ANTI-DISRUPTION STATUTORY CONSTRUCTION

Jonathan H. Adler†

TABLE OF CONTENTS

INTRODUCTION 509
I. MINIMALISM AND MR. ROBERTS 512
II. OBAMACARE AND SCOTUSCARE 514
III. CONSTITUTIONAL AVOIDANCE 518
IV. SURGICAL STRIKES 525
CONCLUSION 527

INTRODUCTION

How does Chief Justice John Roberts approach questions of statutory interpretation? Recent decisions provide some clues, and also suggest how his approach to statutory interpretation fits with his "minimalist" judicial philosophy.[1]

In *King v. Burwell*, Chief Justice John Roberts explained that it was necessary to "depart" from what might be the "most natural reading" of the statutory text in order to conclude that the Patient Protection and Affordable Care Act (PPACA) authorized tax credits for the purchase of

† Johan Verheij Memorial Professor of Law and Director, Center for Business Law & Regulation, Case Western Reserve University School of Law. This Essay is based upon remarks delivered at the *Cardozo Law Review* symposium, *Ten Years the Chief: Examining a Decade of John Roberts on the Supreme Court*, at the Benjamin N. Cardozo School of Law, October 15, 2015. The Author would like to thank Shannon Meyer for her research assistance. Any errors, omissions, or inanities are solely the fault of the Author.

1 For this Author's earlier analysis of the Chief Justice's judicial minimalism, see Jonathan H. Adler, *Judicial Minimalism, the Mandate, and Mr. Roberts*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 171 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013). This Essay both modifies and expands upon this earlier analysis.

health insurance in exchanges established by the federal government.[2] The relevant statutory text referred exclusively and repeatedly to exchanges "established by the State."[3] Despite the apparent clarity of this phrase, Chief Justice Roberts found ambiguity when the tax credit provisions were placed within the broader context of the PPACA as a whole, and then relied upon the statutory context and structure again to conclude tax credits would be available.[4]

In concluding the PPACA authorized tax credits in exchanges established by the federal government, the Chief Justice did not rely upon, or even reference, traditional canons of statutory interpretation.[5] The Chief's *King* majority relied upon structure and context first to find ambiguity,[6] and again to resolve it,[7] eschewing *Chevron* deference.[8] This

---

2 King v. Burwell, 135 S. Ct. 2480, 2495 (2015) ("In this instance, the context and structure of the Act compel us to depart from what would otherwise be the *most natural reading* of the pertinent statutory phrase." (emphasis added)).

3 42 U.S.C. § 18031(a) (2012) (the Affordable Care Act (ACA) authorizes unlimited start-up funds for state-run exchanges and incentivizes states to establish exchanges by conditioning renewal of those funds on both progress establishing an exchange and implementation of other parts of the act); *id.* § 18031(b)(1) ("Each State shall . . . establish an . . . Exchange."); *id.* § 18031 (d)(1) ("An Exchange shall be a governmental agency or nonprofit entity that is established by a State."); *id.* § 18031(d)(3)(B) (Congress authorizes that states may require additional benefits but must assume the cost and make payments); *id.* § 18031(d)(5)(A) ("No Federal funds for continued operations. In establishing an Exchange under this section, the *State* shall ensure . . . ." (emphasis added)).

4 For an extensive critique of the Chief Justice's opinion, see Jonathan H. Adler & Michael F. Cannon, King v. Burwell *and the Triumph of Selective Contextualism*, 2015 CATO SUP. CT. REV. 35.

5 *See* Abbe Gluck, *Symposium: Congress Has a "Plan" and the Court Can Understand It—The Court Rises to the Challenge of Statutory Complexity in* King v. Burwell, SCOTUSBLOG (June 26, 2015, 8:55 AM), http://www.scotusblog.com/2015/06/symposium-congress-has-a-plan-and-the-court-can-understand-it-the-court-rises-to-the-challenge-of-statutory-complexity-in-king-v-burwell [hereinafter Gluck, *Congress Has a "Plan"*] ("*King* is one of the only major text-oriented statutory interpretation decisions in recent memory in which the majority opinion barely includes a single canon of interpretation."); *see also* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 64 (2015) [hereinafter Gluck, *Imperfect Statutes*] ("[*King*] holds that the assumptions of perfection underlying the canons are unrealistic as applied to the ACA . . . .").

Interestingly enough, the Chief Justice did not rely much upon legislative history either. *See id.* at 66 (noting that the *King* majority's emphasis on a legislative "plan" did not "mean a resort to legislative history or other subjective factors maligned by textualists"); Adler & Cannon, *supra* note 4, at 50 (noting that the Court "did not rely much on traditional sources of legislative history to determine Congress's unstated purpose, and was quite selective in the sources of legislative history it did cite"). This may be due to the fact that there was relatively little legislative history that spoke to the question, and even less that was supportive of the federal government's position in *King*. *See id.* at 37–40 (discussing relevant legislative history of PPACA); Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, 23 HEALTH MATRIX 119, 148–67 (2013) (also discussing relevant legislative history of PPACA).

6 *King*, 135 S. Ct. at 2491 (explaining that, read in context, "the phrase 'an Exchange established by the State under [42 U.S.C. § 18031]' is properly viewed as ambiguous"); *id.* at

approach was "necessary," the Chief Justice explained, "to avoid the type of calamitous result that Congress plainly meant to avoid."[9] Whatever the merits of this approach, it was not textualism as we have come to know it.[10]

King was not the first case in which the Chief Justice found it necessary to reject the plain meaning of relevant statutory phrases or provisions in resolving a case. Indeed, it was not even the first time he had done so in a case involving the PPACA.[11] In both major health care cases, the Chief Justice authored opinions that expressly departed from the plain meaning of the relevant statutory provisions, and in both cases the practical consequences of these departures was to reduce the potential disruption caused by the Court's ultimate judgment.

These decisions are not aberrations. They are of a piece with the Chief Justice's pragmatic approach to statutory interpretation which, in turn, is but one part of his "minimalist" jurisprudence.[12] While he often pays careful attention to statutory text, Chief Justice Roberts is not an Antonin-Scalia-style textualist. In his first ten years on the Court, the Chief has been quite willing to stretch or massage relevant statutory provisions where necessary to avoid interpretations that would require invalidating federal statutes on constitutional grounds or would otherwise prove disruptive to the status quo. This preference for limiting the disruptive impact of the Court's decisions takes priority

2492 ("After reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase 'an Exchange established by the State under [Section 18031]' is unambiguous.").

