "a page of history is worth a volume of logic."[56]

In FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007), Chief Justice Roberts found that Wisconsin Right to Life Speech's ad was not functionally equivalent to campaign speech and that § 203 of the Bipartisan Campaign Reform Act (BCRA) was unconstitutional as-applied here and in similar cases.[57] Roberts first deals with the initial issue of whether the court can hear the case over the FEC's argument that it was now moot. He agrees with the District Court in finding

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[54] 547 U.S. 103 at 142.
[55] eBay Inc. v. MercExchange, L.L.C., 547 US 388, 395 (2006).
[56] Id.
[57] FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 457 (2007).

that an established exception to mootness applied.[58] Roberts found that it was enough that Wisconsin Right to Life "credibly claimed that it planned on running "'materially similar'" future targeted broadcast ads mentioning a candidate within the blackout period and there is no reason to believe that the FEC will "refrain from prosecuting violations" of BCRA."[59]

Roberts explains that strict scrutiny applies in this case, so "the *Government* must prove that applying BCRA to WRTL's ads furthers a compelling interest and is narrowly tailored to achieve that interest" and the Courts approach is informed by precedent.[60] The Chief Justice turns to McConnell v. Federal Election Comm'n, 540 U.S. 93, (2003) and analyzes its import to the present case. He notes that the McConnell court relied upon fact specific studies that used the language of intent and effect. He found that, "[t]the Court's assessment was accordingly phrased in the same terms, which the Court regarded as sufficient to conclude, on the record before it, that the plaintiffs had not "carried their heavy burden of proving" that § 203 was facially overbroad and could not be enforced in *any* circumstances."[61] Roberts finds that this effectively closeted the Court's discussion in McConnell to that particular case and did not bind the Court to use that same standard as the constitutional test to be used in separating banned political speech from protected political speech.

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[58] Roberts agrees with the District Court's finding that the case fits within an exception to mootness for disputes capable of repetition, yet evading review. The first prong, "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration" is met because, as Roberts, citing the District Court's decision, writes "it would be "entirely unreasonable . . . to expect that [WRTL] could have obtained complete judicial review of its claims in time for it to air its ads" during the BCRA blackout periods." The second prong, that "there is a reasonable expectation that the same complaining party will be subject to the same action again" was met even though the Roberts found it was too much of the FEC to ask WRTL to prove that they will run ads in the future sharing all the legally relevant characteristics. 551 U.S. 449 at 460.

[59] 551 U.S. 449 at 463.

[60] 551 U.S. 449 at 464, 465.

[61] Id.

Additionally, he finds the methodology used by the Court in McConnell suspect, noting that there was serious dispute among the district judges over the two studies, and that "[n]othing in this Court's opinion in *McConnell* suggests it was resolving the sharp disagreements about the evidentiary record in this respect."[62] The precedential value of McConnell is therefore undermined because there was not a consensus as to the methodology used by the court that could form a solid foundation for future decisions. More importantly for Roberts however, the Court had rejected such an approach in Buckley v. Valeo, 424 U.S. 1 (1976).[63] He writes, "the *Buckley* Court explained that analyzing the question in terms "'of intent and of effect'" would afford "'no security for free discussion."[64] Therefore, the test used by the Court framed in such turns, even though a decision more recent that Buckley had done so. Roberts would like the test to be clearer and provide a more readily ascertainable standard. He finds that "[t]he test to distinguish constitutionally protected political speech from speech that BCRA may proscribe should provide a safe harbor for those who wish to exercise First Amendment rights."[65] In Roberts' view, the proper test cannot rely on subjective considerations of intent and effect. Rather, "the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect."[66]

Roberts finds that the appellant's argument for an expansive definition of what it means to be functionally equivalent does not fit within the standard required by strict scrutiny. Appellants argued that such a broad definition is "needed to ensure that issue advocacy does not

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[62] 551 U.S. 449 at 467, footnote 4.
[63] Id.
[64] Id.
[65] Id.
[66] 551 U.S. 449 at 469.

circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions."[67] According to the Chief Justice however, "such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny."[68]

Before ending his opinion, Roberts makes sure to cite the language of the First Amendment. He writes that "[o]ur jurisprudence over the past 216 years has rejected an absolutist interpretation of those words, but when it comes to drawing difficult lines in the area of pure political speech--between what is protected and what the Government may ban--it is worth recalling the language we are applying."[69] He further writes that "when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban...we give the benefit of the doubt to speech, not censorship...[t]he First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech" demands at least that."[70]

