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Maximinimalism

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TABLE OF CONTENTS

INTRODUCTION

When John Roberts became Chief Justice of the United States more than a decade ago, commenters frequently described him as a minimalist.[1] Although Chief Justice Roberts himself resisted this label,[2] he fairly inspired it by advocating for more consensus among his colleagues[3] and by famously recounting to a Georgetown Law Commencement audience his view that "[i]f it is not necessary to decide

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1 *See, e.g.*, Cass R. Sunstein, *The Minimalist*, L.A. TIMES, May 25, 2006, at B11.

2 *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. 158 (2005) [hereinafter *Roberts Hearing*] (statement of Judge John G. Roberts) ("Like most people, I resist the labels.").

3 *See id.* at 303 ("I do think it should be a priority to have an opinion of the Court.").

more to dispose of a case . . . it is necessary not to decide more."[4] The suggestion that the Court decide significant issues one case at a time recalls the work of Cass Sunstein, the American academy's most articulate minimalist.[5]

For many of Chief Justice Roberts's detractors, describing him as a minimalist seems Orwellian. In case after case during his tenure, the Chief Justice has written or joined opinions in which a sharply divided Court dramatically changed the law, often displacing considered legislative judgments in the process. In *Citizens United v. FEC*,[6] the Court invalidated corporate political campaign expenditure limits.[7] In *Shelby County v. Holder*,[8] the Court neutralized section 5 of the Voting Rights Act of 1965.[9] In *National Federation of Independent Businesses v. Sebelius* (*NFIB*),[10] the Court held that Congress did not have the Commerce Clause power to force Americans to purchase health insurance,[11] and that Congress could not condition existing Medicaid funding on states expanding the scope of their Medicaid plans.[12]

This Article argues that both contentions are correct. Chief Justice Roberts is both a minimalist and a maximalist. Reconciling this apparent tension requires an understanding of the different ways in which one can practice minimalism. As Sunstein has explained in detail, and as Part I elaborates, minimalism is typically understood as decision-making that is both "narrow" rather than "wide" and "shallow" rather than "deep."[13] A minimalist prefers that courts decide one case at a time—that is, narrowly—without necessarily resolving similar cases that may share a close factual nexus.[14] A minimalist also prefers that courts justify decisions through rationales that are incompletely theorized—that is, shallow—and that preserve the possibility of consensus.[15] For

4 Chief Justice Roberts, Commencement Address at Georgetown University Law Center (May 21, 2006) [hereinafter Georgetown Address] (video available at https://www.c-span.org/video/?192685-1/georgetown-university-law-center-commencement-address). Chief Justice Roberts was repeating a line he had used in a concurring opinion while a judge on the D.C. Circuit. PDK Labs. Inc. v. U.S. DEA, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring) (referring to "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more").

5 *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

6 558 U.S. 310 (2010).

7 *See id.* at 365.

8 133 S. Ct. 2612 (2013).

9 *See id.* at 2631.

10 132 S. Ct. 2566 (2012).

11 *See id.* at 2591 (Roberts, C.J.).

12 *See id.* at 2606–07.

13 *See* SUNSTEIN, *supra* note 5, at 10–13.

14 *See id.* at 10.

15 *See id.* at 11.

Sunstein, this dual commitment to narrow and shallow rulings defines a jurist as a minimalist in the tradition of the Whig political theorist Edmund Burke.[16]

Burkeanism is not, however, the sole variety of minimalism. Alexander Bickel exemplifies a different tradition. Bickel believed that it was indispensable for Supreme Court Justices to decide cases according to principle, since their relative capacity to do so is what distinguishes them from politicians.[17] In order to create the conditions under which deciding according to principle is a practical possibility, however, the Court had to have substantial control over its docket.[18] Bickel argued that the Court should avoid hearing cases, *even on unprincipled grounds*, unless it was prepared to decide the merits in principled fashion. In the words of Gerald Gunther's well-known takedown, Bickel advocated "100% insistence on principle, 20% of the time."[19]

In Sunstein's terms, Bickel's version of minimalism is narrow rather than broad—it supports one-case-at-a-time adjudication and advocates techniques for not deciding any more than is needed—but it is deep rather than shallow—it supports thorough rather than incomplete theorization. Part II argues that Chief Justice Roberts is a minimalist in this tradition. He feels temperamentally and institutionally constrained not to reach out to decide cases, but his merits decisions are typically ambitious and generative: he is what this Article calls maximinimalist.

Part II focuses on three principal cases as examples of Chief Justice Roberts's approach: *Shelby County*, *Citizens United*, and *NFIB*. These are three of the most significant and most controversial constitutional cases of Chief Justice Roberts's tenure. In each case, the Supreme Court invalidated or altered the terms of a congressional statute, the most solemn—and on some accounts, least minimalist—act the Court can perform.[20] At the same time, in two of the cases—*Shelby County* and *Citizens United*—the Court's decision followed earlier cases in which the Court could have but declined to declare the very same laws unconstitutional. In the third case, *NFIB*, the Court declined to invalidate the statute in its entirety because, as Part II argues, the doctrinal groundwork to declare the Affordable Care Act to be beyond

16 *See* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

17 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 69 (2d ed. 1986).