7 *Id.* at 2492–96 (relying upon "context and structure of the Act" to resolve ambiguity about the meaning of "Exchange established by the State").

8 *Id.* at 2488–89 (holding case presents "extraordinary" case in which *Chevron* should not apply).

9 *Id.* at 2496.

10 *See* Gluck, *Congress Has a "Plan"*, *supra* note 5 ("This is not Justice Antonin Scalia's textualism."). For a greater discussion of this issue, see Gluck, *Imperfect Statutes*, *supra* note 5; *see also* Adler & Cannon, *supra* note 4, at 52–63.

11 *See infra* Part II.

12 *See* Cass R. Sunstein, *The Minimalist*, L.A. TIMES (May 25, 2006), http://articles.latimes.com/2006/may/25/opinion/oe-sunstein25. For an empirical assessment of Chief Justice Roberts's minimalism, see Robert Anderson IV, *Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court*, 32 HARV. J.L. & PUB. POL'Y 1045, 1089–90 (2009) (finding the Chief Justice to be more minimalist than other conservative justices on the Court). For a broader perspective on the Roberts Court, see J. Mitchell Pickerill & Artemus Ward, Measuring Judicial Minimalism on the Roberts Court, Paper Prepared for the Annual Meeting of the American Political Science Association (unpublished paper) (Sept. 1, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2314135. On judicial minimalism generally, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). For a critique, see Diane S. Sykes, *Minimalism and Its Limits*, 2015 CATO SUP. CT. REV. 17.

over any commitment to a particular interpretive technique or broader doctrinal outcomes.

The claim of this brief Essay is that the Chief Justice's approach to statutory interpretation exhibits a "Burkean minimalism" that seeks to reduce seismic effect of the Court's decisions.[13] In particular, the Chief Justice is drawn toward statutory interpretations that avoid constitutional questions and preserve legislative enactments against constitutional challenge.[14] Avoiding disruption is not an unyielding imperative, as the Chief Justice is sometimes willing to join broad judgments with significant effects. Avoiding disruption does, however, appear to be among the Chief Justice's preferences when deciding cases, and when interpreting federal statutes in particular.

I. MINIMALISM AND MR. ROBERTS

Since his appointment to the Supreme Court, Chief Justice Roberts has emphasized the value of narrow decisions that may command broad agreement amongst his colleagues.[15] At his confirmation hearings, then-Judge Roberts stressed his desire to foster "a greater degree of coherence and consensus in the opinions of the Court."[16] In a 2006 speech at Georgetown shortly after his confirmation to the Court, the Chief Justice reiterated his desire for greater unanimity on the Court.[17] Decisions in which the Court is unanimous (or nearly so), he explained, "promote clarity and guidance for the lawyers and for the lower courts trying to figure out what the Supreme Court meant."[18]

Reaching broader agreement often requires narrowing the scope of a decision. To Chief Justice Roberts, this is a feature, not a bug. As he

---

13 *See* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 358–59 (2006) (noting that "Burkean minimalists prize stability" and will depart from other doctrinal commitments so as not to "disrupt established practices"). *See also* Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996).

14 *See* Adler, *supra* note 1.

15 *See* Neal K. Katyal, Opinion, *The Supreme Court's Powerful New Consensus*, N.Y. TIMES (June 26, 2014), http://www.nytimes.com/2014/06/27/opinion/the-supreme-courts-powerful-new-consensus.html.

16 *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 371 (2005) (Statement of John G. Roberts, Jr., Nominee to Be Chief Justice of the United States), *reprinted in* 20 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916–2005, at 371 (Roy M. Mersky & Tobe Liebert, eds., 2006).

17 *See* Chief Justice John G. Roberts, Jr., Address at the 2006 Georgetown University Law Center Commencement Ceremony (May 21, 2006), http://apps.law.georgetown.edu/webcasts/eventDetail.cfm?eventID=144.

18 *Id.* (00:12:21).

explained: "The broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible ground. . . . If it's not necessary to decide more to dispose of a case, in my view it is necessary not to decide more."[19] In the case of statutes, resolving cases on the "narrowest possible ground" often entails reading statutes so as to avoid constitutional questions or incongruous results.

The preference for greater unanimity and narrower focus in judicial opinions follows from the Chief Justice's view of the proper judicial role. As he explained when he was nominated to the U.S. Court of Appeals for the D.C. Circuit, his judicial philosophy "begins with an appreciation of the limited role of a judge in our system of divided powers."[20] That "limited role" consists of "discerning the law, not shaping policy" and requires that judges exercise "self-restraint."[21]

Judicial restraint can take many forms. For Chief Justice Roberts, it manifests itself in adopting narrow rulings and avoiding unnecessary constitutional judgments, as well as by striving to uphold legislative enactments.[22] Although Chief Justice Roberts has joined decisions striking down federal statutes on constitutional grounds, he has authored several opinions that strained to interpret congressional acts so as to preserve their constitutionality. Where constitutional infirmities have been found, he has also sought to excise them with surgical precision, leaving as much of the legislature's handiwork intact. These tendencies are evidence of the Chief Justice's preference for minimalism.

Whereas various formulations of judicial minimalism often stress the need to respect and defer to the political branches, Chief Justice Roberts's minimalism seems equally concerned with the potential ramifications of judicial decisions for the political system. In this regard, the Chief Justice's efforts have met with some success.[23] The Roberts Court has overturned federal statutes and applicable precedents at a lower rate than its immediate predecessors.[24] But Roberts has also

---

19 *Id.* (00:12:33).

20 Quoted in Adam J. White, *Judging Roberts: The Chief Justice of the United States, Ten Years in*, WEEKLY STANDARD (Nov. 23, 2015), http://www.weeklystandard.com/judging-roberts/article/1063131.