Chief Justice Roberts filed a concurring opinion in Citizens United v. FEC, 558 U.S. 310 (2010) in which he agreed with the majority's decision to protect the first amendment rights of corporations and their approach, but highlighted his concern for the principles of judicial restraint and stare decisis.[71] Justice Roberts writes that "[t]he majority's step-by-step analysis accords with our standard practice of avoiding broad constitutional questions except when necessary."[72] In his view, the Court properly rejected Citizens United's statutory claim first before moving on to the constitutional issues. Roberts notes that, "[i]t is only because the

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[67] 551 U.S. 449 at 479.
[68] Id.
[69] 551 U.S. 449 at 482.
[70] Id.
[71] Citizens United v. FEC, 558 U.S. 310, 373 (2010).
[72] 558 U.S. 310 at 374.

majority rejects Citizens United's statutory claim that it proceeds to consider the group's various constitutional arguments, beginning with its narrowest claim...and proceeding to its broadest."[73]

Addressing the Dissent's argument, which he finds "quite perplexing," Roberts writes that they must be in agreement as to the need to reach the broad constitutional issue because they do not argue that Citizens United should lose on narrower grounds [74]. Roberts observes however that,"[d]espite agreeing that these narrower arguments fail...the dissent argues that the majority should nonetheless latch on to one of them in order to avoid reaching the broader constitutional question of whether *Austin* remains good law."[75] In his view, the dissent is asking the court to embrace a narrow decision on less than meritorious grounds in order to avoid what they believe to be an unnecessary constitutional holding. As the Chief Justice notes, "[i]t should go without saying, however, that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right."[76]

According to Roberts, what is causing the Court consternation in this case is the Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (U.S. 1990) decision. The Dissent points to decisions since Austin that in their view re-affirmed that decision but as Robert notes, in none of the cases cited by the Dissent did the Court deal with a direct challenge to Austin, so at most the Court simply did not overturn it in those cases. According to Roberts, "[t[he Court's unwillingness to overturn *Austin* in those cases cannot be understood as a *reaffirmation* of that decision."[77]

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[73] Id.
[74] 558 U.S. 310 at 375.
[75] Id.
[76] Id.
[77] 558 U.S. 310 at 377.

Turning again to the principal of stare decisis, Roberts writes "[f]idelity to precedent...is vital to the proper exercise of the judicial function...it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[78] He notes however that it is not an immutable rule but a "principle of policy" that while urging the Court to rule in consistent ways, allows the Court to overturn decisions that are clearly incorrect or outdated.[79] He writes, "[i]ts greatest purpose is to serve a constitutional ideal -- the rule of law...[i]t follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent."[80] The Chief Justice provides two examples in which dogmatic adherence to stare decisis would be detrimental to the rule of law. The first scenario is where recently decided precedent fails to conform to the Court's broader jurisprudence and the second instance the Chief Justice points to is that in which adhering to a particular precedent disrupts the "stable and orderly adjudication of future cases."[81]

Chief Justice Roberts believes that Austin should be overturned because it fits into both of the above scenarios. He notes that, "as the majority explains, that decision was an "aberration" insofar as it departed from the robust protections we had granted political speech in our earlier cases" and that Austin specifically undermined the Buckley decision rejecting the government's interest in regulating independent political expenditures.[82]

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[78] Id.
[79] 558 U.S. 310 at 378.
[80] Id.
[81] 558 U.S. 310 at 378, 379.
[82] Id.

Roberts also notes that Austin was decided with two dissenting opinions. He writes that Austin "has proved to be the consistent subject of dispute among Members of this Court" and that this "undermine[s] the precedent's ability to contribute to the stable and orderly development of the law."[83] Roberts also recognizes that Austin's import is much broader than prior precedent; "the *Austin* decision is uniquely destabilizing because it threatens to subvert our Court's decisions even outside the particular context of corporate express advocacy."[84] Roberts admonishes the Dissent for taking such an expansive view of Austin but see this as the logical conclusion to be reached from that decision's logic. He writes that, "[b]ecause *Austin* is so difficult to confine to its facts -- and because its logic threatens to undermine our First Amendment jurisprudence and the nature of public discourse more broadly -- the costs of giving it *stare decisis* effect are unusually high."[85] Roberts concludes by reviewing the Government's arguments for upholding Austin. He notes that the Government does not invoke the compelling interest relied upon in Austin but asks the Court to rule on two potentially expansive grounds never previously brought before the Court. He notes, "[t] hose interests may or may not support the *result* in *Austin*, but they were plainly not part of the *reasoning* on which *Austin* relied."[86] Roberts goes on to say that "[t]here is therefore no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited."[87] To do so, according to Roberts, "would undermine the rule-of-law values that justify *stare decisis*."[88]

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[83] 558 U.S. 310 at 380.
[84] Id.
[85] 558 U.S. 310 at 382.
[86] 558 U.S. 310 at 383.
[87] 558 U.S. 310 at 384.
[88] Id.