18 *See id.* at 70–71.

19 Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

20 *See* Blodgett v. Holden, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring) (per curiam) ("[T]o declare an Act of Congress unconstitutional . . . is the gravest and most delicate duty that this Court is called on to perform.").

Congress's taxing power had not yet been laid. In each case, the Roberts Court proceeded narrowly but decided deeply, just as Bickel had urged.

Part III offers a qualified defense of maximinimalism. This decision-making posture is costly. A commitment to narrow rulings almost by definition tolerates a significant lack of clarity in the law, which is antithetical to the role of an apex court whose most important modern task is to give guidance to lower courts, public officials, and citizens. And on the Roberts Court in its first decade, deciding cases deeply has given the law a conservative valence that might be misaligned with the ideology of the median voter.[21]

The virtues of maximinimalism—particularly in closely contested constitutional cases—are nonetheless significant. A narrow posture towards momentous constitutional cases respects the capacity of other constitutional actors to engage in less juriscentric and more dialogic forms of constitutional construction. At the same time, a commitment to depth on the merits provides transparency about the Court's ideological valence. As Bickel recognized, transparency in substantive decision-making is the Court's only form of accountability and, ultimately, the source of its lawmaking authority.

I. ONE CONCEPTION OF MINIMALISM

Minimalism carries a diverse, and at times competing, set of definitions, and some clarity about the term will frame this Article's contribution. Sunstein's work provides the foundation for the Article's claims. On this understanding, a judge who is minimalist *simpliciter* decides cases both "narrowly" and "shallowly."

A narrow decision addresses only the case before the court even if other, hypothetical cases may be implicated.[22] In seeking to elucidate the difference between a narrow and a wide decision, it is useful to compare the Court's two most significant abortion rights rulings. In *Roe v. Wade*,[23] the Court issued a set of directives that outlined the kinds of abortion restrictions a state may enact in each of the three trimesters of pregnancy.[24] For example, the Court suggested that a state may require that a first-trimester abortion be performed by a physician but may not require that it be performed in a hospital.[25] *Roe* is a wide rather than

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21 *See* Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, FIVETHIRTYEIGHT (Mar. 29, 2012, 8:06 PM), http://fivethirtyeight.com/features/supreme-court-may-be-most-conservative-in-modern-history.

22 *See* SUNSTEIN, *supra* note 5, at 10.

23 410 U.S. 113 (1973).

24 *See id.* at 163–65.

25 *See id.* at 163.

narrow opinion because it addresses a broad range of factual scenarios rather than simply deciding whether and why the particular abortion restrictions in Texas and in Georgia (whose statute gave rise to *Roe*'s companion case, *Doe v. Bolton*) were unconstitutional.[26] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[27] the Court jettisoned *Roe*'s trimester framework in favor of an "undue burden" standard.[28] The Court applied this standard to the Pennsylvania statute before it, but it declined to discuss in any detail how the standard might apply to other possible abortion restrictions. The decision in *Casey* was narrow rather than wide.[29] As a shorthand, constitutional decisions that are articulated in terms of general rules of decision tend to be wide, whereas those that apply constitutional standards to particular fact situations tend to be narrow.

This discussion understands narrowness as a feature of substantive doctrine, but narrowness can also apply to pre-decisional law. Since 1988, the Supreme Court's docket has been almost entirely discretionary.[30] The Court as a body therefore has near complete power to refuse to address a particular issue. Even after it decides to hear a case, the Court has the power to exercise what Bickel referred to as the passive virtues, the "mediating techniques of 'not doing.'"[31] Examples include holding that a litigant lacks standing, that the case is moot or unripe, that the issue presents a political question, or that a lower court opinion should be vacated for reconsideration in light of a set of announced principles rather than reversed. Bickel was drawing on the canonical discussion of these and similar techniques of constitutional merits avoidance in Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority*.[32] There, Justice Brandeis referred to "a series of rules under which [the Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."[33] Brandeis was urging the Court to prefer narrow rather than wide approaches to its constitutional docket.

A shallow decision is one that "avoid[s] issues of basic principle" by relying on what Sunstein has referred to as incompletely theorized

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26 410 U.S. 179 (1973); *see* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 922 (1973) ("The opinion strikes the reader initially as a sort of guidebook, addressing questions not before the Court and drawing lines with an apparent precision one generally associates with a commissioner's regulations.").

27 505 U.S. 833 (1992).

28 *Id.* at 876–77.

29 *See* Sunstein, *supra* note 16, at 362–63.