21 *Id.*

22 *See* Sykes, *supra* note 12, at 19 (Minimalism "self-consciously avoids invalidating acts of the legislative and executive branches either by upholding them on the merits or by using various techniques for avoiding constitutional questions."). For an argument that Chief Justice Roberts is more deferential to the legislature than to the executive, see White, *supra* note 20.

23 *See* Pickerill & Ward, *supra* note 12; *see also* Sykes, *supra* note 12, at 31 (a "noteworthy feature" of the Roberts Court is "its preference for using minimalist techniques to avoid or soften or at least postpone confrontation with the political branches in structurally or politically sensitive cases").

24 *See* Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES (July 24, 2010), http://www.nytimes.com/2010/07/25/us/25roberts.html?_r=0 (reporting that the

seemed interested in reducing the practical impact of his rulings. If, in his infamous formulation, the role of a judge is that of an umpire, it seems that the Chief Justice seeks to avoid making calls that control the outcome of the game. In this way, we can connect the Chief Justice's preference for constitutional avoidance with some of his other more notable statutory interpretation decisions.

II. OBAMACARE AND SCOTUSCARE[25]

The ink on the PPACA was scarcely dry before its constitutionality was challenged in federal court.[26] These challenges eventually made their way to One First Street in *National Federation of Independent Business v. Sebelius* (*NFIB*).[27] In deciding *NFIB*, both in rejecting challenges to the "individual mandate" and rejecting challenges to the Medicaid expansion, Chief Justice Roberts demonstrated a willingness to stretch the relevant statutory text so as to avoid an unduly disruptive result.

The central issue in *NFIB* was whether the so-called "individual mandate" could be justified as an exercise of one of Congress's enumerated powers. Under § 5000A(a) of the PPACA, all non-exempt individuals "shall" obtain qualifying health insurance.[28] Any non-exempt individual who fails to comply with this mandate is subject to a penalty.[29]

Those challenging the constitutionality of the individual mandate focused on whether this provision could be justified as an exercise of Congress's power to regulate commerce "among the several States,"[30] either alone or in conjunction with the "necessary and proper" clause.[31]

Roberts Court invalidates statutes and overturns precedents at a lower rate than the Rehnquist and Burger Courts).

25 In his *King* dissent, the late Justice Antonin Scalia suggested the PPACA should be known as "SCOTUSCare." King v. Burwell, 135 S. Ct. 2480, 2507 (2015) (Scalia, J., dissenting).

26 *See* Charles Dharapak, *13 Attorneys General Sue Over Health Care Overhaul*, USA TODAY (Mar. 23, 2010, 1:53 PM), http://usatoday30.usatoday.com/news/nation/2010-03-23-attorneys-general-health-suit_N.htm ("Attorneys general from 13 states sued the federal government Tuesday, claiming the landmark health care overhaul bill is unconstitutional just seven minutes after President Obama signed it into law."); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2580 (2012) ("On the day the President signed the Act into law, Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida.").

27 *NFIB*, 132 S. Ct. 2566.

28 26 U.S.C. § 5000A(a) (2012).

29 § 5000A(b)(1)–(3).

30 U.S. CONST. art. I, § 8.

31 U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . .").

This is because the language of the statute presented the mandate as just that: a mandate to obtain insurance that was enforced with a penalty. In enacting the mandate, congressional leaders had cited the commerce power as the basis for this enactment.[32] Although it might have been easier to justify the penalty for noncompliance as a tax, thereby resting the provision on Congress's taxing power, congressional leaders and the President himself denied that the penalty for noncompliance was a tax.[33]

Chief Justice Roberts agreed that the "most straightforward reading of the mandate is that it commands individuals to purchase insurance."[34] Yet, the Chief Justice concluded, the mandate could not be sustained on that basis.[35] The power to regulate commerce among the several states, even when supplemented by the Necessary and Proper Clause, does not empower the federal government to require everyone to purchase a specified good or service. Therefore, the Chief Justice concluded, it was "necessary" to consider whether the mandate could be upheld on an alternative basis.[36]

Looking beyond the text of the statute, and examining how the individual mandate would operate in practice, the Chief Justice concluded that Congress could require those who fail to obtain qualifying health insurance to pay a modest penalty.[37] Although not characterized as a tax by Congress, the fee would operate as a tax.[38] Like many other provisions of federal law, the PPACA would impose a slightly greater tax burden on those who fail to engage in

---

32 *See NFIB*, 132 S. Ct. at 2593 ("Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis."); *see also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified at 42 U.S.C. § 18091) (Congress finding the individual mandate is "commercial and economic in nature, and substantially affects interstate commerce"); 156 CONG. REC. H1,826 (daily ed. Mar. 21, 2010) (statement of Rep. Slaughter) (arguing that that the individual mandate falls within Congress's authority to regulate activity that substantially affects interstate commerce).

33 *See*, *e.g.*, Interview by George Stephanopoulos with President Barack Obama, in Wash. D.C., ABC News (Sept. 20, 2009), http://abcnews.go.com/ThisWeek/Politics/transcript-president-barack-obama/story?id=8618937 (claiming individual mandate "is absolutely not a tax increase"); Susan Jones, *Pelosi: Individual Mandate Isn't a Tax: 'No, It's Penalty, No, It's a Penalty, It's a Penalty'*, CNS NEWS (July 2, 2012, 6:06 AM), http://cnsnews.com/news/article/pelosi-individual-mandate-isn-t-tax-no-it-s-penalty-no-it-s-penalty-it-s-penalty (discussing Pelosi's insistence the individual mandate is not a tax but rather a penalty for free riders).

34 *See NFIB*, 132 S. Ct. at 2593.

35 *Id.*

36 *Id.* ("Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government's second argument: that the mandate may be upheld as within Congress's enumerated power to 'lay and collect Taxes.'" (citation omitted)).

37 *Id.* at 2594 ("[I]t makes going without insurance just another thing the Government taxes, like buying gasoline or earning income.").

38 *Id.* ("It is of course true that the Act describes the payment as a 'penalty,' not a 'tax.'").

congressionally desired activity. As the Chief Justice explained, the question for the Court was not whether mandate penalty as a tax was the "most natural interpretation" of the relevant statutory language, but only "whether it is a 'fairly possible' one."[39] Reading the statute in this way, although not necessarily true to the words Congress chose, enabled the Chief Justice to refrain from invalidating a key provision of the PPACA.