In Miller v. Alabama, 132 S. Ct. 2455 (2012) the Chief Justice disagrees with the Majority's decision that the Eight Amendment to the Constitution prevents the Court from upholding mandatory life sentences without parole for two fourteen year-olds convicted of murder. In his view, "the Court invokes [the Eight Amendment] to ban a punishment that the Court does not itself characterize as unusual, and that could not plausibly be described as such."[89] Looking at current statistics, Roberts notes that the parties agree that 2500 prisoners are serving life sentences without parole for crimes committed before the age of eighteen, and that the Court recognizes that many of those sentences resulted from mandatory sentencing guidelines.[90]

Roberts also finds support for his position in the Court's precedent. In his view, the cases established that "[w]hen determining whether a punishment is cruel and unusual, this Court typically begins with " 'objective indicia of society's standards, as expressed in legislative enactments and state practice."[91] The purpose of the objective standards is to ensure that the Court does not use subjective values or beliefs when determining whether a particular punishment is creel and unusual.[92] According to Roberts, the purpose of using such "tangible evidence" is that it "enables us to determine whether there is a "consensus against" a given sentencing practice...[i]f there is, the punishment may be regarded as "unusual.""[93] Furthermore, Roberts believes that stare decisis asks the Court to look to the "evolving standards of decency that mark the progress of a maturing society."[94] He notes however that decency does not

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89 Miller v. Alabama, 132 S. Ct. 2455, 2477 (2012).
90 Id.
91 Id.
92 132 S. Ct. 2455 at 2478.
93 Id.
94 Id.

necessarily mean leniency, and that "[a]s judges we have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty."[95]

Roberts then turns to the Majority's use of Graham v. Florida, 560 U.S. 48 (U.S. 2010, finding that they misstate its impact. According to Roberts, the majority believes that because Graham found a sentence available in 39 states unconstitutional and the sentence involved here is only available in 10 states, that Graham provides support for their finding. However, as Roberts points out, the reason the Court in Graham found the sentence unconstitutional was because while it was indeed available in 39 states, its actual use was exceedingly rare and so there was a national consensus against its use.[96] In this case, he finds no such consensus against the sentence at issue. Roberts also fails to understand why the majority disregards the numbers involved in both Graham and the present case. He thinks the majority is "claiming that the prevalence of the sentence in question results from the number of statutes requiring its imposition" and "excuses the high number of actual sentences by citing the high number of statutes imposing it."[97] In his view however "[t]o say that a sentence may be considered unusual *because* so many legislatures approve it stands precedent on its head."[98]

Roberts next turns to the majority's argument that in some states, the life sentence without parole comes to be as the result of the interaction of two laws that allow minors to be tried as adults and imposes a life sentence on those convicted of murder, so therefore the sentence at issue may arise inadvertently. He writes that "the widespread and recent imposition

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[95] Id.
[96] 132 S. Ct. 2455 at 2478, 2479.
[97] 132 S. Ct. 2455 at 2479.
[98] Id.

of the sentence makes it implausible to characterize this sentencing practice as a collateral consequence of legislative ignorance."[99] Additionally, Roberts writes "we [do not] display our usual respect for elected officials by asserting that legislators have *accidentally* required 2,000 teenagers to spend the rest of their lives in jail."[100]

Roberts admonishes the majority for not showing restraint in its decision. He writes, "[i]ndeed, the Court's opinion suggests that it is merely a way station on the path to further judicial displacement of the legislative role in prescribing appropriate punishment for crime."[101] He further believes that although the majority focused on the mandatory nature of the sentencing, they left the door open to expand its reasoning. He believes that the "Court has already announced that discretionary life without parole for juveniles should be "uncommon" and that this "appears to be nothing other than an invitation to overturn life without parole sentences imposed by juries and trial judges," beginning a "process [with] no discernable end point."[102] Roberts finishes by stating that "[u]nless confined, the only stopping point for the Court's analysis would be never permitting juvenile offenders to be tried as adults…[l]earning that an Amendment that bars only "unusual" punishments requires the abolition of this uniformly established practice would be startling indeed."[103]

A number of aspects of Roberts' judicial approach are clear from the above sampling. Firstly, as seen throughout these cases, he looks to precedent to bolster his positions and also to undercut reasoning he disagrees with. For Roberts though, while the principle of stare decisis is central to the proper function of the Court, it gives way when reason dictates; similar to the way