30 Supreme Court Case Selections Act of 1988, Pub. L. 100-352, 102 Stat. 662 (codified as amended at 28 U.S.C. § 1257 (2012)).

31 BICKEL, *supra* note 17, at 112.

32 297 U.S. 288 (1936).

33 *Id.* at 346 (Brandeis, J., concurring).

agreements.[34] An incompletely theorized agreement involves either a consensus on particular conclusions without agreeing on the basis for those conclusions or consensus as to a conceptual apparatus without agreeing on what follows from it.[35] Shallow decision-making enables a court to reach a judgment amid sharp division over the basis for the decision. For example, in *Fisher v. University of Texas at Austin* (*Fisher I*), the Court issued a 7-1 judgment vacating and remanding the Fifth Circuit's decision upholding the race-based affirmative action plan of the University of Texas at Austin.[36] Justice Kennedy's majority opinion asserted that the lower court applied strict scrutiny incorrectly.[37] It was clear at the time, and is crystal clear now, that the members of the majority disagreed as to whether the University of Texas's plan could satisfy strict scrutiny properly applied.[38] A deep decision would have exposed these disagreements. A shallow one left them dormant.

When commentators refer to a judge, a court, or a decision as "minimalist," they sometimes mean that the decision was deferential to political decision-makers. This form of minimalism is associated with James Bradley Thayer, who believed courts should interfere with congressional constitutional judgments only in instances in which Congress has "not merely made a mistake, but [has] made a very clear one,"[39] and with Oliver Wendell Holmes, who wrote, dissenting, in *Lochner v. New York*,[40] that the Fourteenth Amendment should not be read "to prevent the natural outcome of a dominant opinion" unless the statute under review was irrational.[41]

This understanding of minimalism is not this Article's subject and is at best orthogonal to it. Political deference can be accomplished through wide rather than narrow adjudication, as when the Court announced in *United States v. Carolene Products Co.*[42] that most social and economic legislation would enjoy a strong presumption of constitutionality.[43] Deference can also be accomplished deeply rather than shallowly, as when Justice Stone sketched in his famous *Carolene*

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34 *See* SUNSTEIN, *supra* note 5, at 11.

35 *See id.*

36 133 S. Ct. 2411 (2013).

37 *See id.* at 2415.

38 *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198 (2016).

39 James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

40 198 U.S. 45 (1905).

41 *Id.* at 76 (Holmes, J., dissenting).

42 304 U.S. 144 (1938).

43 *See id.* at 152.

Products footnote a theory that seemed to justify deference in terms of democratic political conditions.[44]

Minimalism of the Thayerian sort is interesting and important, but Chief Justice Roberts has not committed himself to systematic political deference beyond the ordinary traditions of the Court. He has, on the other hand, committed himself to a form of minimalism evocative of narrow and shallow decision-making. Part II details those commitments, and their relationship to his practices as a judge, below.

II. CHIEF JUSTICE ROBERTS'S MAXIMINIMALISM

Chief Justice Roberts came to the Court espousing what on Sunstein's terms would be called a shallow approach to judging, one that seeks to achieve consensus and does not rely upon general theories to justify case outcomes. This Part shows that the Chief Justice's tenure has been marked by narrowness but not by shallowness.

A. *What Chief Justice Roberts Has Preached*

Chief Justice Roberts's most extended public discussion of his interpretive philosophy was at his confirmation hearing. Senator Orrin Hatch asked Roberts, who was then a D.C. Circuit judge, to place himself within a category of "an originalist, a strict constructionist, a fundamentalist, a perfectionist, a majoritarian or a minimalist."[45] Judge Roberts replied that he "resist[ed] the labels" but "prefer[red] to be known as a modest judge," one with "humility" who recognizes the "limited" role of a judge, to have respect for precedent, and to be "collegial" with his colleagues on the bench.[46] When Senator Hatch followed up by asking whether it was fair to call him "eclectic," Judge Roberts answered: "I do not have an overarching judicial philosophy that I bring to every case . . . . I tend to look at the cases from the bottom up rather than the top down. And like I think all good judges focus a lot on the facts."[47]

It is difficult to make firm pronouncements based on this kind of answer. The testimony a judicial nominee offers at a hearing before the Senate Judiciary Committee is intended above all to secure his

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44 *See id.* at 152 n.4. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (developing a process-oriented theory of judicial review grounded in the categories that *Carolene Products* excluded from the presumption of constitutionality).

45 *Roberts Hearing*, *supra* note 2, at 158.

46 *Id.*

47 *Id.* at 159.

confirmation. While not necessarily false or misleading, such statements are often—to return to Sunstein's parlance—incompletely theorized. They are stated at a level of abstraction that enables supportive Senators to hear what they want, while at the same time frustrating opposing Senators looking for an opening to exploit.