Because the individual mandate was designed to interact with other provisions of the PPACA, invalidating this single provision could have had destabilizing effects on other parts of the law.[40] Upholding the mandate penalty as a tax avoided this potential outcome. Although the Chief Justice did vote to invalidate another portion of the PPACA—specifically, the conditioning of federal Medicaid funds on a state's willingness to implement the Medicaid expansion—he again departed from the plain language of the statute to reduce the potential disruptive impact of this holding.

A key feature of the PPACA was the expansion of coverage for low-income populations through the expansion of the federal Medicaid program. Historically, the Medicaid program targeted specific highly vulnerable populations, such as children, pregnant women, the elderly, and disabled individuals.[41] Under the PPACA, however, Medicaid was expanded to provide coverage to all adults with incomes below 133% of the federal poverty line.[42] In order to induce state cooperation, the federal government agreed to cover the lion's share of costs of the expansion for the first several years. Were a state to refuse the expansion, however, that state would sacrifice *all* federal Medicaid funding, including support for coverage of previously eligible populations.

Seven justices concluded that requiring states to accept the Medicaid expansion as a condition of continuing to receive existing Medicaid funds was unconstitutionally coercive.[43] For four justices, this conclusion justified invalidating all of the PPACA's Medicaid provisions.[44] For Chief Justice Roberts, however, the unconstitutional

---

39 *Id.* (citation omitted).

40 *See id.* at 2675.

41 *See NFIB*, 132 S. Ct. at 2581 ("Enacted in 1965, Medicaid offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care.").

42 *See* 42 U.S.C. § 1396a(a)(10) (2012); *NFIB*, 132 S. Ct. at 2581–82.

43 *See NFIB*, 132 S. Ct. at 2666–67.

44 Indeed, the four joint dissenters concluded that the entire PPACA had to be invalidated due to their conclusion that the Medicaid expansion and individual mandate were unconstitutional. *Id.* at 2675–76 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

coercion in the PPACA justified a less disruptive remedy, albeit one without any statutory basis.

In his controlling *NFIB* opinion, Chief Justice Roberts concluded that the proper remedy for the coercive nature of the Medicaid expansion was to decouple the offer of funding for the Medicaid expansion from pre-existing Medicaid.[45] In effect, the Chief Justice treated pre-existing Medicaid and the Medicaid expansion as two separate programs that states could accept or reject independently.[46]

The problem with the Chief Justice's approach, as a matter of statutory interpretation, is that there is nothing in the PPACA that separates "old" and "new" Medicaid.[47] The two programs are not separate in the Act, nor in the U.S. Code. The PPACA does not characterize or treat the programs differently.[48] The PPACA expanded Medicaid by changing the conditions upon which states receive Medicaid funds. It did not enact a new program, or even a separate subpart. Whether or not it is fair to characterize the Medicaid expansion as, in operation, a materially different program from what existed before, such a characterization has little basis in the relevant statutory text. Yet interpreting the expansion as a separate program facilitated a less disruptive outcome than would have been required by invalidating the Medicaid expansion altogether. Whereas Congress enacted the Medicaid expansion as a set of new conditions on the continued receipt of Medicaid funds, the Chief Justice interpreted the statute to create a new program that could be accepted or rejected independently.

---

45 *Id.* at 2607 (majority opinion).

46 This same analysis also supported the Chief Justice's substantive conclusion as to the unconstitutionality of the offer to states, as the Chief Justice concluded that Congress was, in effect, leveraging state participation in "old" Medicaid to induce cooperation with "new" Medicaid. *Id.* at 2608 (the Chief Justice saying, "Congress assumed that every State would participate in the Medicaid expansion, given that States had no real choice but to do so"); *see also* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 868–71 (2013).

47 Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Business v. Sebelius, 93 B.U. L. REV. 1, 55 (2013) (noting "the artificial distinction" the Chief Justice's opinion "forges between 'old' and 'new' Medicaid").

48 *See NFIB*, 132 S. Ct. at 2630 (Ginsburg, J., dissenting) ("Medicaid, as amended by the ACA, however, is not two spending programs; it is a single program with a constant aim—to enable poor persons to receive basic health care when they need it."). The only distinction in the statute is that the rates of federal reimbursement of state costs is different for previously eligible populations and newly eligible populations. *Id.* at 2632 ("In 2014, federal funds will cover 100% of the costs for newly eligible beneficiaries; that rate will gradually decrease before settling at 90% in 2020. 42 U.S.C. § 1396d(y) (2006 ed., Supp. IV). By comparison, federal contributions toward the care of beneficiaries eligible pre-ACA range from 50% to 83%, and averaged 57% between 2005 and 2008.").

III. CONSTITUTIONAL AVOIDANCE

NFIB was not the first time that the Chief Justice would show a willingness to adopt a saving construction of a statute in order to deflect a constitutional challenge to a federal statute, and it would not be the last. In *Northwest Austin Municipal Utility District No. One v. Holder* (*NAMUDNO*),[49] the Chief Justice adopted an implausible interpretation of section 5 of the Voting Rights Act (VRA) in order to preserve portions of the statute against a constitutional attack.[50] Although the Chief Justice's opinion was not particularly persuasive as a matter of statutory interpretation, it was joined by seven other justices and (temporarily) preserved section 5.[51]

Congress enacted the VRA to enforce the Fifteenth Amendment guarantee that the "right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."[52] The law bars discriminatory election procedures and practices nationwide and imposes additional restrictions on those portions of the country with a history of voting discrimination. Specifically, section 5 requires designated jurisdictions (so-called "covered jurisdictions") to obtain the federal government's permission before making any changes to existing voting procedures or practices, including voter eligibility requirements and polling locations.[53]

"Covered jurisdictions" are those jurisdictions that had employed discriminatory or otherwise prohibited voting practices and in which fewer than fifty percent of eligible voters were registered or voted in the 1964 presidential election.[54] Such jurisdictions may only alter voting practices or procedures by obtaining "preclearance" from the attorney general or a three-judge federal district court on the basis that the change neither "has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color."[55] "Covered jurisdictions" that wish to be free of section 5's limitations may file a

---

49 557 U.S. 193 (2009).