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[99] 132 S. Ct. 2455 at 2480.
[100] Id.
[101] 132 S. Ct. 2455 at 2481.
[102] Id.
[103] 132 S. Ct. 2455 at 2482.

the Chief Justice was described as believing "in having some humility about one's ability to suddenly decree that those who came before you were wrong, but he was not a stick in the mud either."[104] Additionally, also seen in the above cases is Roberts' insistence on approaching the issues before the court in as narrow a manner possible, leading him to only deal with the merits of litigation only after finding the Court is right to do so and only reaching Constitutional issues when it is necessary to go so far. Stemming from this is Roberts respect for both the separation of powers and federalism, leading him to ensure that the Court stays within its powers and to show respect for the other branches and states. This concern also leads Roberts to look for particularized rather than general arguments; a goal, which crops up in both his own arguments and his analysis of the arguments of other Justices and the parties before the Court. The same further leads him to look at the facts and circumstances of legislative acts, including their history, and effects of the Court's decisions because he believes that the way in which a decision plays out, if discernible, points to whether the Court has properly narrowed its considerations. Finally, as just alluded to above, Roberts, history major in college and clerk to a history loving Judge Friendly, keeps an eye towards history and pulls in historical text when appropriate.

B. The Affordable Care Act Decision

In Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012), Chief Justice Roberts found the Affordable Care Act's (ACA) individual mandate was Constitutionally valid under Congress' power to tax. Roberts makes his deference to Congress clear by stating that "[o]ur permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders."[105] Furthermore, "[p]roper respect for a coordinate branch of

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[104] *See* fn. 9, supra.
[105] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012).

the government" requires the Court to strike down an act of Congress only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated.""[106] He warns however that, "[o]ur deference in matters of policy cannot...become abdication in matters of law."[107] According to Roberts, Constitutionality is not affected by "circumstances of the moment" and it is the province of the Court to strike down laws that exceed the limits on Congress' power.[108]

Before reaching the merits of the case, Roberts analyzes whether Court has the authority to proceed, given the Anti-Injunction Act. The Anti-Injunction Act effectively requires that all challenges to a tax to be held only after the tax at issue has been paid and because the ACA's penalty for not complying with the individual mandate is treated as a tax by the IRS, it was argued that the Anti-Injunction Act bars the suit before the Court. Roberts however feels that the text of the statute means something different. He recognizes that the Anti-Injunction Act covers any tax, but contends that Congress labeled the shared responsibility payment as a penalty and not a tax. He then writes that, "[t]here is no immediate reason to think that a statute applying to "any tax" would apply to a "penalty.""[109] Roberts finds it significant that Congress described many other parts of the ACA as a tax. He contends that, "[w]here Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally."[110]

Additionally, Roberts does not agree with the amicus' other argument that the IRC §6201(a) requires courts to treat the penalty as a tax under the Anti-Injunction Act because that

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106 Id.
107 Id.
108 132 S. Ct. 2566 at 2579, 2580.
109 132 S. Ct. 2566 at 2583.
110 Id.

section includes assessable penalties as taxes. He thinks this misses the mark because it is valid only if §6201(a) is read in isolation and many other sections of the IRC that treat penalties apart from taxes are ignored. Roberts concludes that "[i]n light of the Code's consistent distinction between the terms "tax" and "assessable penalty," we must accept the Government's interpretation: §6201(a) instructs the Secretary that his authority to assess taxes includes the authority to assess penalties, but it does not equate assessable penalties to taxes for other purposes."[111] Only because the ACA does not require the penalty to be treated as a tax for purposes of the Anti-Injunction Act, does Roberts find that the Court can proceed to the merits of the case.

Roberts addresses the Government's argument that the individual mandate is a proper exercise of Congress' power under the Commerce Clause. In rejecting this argument, Roberts found that "Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product."[112] He further writes that "[l]egislative novelty is not necessarily fatal; there is a first time for everything...[b]ut sometimes "the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" for Congress's action."[113] He reads the Commerce Clause as presupposing the existence the activity to be regulated but not the ability to create the activity. Roberts writes that "[t]he language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated."[114] Turning to past Commerce Clause cases, Roberts finds little to support the Government's positions. He states that "[a]s expansive as our cases construing the

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[111] I132 S. Ct. 2566 at 2584
[112] 132 S. Ct. 2566 at 2586.
[113] Id.
[114] Id.

scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching "activity.""[115] He believes this to mean that the activity must be in existence before it can be regulated under the Commerce Clause.