Still, two features of Roberts's response to Senator Hatch sketch the outlines of a judicial philosophy of a sort. First, Judge Roberts wanted to convey a sense of collegiality, of not being a flamethrower but of seeking dialogue and rapprochement with colleagues with whom he might not initially agree. Roberts indeed expressed a quite specific commitment to seeking a more unified Court that featured fewer separate opinions or splintered judgments. "[T]he Chief Justice has a particular obligation to try to achieve consensus consistent with everyone's individual oath to uphold the Constitution, and that would certainly be a priority for me if I were confirmed," he said at his hearing.[48] "The Supreme Court speaks only as a Court. Individually, the Justices have no authority. And I do think it should be a priority to have an opinion of the Court."[49] Prioritizing collegiality and a single opinion of the Court necessarily requires a judge to seek incompletely theorized agreement; that is, it requires him to be shallow.

Chief Justice Roberts also disclaimed any overarching judicial philosophy and emphasized a "bottom up" approach that focuses on the facts of an individual case. This commitment is almost precisely the opposite of the one Justice Scalia articulated in an early speech and subsequent Article entitled *The Rule of Law as a Law of Rules*.[50] A jurisprudence that seeks to adjudicate via case-by-case application of standards rather than through general rules is appropriately described as shallow rather than deep. Prioritizing the individual case enables a consensus outcome that assumes away difficult questions of first principle, as when, for example, a court resolves cases on harmless error or qualified immunity grounds without reaching the underlying constitutional question.

Chief Justice Roberts elaborated on his approach to judging in a Commencement address he delivered at Georgetown University Law Center in 2006, as he approached the end of his first full Term on the Court. There, he lauded the potential for greater agreement among the Justices, which he said would make it "more likely [to be a] decision . . . on the narrowest possible ground."[51] He said further that "[i]f it is not necessary to decide more to dispose of a case, in my view it

48 *Id.* at 303.

49 *Id.*

50 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

51 Georgetown Address, *supra* note 4.

is necessary not to decide more."[52] Chief Justice Roberts used the word "narrowest" to describe the grounds for decision he favors and Professor Sunstein has used this quote to support his case for the Chief Justice as a proponent of narrow decisions.[53] While the quoted language is not inconsistent with a commitment to narrowness, it more directly describes a *shallow* approach to judging, one whose grounds for decision are structured to achieve consensus.

This summary is not to say that Chief Justice Roberts is not notionally committed to narrowness. It is to say, rather, that to the degree one can identify a philosophical commitment within his public pronouncements, it is a commitment to shallow adjudication.

B. *What Chief Justice Roberts Has Practiced*

To assess the degree to which Chief Justice Roberts has espoused minimalism in practice, this Section begins with what are arguably the three most controversial decisions of the Chief Justice's tenure: *Citizens United v. FEC*, *Shelby County v. Holder*, and *NFIB*. It may be true that hard cases make bad law, but that is indeed the reason to focus on them in assessing a judge's methodological commitments. All adjudicatory approaches work well in easy cases[54]—which is why such cases are easy—but hard cases test a judge's faithfulness and lay bare his or her jurisprudential instincts. Hard constitutional cases are a valuable proving ground for minimalists in particular, since the best normative case for minimalism is that its strategy of merits avoidance accommodates nonjudicial actors in just the kinds of difficult cases in which their engagement is critical.[55]

In each of these three cases, Chief Justice Roberts signed onto an opinion that either invalidated or significantly altered a congressional statute. But in each case, he also refused to proceed as aggressively as he could have even though he likely had the votes to do so. This Section discusses each case in turn before more briefly discussing other cases or doctrinal areas in which Chief Justice Roberts's narrow—but not always shallow—approach is evident.

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52 *Id.*

53 *See* Sunstein, *supra* note 16, at 362.

54 *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1193 (1987) ("[W]ithin our legal culture, it is the rare judicial opinion, the anomalous brief, the unusual scholarly analysis that describes the relevant kinds of arguments as pointing in different directions.").

55 *See* SUNSTEIN, *supra* note 5, at 5–6.

1. *Citizens United v. FEC*

In *Citizens United*, the Court invalidated section 203 of the Bipartisan Campaign Reform Act (BCRA), which restricted the use of a corporation's general treasury funds for independent electioneering expenditures in the run-up to an election.[56] Writing for a 5-4 majority, Justice Kennedy held that the First Amendment does not permit the government to restrict speech on the basis of the corporate identity of the speaker.[57] That holding overruled the Court's prior decisions in *Austin v. Michigan Chamber of Commerce*[58] and *McConnell v. FEC*.[59]