50 *See* Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 182–83 (noting Court adopted "an implausible reading of a statute that appeared contrary to textual analysis, congressional intent, and administrative interpretation").

51 A majority of the Supreme Court would subsequently invalidate section 5 of the VRA in *Shelby County v. Holder*, 133 S. Ct. 2612, 2632 (2013).

52 South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966) (quoting U.S. CONST. amend. XV), *abrogated by* Shelby County v. Holder, 133 S. Ct. 2612 (2013).

53 52 U.S.C. § 10304 (2012).

54 § 10303(b).

55 § 10304(a).

declaratory judgment seeking to "bail out" from the preclearance requirements.[56] In such a suit, the jurisdiction must show that it has not engaged in any proscribed voting rights violations within the previous ten years and that it has taken steps to prevent voter intimidation and harassment.[57]

The Northwest Austin Municipal Utility District No. 1 (NAMUDNO) filed suit challenging the preclearance provisions on the basis that these requirements could no longer be considered "congruent and proportional" to the rights violations they were designed to address.[58] This claim received some force from the fact that Congress had twice renewed the VRA without updating the formula upon which the "covered jurisdiction" determinations are made.[59] Whatever the scope of voting rights violations today, NAMUDNO argued, they bear little relationship to those in 1964. In the alternative, NAMUDNO also argued that it was a "political subdivision" that should be permitted to bail out from the preclearance requirements. The problem with this argument was that the plain text of section 5 seemed to limit bailout suits to states and those political subdivisions separately designated for coverage under the Act, and a local utility district in Texas would not seem to qualify.[60]

The plain text of the VRA notwithstanding, eight justices concluded that NAMUDNO could bail out of section 5's preclearance requirements.[61] Chief Justice Roberts's opinion for the Court noted the potential constitutional difficulties posed by section 5, but shrunk from confronting them.[62] Quoting Justice Oliver Wendell Holmes's admonition that overturning a duly enacted act of Congress is "the gravest and most delicate duty that this Court is called on to perform," Roberts noted that the Court should avoid reaching constitutional questions "if there is some other ground upon which to dispose of the

56 § 10303.

57 § 10304; § 10303(a)(1).

58 *See NAMUDNO*, 557 U.S. 193, 204 (2009).

59 *See id.* at 200 (noting the "coverage formula remained the same" with each VRA reauthorization).

60 *See* Nw. Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 230–31 (D.D.C. 2008), *rev'd and remanded by NAMUDNO*, 557 U.S. 193 (2009).

61 *NAMUDNO*, 557 U.S. at 211.

62 *Id.* ("Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today. We conclude instead that the Voting Rights Act permits all political subdivisions, including the district in this case, to seek relief from its preclearance requirements.").

case."[63] NAMUDNO's alternative statutory argument provided this alternative basis, even if the text of the VRA did not.[64]

Roberts's opinion acknowledged that the text of the VRA did not appear to support NAMUDNO's bailout claim, as the district court had concluded.[65] Yet the "underlying constitutional concerns" with such an interpretation "compel[led] a broader reading of the bailout provision," even if there was little basis in the VRA's text or history to support it.[66] By comparison, Roberts's interpretation of the individual mandate penalty as a "tax" is thoroughly persuasive.

Roberts's strained effort to save section 5 was not likely motivated by any specific desire to save this particular provision of federal law. There is no reason to believe that the Chief Justice is particularly sympathetic to the VRA generally or section 5 in particular. Indeed, just four years after stretching to preserve section 5 in *NAMUDNO*, the Chief Justice would author the Court's opinion in *Shelby County v. Holder* invalidating the coverage formula that determines where section 5 applies.[67] According to the Chief Justice, the Court's *NAMUDNO* opinion had placed Congress on notice of the VRA's potential constitutional infirmities, and Congress failed to act. Thus, the Court had "no choice" but to confront the underlying constitutional question.[68]

The Chief Justice again adopted an implausible statutory interpretation in order to deflect a constitutional challenge in *Bond v. United States*.[69] The facts of *Bond* are made for bad television. Carol Anne Bond sought revenge on her husband's mistress—her once-best friend, Myrlinda Haynes—who was pregnant with Bond's husband's child. So she did what any other angry, jealous microbiologist would do: she obtained highly toxic chemicals and sought to poison Haynes by spreading the toxins on Haynes's car door, mailbox, and door knob. These efforts were unsuccessful, but did lead to Bond's arrest and indictment for violating the Chemical Weapons Convention

63 *Id.* at 204–05 (citations omitted).

64 *See* Sykes, *supra* note 12, at 32 (in order to conclude NAMUDNO was eligible for preclearance, "the Court had to stretch the statutory definition of 'political subdivision' well beyond its text"); *see also* Hasen, *supra* note 50, at 203–06.

65 *NAMUDNO*, 557 U.S. at 206–07.

66 *Id.* at 207.

67 Shelby County v. Holder, 133 S. Ct. 2612 (2013).

68 *Id.* at 2631 ("Congress could have updated the coverage formula [after *NAMUDNO*], but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.").

69 134 S. Ct. 2077 (2014).

Implementation Act (Implementation Act),[70] enacted by Congress to implement the Chemical Weapons Convention.

Bond challenged her conviction on statutory and constitutional grounds. Among other things, she argued that the Implementation Act was unconstitutional, at least as applied to her conduct, as it exceeded the scope of Congress's enumerated powers. Lower courts rejected these arguments, but they found a more receptive audience at One First Street.

The Supreme Court unanimously overturned Bond's conviction. Four justices would have reached the constitutional question, but not the Chief Justice. Writing for a majority of the Court, Chief Justice Roberts held that the Implementation Act could not be read so as to apply to purely "local" crimes, such as were involved here.[71] "Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach," Roberts explained.[72] Although the plain text of the Act would seem to cover Bond's conduct, such an interpretation would "'dramatically intrude[] upon traditional state criminal jurisdiction,' and we avoid reading statutes to have such reach in the absence of a clear indication that they do."[73]

The Chief Justice's *Bond* opinion reads as if the Court was asked to resolve a statutory ambiguity or choose between competing-yet-plausible interpretations of expansive statutory text. But the text of the Implementation Act is rather clear, as Justice Scalia detailed in his concurring opinion. In Scalia's view, the Chief Justice had engaged in "result-driven antitextualism" so as to avoid confronting the constitutionality of the statute.[74] The toxic chemicals Bond employed easily satisfied the Act's definition of prohibited "chemical weapons." It is likewise hard to argue that trying to poison someone constitutes a peaceful purpose exempt from the Act.[75] The alleged ambiguity that

---

70 Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-856 (codified as amended in scattered sections of the U.S.C.).