Additionally, Roberts finds that the Court's precedent may recognize that Congress can regulate classes of activities, but "not classes of individuals, apart from the activity in which they are engaged."[116] He rejects the government's argument that this distinction does not matter. The Chief Justice writes that, "[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent."[117] In his view, while the Court has found that Congress may anticipate the effects of a particular activity to be regulated, "we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce…[e]ach one of our cases…involved preexisting economic activity."[118] Furthermore, if such a power exists in any body, it is with the states, not the federal government. Roberts writes that, "[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions…[a]ny police power to regulate individuals as such…remains vested in the States."[119]

Roberts then turns to the government's Necessary and Proper Clause argument, which he also rejects. Roberts thinks the government's Necessary and Proper Clause argument goes too far. He finds that "[e]ach of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power…[t]he individual mandate, by contrast,

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[115] 132 S. Ct. 2566 at 2587.
[116] 132 S. Ct. 2566 at 2590.
[117] Id.
[118] Id.
[119] 132 S. Ct. 2566 at 2591.

vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power."[120] Roberts asserts that this authority is neither narrow in scope nor incidental to the Commerce Clause, and concludes that, "[e]ven if the individual mandate is "necessary" to the Act's insurance reforms, such an expansion of federal power is not a "proper" means for making those reforms effective."[121]

Having determined that neither the Commerce Clause nor the Necessary and Proper clause justify the individual mandate, Chief Justice Roberts turns to the government's third argument that the mandate is appropriate under Congress' taxation powers. Looking at 180 year old precedent, he writes that "it is well established that if a statute has two [or more] possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not."[122] Therefore, "it is...necessary to ask whether the Government's alternative reading of the statute--that it only imposes a tax on those without insurance--is a reasonable one."[123] He finds that "[t]he exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects."[124] Additionally, while "[i]t is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress's choice of label on that question...[t]hat choice does not, however, control whether an exaction is within Congress's constitutional power to tax."[125]

Roberts looks to precedent, which in his view creates a functional approach to determining whether something is within Congress' power to tax. After culling a number of

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120 132 S. Ct. 2566 at 2592.
121 Id.
122 132 S. Ct. 2566 at 2593.
123 Id.
124 132 S. Ct. 2566 at 2594.
125 Id.

important factors from the Court's prior cases, Roberts finds that the individual mandate has many characteristics of a tax.[126] Roberts then looks to the penalty versus tax distinction, finding that the "Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission.""[127] He finds however, that "[w]hile the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful."[128]

Roberts next notes that it is estimated that up to four million people will choose to pay the charge rather than become insured, and finds that, "that Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws" but instead "[i]t suggests...that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance."[129] Roberts places the Court's machinations in this case in line with its prior reasoning in New York v. United State; stating that there is " no insurmountable obstacle to a similar approach here."[130] In that case, the Court rejected an argument similar to the one posed by the plaintiffs in this case, that "Congress's choice of language--stating that individuals "shall" obtain insurance or pay a "penalty"--requires reading §5000A as punishing unlawful conduct, even if that interpretation would render the law unconstitutional."[131]

Roberts then turns to the plaintiff's argument that the shared responsibility payment, if it is a tax, is a direct tax and so must be apportioned in accordance with Art. I §9 Clause 4 of the

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126 132 S. Ct. 2566 at 2596.
127 Id.
128 132 S. Ct. 2566 at 2596, 2597.
129 132 S. Ct. 2566 at 2597.
130 Id.
131 Id.

Constitution. He looks back to the writing of Constitution, stating that, "[e]ven when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a "head tax" or a "poll tax"), might be a direct tax."[132] Looking at court decisions from that time, Roberts finds that "those Justices who wrote opinions either directly asserted or strongly suggested that only two forms of taxation were direct: capitations and land taxes."[133] He then notes that while the definition of a direct tax did expand since the founding, "[a] tax on going without health insurance does not fall within any recognized category of direct tax."[134] He concludes that "[t]he Federal Government does not have the power to order people to buy health insurance…[s]ection 5000A would therefore be unconstitutional if read as a command" but "[t]he Federal Government does have the power to impose a tax on those without health insurance" thus "[s]ection 5000A is…constitutional, because it can reasonably be read as a tax."[135]

Roberts then turns to the Medicaid expansion issue also before the court. Roberts finds that while the Court's Spending Clause cases "have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States' "taking certain actions that Congress could not require them to take," that there are "limits on Congress's power under the Spending Clause to secure state compliance with federal objectives."[136] This insight and the Court's precedent have led the "Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes."[137]

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[132] 132 S. Ct. 2566 at 2598.
[133] Id.
[134] 132 S. Ct. 2566 at 2599.
[135] 132 S. Ct. 2566 at 2601.
[136] 132 S. Ct. 2566 at 2602.
[137] Id.