Citizens United cannot be characterized as a deferential decision, but Chief Justice Roberts's approach to the issue of restrictions on corporate electioneering has been substantially narrower than it could have been. *Citizens United* was not the first time the Court had the opportunity to address the applicability of campaign spending restrictions to corporations. In *FEC v. Wisconsin Right to Life, Inc.*,[60] decided in 2007, the question was whether federal restrictions on express advocacy in the lead-up to an election could be applied to ads that purported to be issue ads but were timed and structured to influence an election.[61] Chief Justice Roberts wrote an opinion, joined in full only by Justice Alito, that held that the ads at issue in the case counted as constitutionally protected issue ads rather than express advocacy and so could succeed in an as-applied challenge to BCRA section 203.[62]

Justice Scalia, joined by Justice Kennedy and Justice Thomas, concurred in the judgment only, writing that section 203 was unconstitutional on its face.[63] In Justice Scalia's view, virtually any campaign ad would fail Chief Justice Roberts's test for the constitutionally permissible scope of section 203: being "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." That being so, the Chief Justice's opinion, in effect, facially invalidated section 203 without saying so.[64] As Justice Scalia wrote: "This faux judicial restraint is judicial obfuscation."[65] Justice Alito wrote a brief separate concurrence in which he suggested

56 2 U.S.C. § 441b, *invalidated by* Citizens United v. FEC, 558 U.S. 310 (2010).
57 *See Citizens United*, 558 U.S. at 365.
58 494 U.S. 652 (1990).
59 540 U.S. 93 (2003).
60 551 U.S. 449 (2007).
61 *See id.* at 455–57.
62 *See id.* at 457.
63 *See id.* at 483–84 (Scalia, J., concurring).
64 *See id.* at 498 n.7.
65 *Id.*

that it was unnecessary to declare the statute unconstitutional on its face in light of the successful as applied challenge, but that a later Court might need to consider a facial challenge should the existence of the statute be found to chill political speech.[66]

Given the vote lineup in that later case—*Citizens United*, which included precisely the same majority as *Wisconsin Right to Life*—it seems likely that, had Chief Justice Roberts wished to overrule *Austin* in 2007, he would have had four joins—and therefore a majority—for such an opinion. That he chose not to do so reflects a preference for narrow decisions that decide only the case before the Court. The Chief Justice's opinion in *Wisconsin Right to Life* indeed represents a commitment to narrowness sufficient to overcome his announced preference for consensus. Refusing to declare BCRA section 203 unconstitutional on its face meant that *Wisconsin Right to Life* had no majority opinion.

Any assessment of the degree to which *Citizens United* is minimalist must therefore confront the fact that the Court had already issued a shot across the bow in *Wisconsin Right to Life*. There is plenty of ammunition to argue that *Citizens United* is not a narrow opinion. There were several off-ramps that could have awarded victory to the petitioners without holding that section 203 was facially unconstitutional. The communication at issue in *Citizens United* was a video-on-demand film, written by a small nonprofit, that was critical of Hillary Clinton, who was a candidate for the Democratic nomination for president in 2008.[67] The Court could have held that the film was no more "express advocacy" than was the ad at issue in *Wisconsin Right to Life*. It could have held that as a nonprofit corporation financed largely by individual donors, Citizens United could successfully raise an as-applied challenge to section 203. It could have held that video-on-demand, because it does not hold its audience captive, does not raise the same concerns as television ads and therefore could support a successful as applied challenge. The Court accelerated past every one of these narrower alternative holdings.[68]

Recall, however, that Justice Kennedy, not the Chief Justice, wrote the majority opinion in *Citizens United*. In other major cases invalidating or altering federal statutes, the Chief Justice has taken on the writing assignment himself.[69] Jeffrey Toobin has written that this smoke indicates a fire. On Toobin's account, the Chief Justice in fact initially wanted to resolve *Citizens United* on narrow statutory grounds that acknowledged that a video-on-demand film by a small nonprofit

66 *See id.* at 482–83 (Alito, J., concurring).

67 Citizens United v. FEC, 558 U.S. 310, 319 (2010).

68 *See id.* at 324–29.

69 *See* Shelby County. v. Holder, 133 S. Ct. 2612 (2013); *NFIB*, 132 S. Ct. 2566 (2012).

was not the natural target of BCRA.[70] He assigned himself an opinion so holding, but Justice Kennedy circulated a draft concurrence arguing that the Court should declare section 203 unconstitutional on its face.[71] According to Toobin, Justice Kennedy's draft prompted Chief Justice Roberts to withdraw his majority opinion.[72] Rather than issue the Kennedy opinion, however—and with substantial pressure from Justice Souter's draft dissent—the Court agreed to set the case for a reargument the following Term to air the constitutional questions directly.[73] After reargument, Chief Justice Roberts assigned the opinion to Justice Kennedy.[74]

Toobin describes this sequence of events in Machiavellian terms, but what it more likely indicates—if true—is that Chief Justice Roberts's instinct towards narrow adjudication remained intact in the lead-up to *Citizens United*. The only way he could have persevered in his apparent preference for a narrow resolution of the case would have been to issue another splintered decision that, like *Wisconsin Right to Life*, lacked a majority. Under the circumstances, and in light of Chief Justice Roberts's evident substantive view that section 203 was facially unconstitutional,[75] one cannot fairly count *Citizens United* as evidence that Chief Justice Roberts opportunistically avoids narrow decisions.