71 *Bond*, 134 S. Ct. at 2083.

72 *Id.*

73 *Id.* at 2088 (alteration in original) (citing United States v. Bass, 404 U.S. 336, 350 (1971)).

74 *Id.* at 2095 (Scalia, J., concurring in judgment); *see also* Nicholas Quinn Rosenkranz, Bond v. United States*: Concurring in the Judgment*, 2014 CATO SUP. CT. REV. 285, 287 (the majority opinion in *Bond* provides an "object lesson in dodgy statutory interpretation").

75 *See Bond*, 134 S. Ct. at 2094 (Scalia, J., concurring in judgment) ("Bond possessed and used 'chemical[s] which through [their] chemical action on life processes can cause death, temporary incapacitation or permanent harm.' Thus, she possessed 'toxic chemicals.' And, because they were not possessed or used only for a 'purpose not prohibited,' § 229F(1)(A), they were 'chemical weapons.' Ergo, Bond violated the Act. End of statutory analysis, I would have thought." (alterations in original)).

enabled the Court's resort to constitutional avoidance was only revealed by the potential consequences of applying the plain statutory text.[76]

As in *King v. Burwell*, the Chief Justice's statutory interpretation in *Bond* appears driven by a desire to avoid potentially disruptive consequences. Such consequences induce a conclusion that the relevant statutory text is ambiguous, which then provides the Court with the necessary interpretive flexibility to avoid the potentially disruptive result—in this case, either validating a radically expansive interpretation of the federal government's treaty power or striking down a validly enacted federal law.

What distinguishes the Chief Justice's opinion in *King v. Burwell* from those in *NFIB*, *NAMUDNO*, and *Bond* was not the Chief Justice's willingness to look beyond the plain statutory text enacted by Congress in search of a broader purpose or in pursuit of a more rational legislative scheme. What was different was the lack of constitutional avoidance concerns. Interestingly enough, multiple amici in *King* had argued that the Court should conclude tax credits were available in federal exchanges because an alternative ruling might raise federalism concerns.[77] Although this issue was raised at oral argument,[78] there was no mention of any such concerns in Roberts's opinion for the Court.[79] The Chief Justice sought to avoid a disruptive result even in the absence of a constitutional question.

The Chief Justice is not always successful in adopting statutory interpretations that save federal statutes from constitutional challenge. *NAMUDNO* and *Bond* suggest there are few limits to the Chief Justice's willingness to stretch statutory text. But it is not always possible for the

---

76 *See id.* at 2095–96 ("Though the Court relied in part on a federalism-inspired interpretive presumption, it did so only *after* it had found, in Part I of the opinion, applying traditional interpretive tools, that the text in question was ambiguous.").

77 *See* Brief of the Commonwealth of Virginia et al., as Amici Curiae in Support of Affirmance, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114); Brief for Professors Thomas W. Merrill et al., as Amici Curiae Supporting Respondents, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114); Brief of Amici Curiae Jewish Alliance for Law & Social Action (JALSA) et al., in Support of Respondents, King v. Burwell, 135 S. Ct. 2480 (2015) (No 14-114).

78 *See* Transcript of Oral Argument at 16, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114) ("JUSTICE KENNEDY: Let me say that from the standpoint of the dynamics of Federalism, it does seem to me that there is something very powerful to the point that if your argument is accepted, the States are being told either create your own Exchange, or we'll send your insurance market into a death spiral.").

79 One possible reason that these arguments were not embraced in *King* is because they could have had far-reaching implications for the Court's federalism jurisprudence. *See* Jonathan H. Adler, *Could* King v. Burwell *Overturn Parts of* New York v. United States*?*, WASH. POST: VOLOKH CONSPIRACY (Mar. 5, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/05/could-king-v-burwell-overturn-parts-of-new-york-v-united-states/?utm_term=.f9dd0c706734.

Chief Justice to convince enough of his colleagues to go along. *Citizens United v. Federal Election Commission*[80] may be a case in point.

Citizens United concerned a challenge to provisions of the Bipartisan Campaign Reform Act (BCRA), specifically section 203, which barred corporations and unions from spending general treasury funds on an "electioneering communication," defined as a "broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office" aired within thirty days of a primary or sixty days of a general election.[81] The petitioners, Citizens United, had sought to air an anti-Hillary Clinton video on cable networks as a video-on-demand feature.[82] Such a broadcast would almost certainly have constituted a "cable . . . communication." Consequently, distributing the video in this fashion would have been covered by the Act.[83] Holding otherwise, and defining cable video-on-demand as something other than a "cable . . . communication," would have required adopting a fairly implausible reading of the statutory text—a reading not a single justice on the Court was willing to endorse in a published opinion.

When *Citizens United* was finally decided, after reargument, the Chief Justice joined Justice Kennedy's opinion for the Court, invalidating the relevant provisions of the BCRA on First Amendment grounds. Justice Kennedy's opinion for the Court was quite expansive (as is his wont).[84] The Court's opinion rejected the various statutory arguments presented by the petitioners to reach the underlying constitutional question. In the process, it swept aside prior Court precedents and embraced a broad constitutional holding that continues to resonate in the lower federal courts.

Although Chief Justice Roberts ultimately joined Justice Kennedy's opinion rejecting a potential saving construction of the BCRA, reporting by Jeffrey Toobin for the *New Yorker* suggests Roberts—and Roberts alone—had been willing to adopt a saving construction of the statute.[85] After *Citizens United* was first argued, Roberts reportedly drafted a narrow opinion holding for Citizens United on statutory grounds.[86]

---

80 558 U.S. 310 (2010).

81 52 U.S.C. § 30104(f)(3) (2012).

82 *See Citizens United*, 558 U.S. at 319–20.