For Roberts, the key consideration in this area is federalism. As he writes, "[p]ermitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system."[138] He further notes that "Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds."[139] Roberts however, agrees with the states' contention that "[i]nstead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States' existing Medicaid funds."[140] Prior cases established that a financial inducement in connection with a federal program may not rise above "relatively mild encouragement."[141] According to Roberts, "the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"--it is a gun to the head."[142] This is so because if a state refuses to participate in the expansion, the Federal government will take away all Medicaid funding, not just the additional funding made available under the ACA.

The final item considered is what effect the Court's holding has on the rest of the ACA. When answering this question, Roberts suggests that the Court looks to what Congress would have wanted, writing that "our "touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature."[143] Roberts writes that "as a practical matter...States may now choose to reject the expansion; that is the

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138 Id.
139 132 S. Ct. 2566 at 2603.
140 Id.
141 132 S. Ct. 2566 at 2604.
142 Id.
143 132 S. Ct. 2566 at 2607.

whole point...[b]ut that does not mean all or even any will."[144] He concludes by finding that, "[w]e do not believe Congress would have wanted the whole Act to fall, simply because some may choose not to participate" since "[t]he other reforms Congress enacted, after all, will remain "fully operative as a law," and will still function in a way "consistent with Congress' basic objectives in enacting the statute.""[145]

John Roberts' opinion in the above case does mirror his approach as seen in the earlier cases in a number of ways. First, he deals with the issue of whether the Court can hear the case in the first place given the Anti-Injunction Act, and finding that it does not apply only then does he move on to the greater constitutional questions. In so doing, Roberts more or less says that Congress, as it did in Miller v Alabama, knew what it was doing when enacting these laws that interact with one another, and because Congress, not the Court, was elected by the people, the Court must defer to their decisions unless they exceed the limits of Congressional power. He then uses a precedent laden analysis in rejecting the Government's first two constitutional claims, which he so rejects because as he views it, those arguments had no support in precedent and impermissibly expanded Congress' historical powers. The same is true of Roberts' analysis of the Medicaid expansion portion of the decision. The taxation power analysis is where he gets creative and is the part of this decision that is most important (and most criticized). The issue for Roberts is that he finds the shared responsibility charge is not a tax for purposes of the Anti-Injunction Act because Congress specifically labeled it a penalty, but that it nonetheless should be considered a tax for the purposed of the taxation power under the Constitution. This obviously a fine distinction, and does not seem to fit with Roberts' approach in previous cases. If he

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144 132 S. Ct. 2566 at 2608.
145 Id.

believed the penalty to actually be tax, the one would expect his ruling to find that the Anti-Injunction Act applied, and so the suit could not move forward until the penalty is paid. To rule otherwise, as Roberts did, belies common sense. What the Chief Justice does however, is distinguish a statutory analysis from a constitutional analysis, so that for purposes of the interaction of the ACA and the Anti-Injunction Act, the penalty is a penalty and not a tax, but for purposes of the Constitution the penalty is a proper exercise of Congress' taxation power.

C. After the Affordable Care Act Decision

In Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321 (2013) Chief Justice Roberts wrote for the majority decision finding that the Federal Government's conditioning funding to nongovernmental organizations under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003(The Leadership Act) (on those organizations having "a policy explicitly opposing prostitution and sex trafficking") violated the First Amendment rights of those organizations.

Roberts first reviewed the legislative history of the Leadership Act. He notes that Congress had concluded that HIV/AIDS had reached pandemic proportions in many countries across multiple continents as well as pronounced objectives that should be achieved by the President's strategy in carrying out the Act.[146] Additionally, Roberts mentions that of particular pertinence to the present case is that "Congress found that the "sex industry, the trafficking of individuals into such industry, and sexual violence" were factors in the spread of the HIV/AIDS, and determined that "it should be the policy of the United States to eradicate" prostitution and "other sexual victimization."[147]

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[146] Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2325 (2013)
[147] Id.