One can say, however, that *Citizens United* is deep rather than shallow. The reason Congress may not regulate corporate electioneering is not because freedom of speech in this case—or even in this and similar cases—outweighs the government's interest in preventing a corporation from using its form to dominate political financing. It is rather because, according to the Court, this "antidistortion" rationale for campaign finance restrictions is not a legitimate governmental interest at all.[76] As to the other significant potential rationale—the politically destabilizing effect of the appearance of undue electoral influence—Justice Kennedy further ventured into democratic theory, writing without evidence that "[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy."[77] *Citizens United* was decided on the basis of deeply contested normative and empirical premises that, if accepted, undermine not just section 203

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70 *See* JEFFREY TOOBIN, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT 167 (2012).

71 *See id.*

72 *See id.* at 168.

73 *See id.*

74 *See id.* at 182.

75 *See* Citizens United v. FEC, 558 U.S. 310, 376 (2010).

76 *See id.* at 349–50.

77 *Id.* at 360.

of BCRA, but the very notion of restrictions on the financing of political campaigns. This opinion is as deep as it gets.

2. *Shelby County v. Holder*

The pattern evident in *Citizens United*—a narrow and seemingly unnecessary shot across the bow preceding a deep and ideologically conservative decision—repeated itself in *Shelby County v. Holder*.[78] At issue was the statutory formula for determining which jurisdictions were covered by section 5 of the Voting Rights Act of 1965 (VRA).[79] Section 5 subjects covered jurisdictions to the requirement that any changes in their voting practices be precleared by the Department of Justice or by a federal court in Washington, D.C.[80] Congress reauthorized the Act in 2006 without altering the formula (found in section 4(b) of the Act), even though that formula had been based on racial disparities in voter registration and turnout from the 1972 presidential election.

The constitutional basis for section 5 of the Voting Rights Act is section 2 of the Fifteenth Amendment, which authorizes Congress to enforce the Amendment's ban on racial discrimination in voting "by appropriate legislation."[81] Up until the *Shelby County* decision, the reigning framework for determining the reach for analogous provisions—namely section 5 of the Fourteenth Amendment—was the test first proposed in *City of Boerne v. Flores*[82]: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[83]

The case in which many observers expected the Court to invalidate the VRA's coverage formula was its 2009 decision in *Northwest Austin Municipal Utility District No. 1 v. Holder* (*NAMUDNO*).[84] There, a utility district in Texas, a covered state, sought to establish its eligibility for a "bailout" from the preclearance requirements of section 5 based on its asserted history of nondiscrimination in voting.[85] The district court had ruled that the statute contemplated bailout only for "a State or political subdivision," and that the utility district did not meet either

78 133 S. Ct. 2612 (2013).
79 *See id.* at 2618–19.
80 52 U.S.C. § 10304 (2012 & Supp. III 2016).
81 U.S. CONST. amend. XV, § 2.
82 521 U.S. 507 (1997).
83 *Id.* at 520.
84 557 U.S. 193 (2009).
85 *See id.* at 196–97.

definition. The district's alternative argument was that the preclearance requirements were unconstitutional.[86]

Chief Justice Roberts wrote an opinion for eight members of the Court that construed the statute as permitting bailout for the utility district. The holding was explicitly grounded in constitutional avoidance. The use of the avoidance canon in NAMUDNO was aggressive. The Act defines a "political subdivision" as "any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."[87] The utility district was not a county or parish nor did it conduct voter registration. The Court's 1980 decision in *City of Rome v. United States*[88] had held that political subdivisions that were covered only because they were part of a covered state were ineligible for bailout.[89] The Department of Justice had issued regulations that indicated its view, consistent with the text of the statute, that only political subdivisions that register voters were eligible for bailout.[90] As Richard Hasen has indicated, the *NAMUDNO* Court's reading of the statute was considered by many voting rights scholars to be "manifestly implausible."[91]

The NAMUDNO decision is both narrow and shallow. It is narrow in that it decides the bailout eligibility of a single municipal utility district without committing the Court to any other conclusions. It is shallow in that, by relying on constitutional avoidance, the Court permits constitutional concerns to motivate the particular decision without requiring agreement on whether those concerns are meaningful.

The public does not yet know what happened behind the scenes in *NAMUDNO*. The best available evidence indicates that the Chief Justice engaged his minimalist instincts by alerting Congress to a serious constitutional concern before overruling its work. The Justices in the Shelby County majority were all on the Court at the time of *NAMUDNO*. Justice Kennedy, often considered the weak link of the Roberts Court's conservative bloc, asked questions at oral argument in

86 *See id.* at 200–01.