83 *Id.* at 323.

84 On the relationship of *Citizens United* to the Roberts Court's First Amendment jurisprudence more broadly, see Joel M. Gora, *In the Business of Free Speech: The Roberts Court and* Citizens United, *in* BUSINESS AND THE ROBERTS COURT 227, 255 (Jonathan H. Adler ed., 2016).

85 *See* Jeffrey Toobin, *Money Unlimited*, NEW YORKER (May 21, 2012), http://www.newyorker.com/reporting/2012/05/21/120521fa_fact_toobin.

86 *Id.* ("But after the Roberts and Kennedy drafts circulated, the conservative Justices began rallying to Kennedy's more expansive resolution of the case. In light of this, Roberts withdrew his own opinion and let Kennedy write for the majority.").

This opinion interpreted the BCRA so as to avoid the constitutional question lurking within the case.[87] Unlike in *NAMUDNO*, however, this approach did not produce a majority opinion. Indeed, insofar as the Chief Justice's attempt to resolve the case on narrow statutory grounds produced unanimity on the Court, it was unanimity in rejecting the Chief Justice's approach. Every other justice on the Court thought the constitutional issue had to be addressed. Four justices saw no constitutional problems with limiting electioneering communications that could justify stretching the statute's text, and four justices thought the statute violated the First Amendment.[88]

After Roberts circulated this opinion, Toobin reports, Justice Kennedy circulated a concurrence reiterating his view that the BCRA was unconstitutional under the First Amendment.[89] The other conservative justices apparently found Kennedy's opinion more compelling than the Chief Justice's effort to read Citizen United's video out of the statute's coverage, and reportedly signed on. This left Roberts as the only justice willing to adopt a saving construction of the statute. Given the alternative of authoring a solo opinion embracing a statutory interpretation rejected by every other justice on the Court, Roberts reportedly acquiesced to Kennedy's approach. As Toobin recounts, some of the dissenters complained that the broader First Amendment questions were not properly before the Court, prompting the Court to schedule a reargument with supplemental briefing that would place the First Amendment question front and center.[90]

In his *New Yorker* article, Toobin dwells on Justice Stevens's complaint that the Court's broad holding in *Citizens United* was unnecessary, as the Court could have held for the petitioners on narrower, statutory grounds. Yet as Toobin's own reporting recounts, Roberts was the only justice on the Court willing to resolve the case on such a basis. Four justices were ready to declare BCRA unconstitutional, and four saw no constitutional problem at all. In this case, Roberts had apparently sought a less disruptive outcome, as he has in other cases, at the expense of statutory text. The problem was that in *Citizens United*, unlike in *NAMUDNO*, *Bond*, and *King*, other justices were not willing to play along.

As the Chief Justice explained in his concurring opinion, if there had been "a valid basis for deciding this statutory claim in Citizens

---

87 In its briefing, Citizens United had presented both statutory and constitutional arguments in support of its position.

88 *See* Tom Goldstein, *Jeff Toobin on* Citizens United *(slightly expanded)*, SCOTUSBLOG (May 14, 2012, 9:30 PM), http://www.scotusblog.com/2012/05/jeff-toobin-on-citizens-united.

89 Toobin, *supra* note 85.

90 *Id.*

United's favor (and thereby avoiding constitutional adjudication), it would be proper to do so."[91] Lacking "any valid narrower ground of decision," the majority concluded there was "no way to avoid Citizens United's broader constitutional argument."[92] While the dissent assailed the majority's alleged activism, it too rejected Citizen United's narrower statutory claim.[93] Thus, the Chief Justice argued, criticisms of the majority's failure to resolve the case on narrower grounds were "based on a false premise: that our practice of avoiding unnecessary (and unnecessarily broad) constitutional holdings somehow trumps our obligation faithfully to interpret the law."[94]

IV. SURGICAL STRIKES

The Chief Justice's desire to minimize disruption can also be seen in his approach to severability. In those cases in which the Chief Justice has concluded that statutory provisions are unconstitutional, he has generally authored opinions that invalidate as little of the statute as possible. With almost surgical precision he has sought to excise the constitutional infirmity while leaving as much of the statutory framework in place as possible, thereby minimizing the practical consequences of the Court's decision.

In *Free Enterprise Fund v. Public Company Accounting Oversight Board* (*FEF v. PCAOB*),[95] for example, the Court concluded that the structure of the PCAOB provided for under the Sarbanes-Oxley Act of 2002 was unconstitutional because members of this Board could only be removed by the Securities and Exchange Commission (SEC) for cause, and the SEC is similarly protected from removal-at-will by the President.[96] Specifically, the Court held that it was unconstitutional to limit the ability of the President to remove a principal officer that is, in turn, limited in its ability to remove an inferior officer that determines policy and enforces the laws of the United States.

---

91 Citizens United v. FEC, 558 U.S. 310, 374 (2010) (Roberts, C.J., concurring).

92 *Id.* at 375.

93 As the Chief Justice noted, "otherwise [the dissent's] conclusion that the group should lose this case would make no sense." *Id.*

94 *Id.*

95 561 U.S. 477 (2010).

96 Interestingly enough, no statute expressly provides that members of the SEC may only be removed by the President for cause, but this has been assumed for some time, and was assumed by the Court in reaching its judgment about the constitutionality of the limitation on the removal of members of the PCAOB. *See id.* at 487 (noting that Court decides the case with the "understanding" that "Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office'").

Writing for the Court, the Chief Justice cabined the effects of his decision in *FEF v. PCAOB* in two ways. First, although the underlying rationale of his opinion would seem to raise questions about the constitutionality of limiting the President's ability to remove *any* principal or inferior officer, the holding was confined to the relatively unique circumstance of the PCAOB.[97] Second, the remedy provided by the Court was not to invalidate the Board or vacate any of its actions. Instead, all the Court did was to declare that, going forward, the SEC could remove members of the Board at will.[98] The restriction on the SEC's removal power was excised, and everything else about the statute, including the PCAOB, was intact.[99] Even actions the PCAOB may have taken under the (now mistaken) belief that its members were insulated from political reprisals were left in place. Thus a potentially significant constitutional ruling was given the most minimal effect.