Roberts begins his discussion on the merits of the case by stating that "it is...a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say" and that "[w]ere it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment."[148] What remains is "[t]he question...whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds."[149] Roberts notes that while a party who objects to the conditions placed upon a particular item of funding generally has recourse by rejecting the funding, "we have held that the Government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit."[150]

Roberts considers the Dissent's view that it is only when "the condition is not relevant to the objectives of the program...or when the condition is actually coercive, in the sense of an offer that cannot be refused" that the Court should find such a condition to be unconstitutional.[151] He dismisses this however by looking to precedent, that in his view is not so narrow. Roberts finds that "[i]n the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."[152]

Roberts compares two cases, Regan v. Taxation with Represenation of Washington and FCC v. League of Women Voters of California. In Regan the Court upheld a rule preventing §501(c)(3) organizations from engaging in lobbying activities. The Court found that because an

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148 133 S. Ct. 2321 at 2327.
149 Id.
150 133 S. Ct. 2321 at 2328.
151 Id.
152 Id.

organization seeking tax exempt status could incorporate separately as a 501(c)(3) entity subject to the funding condition and a 501(c)(4) entity not subject to the anti-lobbying provision, and further that such setup was not unduly burdensome to the entity, "[t]he condition...did not deny the organization a government benefit "on account of its intention to lobby."[153][footnote 2329].

In FCC v. League of Women Voters of California, the Court struck down a condition on federal funding to noncommercial television and radio broadcasters that prohibited all editorializing, even if private funding was used. Roberts finds that "[u]nlike the situation in *Regan*, the law provided no way for a station to limit its use of federal funds to non-editorializing activities...[t]he prohibition thus went beyond ensuring that federal funds not be used to subsidize "public broadcasting station editorials," and instead leveraged the federal funding to regulate the stations' speech outside the scope of the program."[154]

In applying these and similar cases, Roberts notes that, "the distinction drawn in these cases—between conditions that define the federal program and those that reach outside it—is not always self-evident...[h]ere, however, we are confident that the Policy Requirement falls on the unconstitutional side of the line."[155] In his view, "whatever purpose the Policy Requirement serves in selecting funding recipients, its effects go beyond selection...[t]he Policy Requirement is an ongoing condition on recipients' speech and activities."[156]

Roberts relies on precedence for clearly establishing his position. In fact, he closes out his opinion with a reference to a case from seventy years ago, showing that his decision is in accord with the Courts long standing jurisprudence in this area of the law. He writes that, "we cannot

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[153] 133 S. Ct. 2321 at 2329.
[154] Id.
[155] 133 S. Ct. 2321 at 2330.
[156] Id.

improve upon what Justice Jackson wrote for the Court 70 years ago: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."'[157]

In Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) Chief Justice Roberts, writing for the majority, found that official proponents of California's Proposition Eight ballot measure did not have standing under Art. III §2 of the Constitution. He first notes that Art. III §2 "requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision" in order to prove standing.[158] Roberts also notes that the purpose for the Court to consider standing is to prevent the powers of the judiciary from being used to usurp the powers of the other political branches.[159]

Turning to the petitioners in this case, Roberts finds that they "had no "direct stake" in the outcome of their appeal...[t]heir only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law."[160] He points to Court precedent holding that a general interest is not sufficient, stating that "[w]e have repeatedly held that such a "generalized grievance," no matter how sincere, is insufficient to confer standing."[161] Roberts also finds that although the petitioners were uniquely connected to Proposition Eight as those responsible for gathering the signatures, placing it on the ballot, and putting forth the arguments in its favor, this connection existed only in the enactment of the law,

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[157] 133 S. Ct. 2321 at 2332.
[158] Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013).
[159] Id.
[160] 133 S. Ct. 2652 at 2661, 2662.
[161] Id.

and that once it became part of California law, the connection was severed.[162] Roberts, addressing the Dissent and looking at the court's history then states that,"[n]o matter how deeply committed petitioners may be to upholding Proposition 8 or how "zealous [their] advocacy...that is not a "particularized" interest sufficient to create a case or controversy under Article III."[163]

Furthermore, Roberts finds that the petitioners cannot, in the absence of their own legal interest, assert the interest of the State of California on the state's behalf. As he notes, "[i]t is...a "fundamental restriction on our authority" that "[i]n the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties."[164] Even in the rare circumstances in which an exception to this general rule has been granted, the Court nonetheless required the litigant to have suffered a sufficient injury in fact that gives them an interest in the outcome of the dispute.

Roberts then turns to the petitioner's argument that they have standing because the California Supreme Court determined that they were authorized under state law to assert the validity of Proposition Eight. The petitioners cited Karcher v. May, 484 U.S. 72 (U.S. 1987) in support of their argument.[165] Roberts however finds the petitioners reliance on Karcher misguided. He states that "[f]ar from supporting petitioners' standing, however, *Karcher* is compelling precedent against it."[166] This is so because the interveners in Karcher did so in their *official capacity* as state officials and state law allowed them to intervene. Furthermore, once

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162 133 S. Ct. 2652 at 2661-2663.
163 133 S. Ct. 2652 at 2663.
164 Id.
165 Here, the Court held that "the Speaker [of the New Jersey General Assembly] and the President [of the New Jersey Senate], in their official capacities, could vindicate [the] interest in federal court on the legislature's behalf" and thus could intervene is a suit against the state once the State Attorney General decline to defend a state law. 133 S. Ct. 2652, 2664.
166 Id.