87 52 U.S.C. § 10310(c)(2) (2012 & Supp. III 2016).

88 446 U.S. 156 (1980).

89 *See id.* at 167. In 1982, Congress amended the Voting Rights Act to make eligible for bailout political subdivisions that had never been independently subject to the preclearance coverage formula, but this amendment appears to apply only to units that meet the Act's definition of a "political subdivision." *See* Voting Rights Act Amendment of 1982, Pub. L. No. 97-205, 96 Stat. 131, 131–32 (codified as amended at 52 U.S.C. § 10303(a)(1)).

90 *See* 28 C.F.R. §§ 51.2, 51.5 (2015).

91 Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 182.

NAMUDNO that forecast the ultimate holding in *Shelby County*.[92] As with *Wisconsin Right to Life* and BCRA section 203, had the Chief Justice wanted to invalidate or neutralize section 5 of the Voting Rights Act in 2009, it is likely that he would have had the votes to do so.

In *Shelby County*, the Court held that the coverage formula in section 4(b) of the Act is unconstitutional because it violates "the fundamental principle of equal [state] sovereignty" without a sufficient showing that its distinctions between states are related to the underlying Fifteenth Amendment problem.[93] *Shelby County* is arguably a narrow opinion, but it is not shallow. It is arguably narrow because it did not invalidate section 5's preclearance requirements, as many observers assumed it would; it only invalidated the coverage formula, which Congress is theoretically free to amend in whatever way it sees fit.[94] That amendment, were it forthcoming, would likely prompt a new round of litigation about the new formula, and a new Court decision. This back-and-forth between Congress and the Court would be just the kind of dialogue a narrow decision is designed to promote.[95] Had the Court instead invalidated section 5, it would have foreclosed entirely the most successful federal remedial scheme in the Nation's history.[96]

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92 Justice Kennedy said to Neal Katyal, who as Acting Solicitor General argued the case on behalf of the government:

> Congress has made a finding that the sovereignty of Georgia is less than the sovereign dignity of Ohio. The sovereignty of Alabama, is less than the sovereign dignity of Michigan. And the governments in one are to be trusted less than the governments than the other. . . . [T]his is a great disparity in treatment, and the government of the United States is saying that our States must be treated differently. And you have a very substantial burden if you're going to make that case.

Transcript of Oral Argument at 34–35, *NAMUNDO*, 557 U.S. 193 (2009) (No. 08-322).

93 Shelby County v. Holder, 133 S. Ct. 2612, 2622, 2631 (2013).

94 *See id.* at 2631.

95 Some critics of the *Shelby County* decision have noted that the Chief Justice was surely aware that a Republican-led Congress in a polarized era of legislative inertia was not going to amend the Act's coverage formula, and so the Court's decision in effect invalidated section 5. *See, e.g.*, M. Akram Faizer, *Reinforced Polarization: How the Roberts Court's Recent Decision to Invalidate the Voting Rights Act's Coverage Formula Will Exacerbate the Divisions That Bedevil U.S. Society*, 45 CUMB. L. REV. 303, 346 (2014–15); Joel Heller, Shelby County *and the End of History*, 44 U. MEM. L. REV. 357, 404–05 (2013). But for the Court to leave in place what it believes to be an irrational statute based on its prediction that Congress is unlikely to replace it would have been an even more aggressive posture than the one the majority actually took. Justice Thomas concurred on the ground that the Court should have invalidated section 5, and so that disposition was plainly on the table. *See Shelby County*, 133 S. Ct. at 2631 (Thomas, J., concurring).

96 The decision is only *arguably* narrow because, as Justice Ginsburg noted in her dissenting opinion, the Court permitted a facial challenge to section 5 by a litigant—Shelby County, Alabama—that could easily have been named as a covered jurisdiction under an acceptable coverage formula. *See Shelby County*, 133 S. Ct. at 2645–48 (Ginsburg, J., dissenting). Although entertaining an as-applied challenge is ordinarily the more judicious course, which jurisdictions may be covered under a constitutionally acceptable formula is a *relative* assessment that

Shelby County is not, however, a shallow opinion. It relies on an untested, controversial, and potentially quite broad theory of "equal state sovereignty" that had never been the basis for a decision of the Court.[97] As Justice Ginsburg wrote in her dissent, the Court's reliance on that principle as a burden-shifting device "is capable of much mischief," insofar as "[f]ederal statutes that treat States disparately are hardly novelties."[98] The shallower approach would have been to treat the case as an ordinary application of the congruence and proportionality test, which was well-established by the time the Court heard *Shelby County*. The road the Court took instead was far more generative.