The Chief Justice did something similar in the Medicaid portion of his decision in *NFIB*, as discussed above.[100] Upon concluding that the threat to withhold all Medicaid funding from states that refused to accept the Medicaid expansion was unconstitutionally coercive, the Chief Justice remedied the constitutional infirmity in the least disruptive way possible. Rather than invalidate the expansion as a whole (let alone the entire statute as the joint dissenters desired), the Chief Justice merely decoupled funding for the Medicaid expansion from the Medicaid funding streams states already received. Going forward, states would have to meet "old" Medicaid's requirements to continue receiving "old" Medicaid funding, and states would have to meet the Medicaid expansion's new requirements only to receive Medicaid expansion funding.

As noted above, this bifurcation of Medicaid under the PPACA into "new" and "old" programs has no basis in the statutory text.[101] It did, however, facilitate a less-disruptive judgment. By decoupling the programs, the Chief Justice protected the reliance interests of participating states, even as he made it somewhat easier for states to turn down the expansion. The ultimate consequence, however, was to reduce the potential disruption that could be caused by the underlying constitutional judgment.

The Chief Justice has also evinced a preference for evaluating the

---

97 *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1233–34 (2014); *see also* Michael J. Gerhardt, *On Candor,* Free Enterprise Fund*, and the Theory of the Unitary Executive*, 22 WM. & MARY BILL RTS. J. 337 (2013).

98 *FEF v. PCAOB*, 561 U.S. at 508–10.

99 *Id.*

100 *See supra* notes 41–48 and accompanying text.

101 *See supra* notes 44–48 and accompanying text.

constitutionality of statutory provisions on an as-applied basis, eschewing facial challenges that would strike statutory provisions down altogether. This approach makes it easier to avoid broader-than-necessary constitutional rulings (if it also makes constitutional challenges to federal statutes more difficult).[102] Just as Chief Justice Roberts has sought to find saving constructions of federal statutes to preserve their constitutionality, and looked to invalidate as little of a statute as possible, he embraces as-applied challenges as a means to excise potentially unconstitutional applications of an otherwise constitutional statutory scheme, even if it means adopting a more elastic understanding of the relevant statutory text.

In *Federal Election Commission v. Wisconsin Right to Life* (*WRTL*), for example, Roberts concluded that the Bipartisan Campaign Reform Act's limitations on corporate funding of "electioneering communications" were unconstitutional as-applied to the appellants' issue advertisements, effectively rewriting the relevant statutory provisions in the process.[103] In *WRTL* Roberts both rejected Justice Scalia's entreaty to invalidate the challenged provision on its face and eschewed reliance on the statute's "backup" definition of electioneering communications that would have been triggered as a result. Here, as with his approach to statutory interpretation, the Chief Justice adopted an approach calculated to minimize the decision's potentially disruptive effects.

CONCLUSION

During his confirmation hearings, then-Judge John Roberts compared the role of a judge to that of an umpire in a baseball game. "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire."[104] Most critical commentary on these remarks focused on the Chief Justice's implicit comparison between deciding cases and calling balls and strikes. The comparison is strained

---

102 *See* Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of as-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644 (2009); *see also* Gillian E. Metzger, *Facial and as-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773 (2009).

103 FEC v. Wis. Right to Life, Inc. (*WRTL*), 551 U.S. 449 (2007); *see also* Persily & Rosenberg, *supra* note 102, at 1662 ("In doing so, the Court rewrites a law that does not need to be rewritten and does so in a way that Congress specifically avoided.").

104 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the Supreme Court of the United States*, *supra* note 16, at 55.

as the respective decisions are not comparable. Different umpires may apply different strike zones, just as different judges may apply different interpretive philosophies, but the latter clearly implicates normative concerns in a way the former does not. Deciding a case, particularly at the appellate level, often requires far more than determining on which side of the line a given case falls. Further, however much judges strive to make the most accurate call, they inevitably and necessarily resort to jurisprudential priors to resolve difficult cases, particularly those that raise issues of first impression.

Less-remarked upon is Roberts's suggestion that spectators do not go to games to see the umpire. Rather, they are there to see the players play. A good game is not one that turns on a contested call, but where the outcome is clearly and fairly determined by the players' actions on the field. A good umpire, in this view, is scarcely noticed. This is Roberts's prescription for judges.

For a Burkean minimalist like Roberts, the Court should strive to be less conspicuous in public affairs, maintain the status quo, and avoid unnecessarily disruptive holdings. Not only does this perspective influence the Chief Justice's approach to statutory interpretation, it may also explain why he has voted fairly consistently to narrow the scope of Article III standing, heighten pleading requirements, and deny new opportunities for private plaintiffs to file suit against public and private plaintiffs alike.[105]

Chief Justice Roberts has been relatively consistent in pursuing his brand of minimalism, but that does not mean he has been right to do so. The analysis presented here is descriptive, not normative. Whatever the merits of his approach, the Chief Justice's strained efforts to narrow holdings have not always been successful, and have prompted stinging criticism from his colleagues and outside commentators. In one case, Roberts's reluctance to act more boldly prompted Justice Scalia to accuse him of "faux judicial restraint."[106] There is often room for reasonable people to differ on the best interpretation of a complex statute, but some of the Chief Justice's opinions seem to stretch interpretive choices to their breaking point.

Chief Justice Roberts has said that one of his goals is to promote greater stability and predictability in the law. Narrow holdings and broad unanimity may serve this goal, but not if they come at the expense of interpretive predictability. The more willing the Court is to stretch statutory text to avoid disruptive consequences, the more difficult it is

---

105 On the Chief Justice's approach to Article III standing, see Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 CASE W. RES. L. REV. 1061 (2009).

106 *See WRTL*, 551 U.S. at 498 n.7 (Scalia, J., concurring in part and concurring in the judgment) ("This faux judicial restraint is judicial obfuscation.").

for regulated entities and the public at large to know whether courts will interpret statutes to mean what they appear to say. The prospect that the Court will shrink from decisions that could produce disruptive consequences also provides an incentive for litigants to exaggerate the practical consequences of adverse decisions. As a consequence, it is unclear whether the Chief Justice's minimalism advances his view of the courts and the rule of law. That, however, is a subject for another paper and another time.