they were no longer in office, neither intervener in Karcher could proceed. As Robert writes, "[w]hat is significant about *Karcher* is what happened after the Court of Appeals decision in that case...[w]e explained that while they were able to participate in the lawsuit in their official capacities as presiding officers of the incumbent legislature, since they no longer hold those offices, they lack authority to pursue this appeal."[167]

Roberts then turns to the dissent, finding that the cases they cited provide little if any support to the petitioners. He points out that the primary cases used by the Dissent fail to discuss standing and the remaining cases that do actually discuss standing are "easily distinguishable."[168] Roberts then turns to the use of dicta from Arizonans for Official English v. Arizona, 520 U.S. 43 (U.S. 1997) case. Roberts notes that while the Supreme Court found the case moot, the Court did look at the standing decision by the Ninth Circuit, writing that the "Court expressed "grave doubts" about the Ninth Circuit's...analysis."[169] He further points out that the Ninth Circuit in Arizonans for Official English and the California Supreme Court in this case, never described the petitioners in agency terms, so Petitioners argument in this case that they were agents of the State is misguided. Roberts finds that "[t]he Ninth Circuit asked—and the California Supreme Court answered—only whether petitioners had "the authority to assert the State's interest in the initiative's validity."[170]

Roberts concludes his opinion by saying again that standing in federal court is a question of federal law, and that "no matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override our settled law to the

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[167] 133 S. Ct. 2652 at 2664, 2665.
[168] 133 S. Ct. 2652 at 2665.
[169] 133 S. Ct. 2652 at 2666.
[170] Id.

contrary."[171] He states that the standing requirement arises from a concern for separation of powers, writing that "[t]he Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the [limited] role of the Judiciary in our system of separated powers."[172]

The Chief Justice dissented in United States v. Windsor, 133 S. Ct. 2675 (2013) because he thought the Court lacked jurisdiction and that DOMA was duly enacted by Congress. As to the latter concern, he writes "[i]nterests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world."[173] Furthermore, Roberts does not agree with the majority's characterization of Congress' motive in passing DOMA, writing that "without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not tar the political branches with the brush of bigotry."[174]

While he does not agree with their holding, Chief Justice Roberts credits the majority with effectively limiting it. He states that, "while I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further…[t]he Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation,"…may continue to utilize the traditional definition of

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171 133 S. Ct. 2652 at 2667.
172 Id.
173 United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).
174 Id.

marriage."[175] He also recognizes that the majority rests their opinion on sound principle. Roberts notes that, "I think the majority goes off course, as I have said, but it is undeniable that its judgment is based on federalism."[176] Additionally, he believes that the majority's reasoning based on DOMA's history and title are so unique to this case that the reasoning cannot be extended to other cases. Roberts concludes by stating that "I write only to highlight the limits of the majority's holding and reasoning today, lest its opinion be taken to resolve not only a question that I believe is not properly before us…but also a question that all agree…is not at issue."[177]

In these post-ACA decisions, Roberts approach resembles that used in the pre-ACA decisions, though, as noted above, parts of the Sebelius case are not at all disjointed from his overall approach. He uses precedent and Constitutional principles to find that Congress exceeded its power in Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.,. He also cites a decades old opinion to establish the historical breadth of the core principle of his position. In Hollingsworth Roberts makes it clear that there is no need to reach the constitutional question because narrow issue of standing was resolved against the plaintiffs in accordance with the Court's prior cases, undercutting the petitioner's argument using their own case against them. In Windsor, Roberts dissented because he felt the majority did not give due deference to Congress; the same deference he gave in the ACA decision and in the earlier cases. He also notes, approvingly, that the majority does a good job in keeping it's decision and analysis narrow and specific to the case at hand.

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[175] Id.
[176] 133 S. Ct. 2675 at 2697.
[177] Id.

IV. **Conclusion**

Throughout his cases, Chief Justice Roberts displays a reverence for many different pillars of judicial analysis. He respects precedent but recognizes that it is the Court's responsibility not only to observe stare decisis, but to deviate from it when it is necessary to do so. He has a deep concern for the separation of powers, deferring to Congress wherever appropriate so as not to extend the powers of the Court beyond their traditional boundaries. Roberts also believes in Federalism and that the States have their powers so enumerated by the Constitution and that the Court must keep this in sight at all times. He also has an eye to history, citing back to the Founding and Supreme Court decisions from decades past and is open to considering the manner in which laws come to be.