3. *NFIB v. Sebelius*

The question in *NFIB* was whether Congress had the constitutional power to require Americans to purchase health insurance.[99] The Court held, per Chief Justice Roberts, that while Congress could not "require" Americans to purchase health insurance, the Affordable Care Act (ACA) is susceptible to an interpretation that renders the regulatory scheme a tax that merely encourages the purchase of such insurance.[100] The Court has long endorsed Congress's use of federal taxes to encourage behavior by private persons or states.[101] The Court also held that Congress had overreached in its use of its spending power (whose source in Article I section 8 is the same as its taxing power) to encourage states to expand their Medicaid coverage in line with federal benchmarks.[102]

Although there is much to criticize in *NFIB*, it is a narrow opinion par excellence. Chief Justice Roberts manifestly had the votes to invalidate the ACA in its entirety and he declined to do so. Moreover, the Chief Justice's opinion strains visibly to avoid making new

requires the drawing of a hypothetical statute. Whatever one thinks of the merits of the Court's pursuing this course of action—and I myself am sympathetic to it—doing so would have been strikingly immodest.

97 *See id.* at 2648–49; Zachary S. Price, NAMUDNO*'s Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24 (2013). *But see* Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087 (2016) (arguing that the equal sovereignty principle has deeper pedigree than the *Shelby County* opinion articulated).

98 *Shelby County*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting).

99 132 S. Ct. 2566, 2577 (2012).

100 *See id.* at 2593–94.

101 *See* Sonzinsky v. United States, 300 U.S. 506, 513 (1937) ("[I]t has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.").

102 *See NFIB*, 132 S. Ct. at 2606–07.

constitutional law. Understanding how that can be so in an opinion that includes as many as four unprecedented constitutional law holdings requires some additional discussion of the opinion's relationship to then-existing congressional power doctrine.

Chief Justice Roberts wrote that neither Congress's Commerce Clause power nor its power under the Necessary and Proper Clause permits it to require Americans to regulate "inactivity."[103] Until *NFIB*, there was no precedent for the proposition that the Commerce Clause may not be used to regulate inactivity that substantially affects commerce. But the ACA's structure was unusual. Rather than guarantee insurance coverage directly by enrolling Americans in a government-created health insurance plan, Congress chose largely to retain the existing private insurance infrastructure and require Americans to contract into it.[104] This degree of federal intrusion into the private economic decisions of most of the population was at least unusual.

When it comes to Commerce Clause doctrine, novelty matters. In *United States v. Lopez*, the Court invalidated a congressional statute that prohibited the possession of a handgun within the vicinity of a school.[105] As Justice Breyer demonstrated in his dissenting opinion, it is easy to articulate ways in which the presence of dangerous weapons in and near schools can affect interstate commerce. The key to the majority opinion was that Congress's exercise of its regulatory authority must leave in place a remainder of activity subject only to state and local regulation (if any). The Court's response to each of the government's theories of the relationship between gun possession near schools and interstate commerce was that the same theory would imply no limitation on which activities the government could regulate.[106] As Chief Justice Rehnquist wrote for the Court, "Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."[107] Where once the Court identified this injunction with the text of the Tenth

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103 *See id.* at 2592–93. None of Chief Justice Roberts's colleagues joined this part of his opinion, even though it is consistent with the joint dissent of Justices Scalia, Kennedy, Thomas, and Alito. *See id.* at 2644–46 (Scalia, J., Kennedy, J., Thomas, J., Alito, J., dissenting). Reporting on the case has suggested that these dissenters refused to join any part of the Chief Justice's opinion out of anger over his reportedly switching his vote in the case. *See* Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012, 9:43 PM), http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law (This Article makes no assumptions about the accuracy of this reporting except to note that the dissenters' refusal to join is puzzling on its face.).

104 *See NFIB*, 132 S. Ct. at 2580.

105 United States v. Lopez, 514 U.S. 549 (1995).

106 *See id.* at 564.

107 *Id.*

Amendment,[108] it is now fair to call it a structural inference that operates as a background constraint on the federal regulatory state.[109]

In Commerce Clause cases, then, precedent requires the government to grapple with the presence or absence of a federalism remainder. This is why the question of whether Congress hypothetically could regulate consumption of vegetables, raised before the case was heard, at oral argument, and in several opinions,[110] was so devastating. The hypothetical was doctrinally, and not just rhetorically, significant. Although there is no similar case directly requiring such a remainder under the Necessary and Proper Clause, any regulation of activity on the ground that it substantially affects interstate commerce may be recharacterized as a regulation of the same activity on the ground that doing so is a necessary and proper means of regulating interstate commerce directly.[111]

The relative novelty of requiring individuals to engage in market activity opened the government to the doctrinally supported demand for an articulable limit that contemplates a sphere of life that the federal government may not touch. The government's, and the dissent's, response to that demand was inadequate, no doubt in part because none of the dissenters has ever embraced that aspect of Commerce Clause doctrine.[112] This discussion means only to suggest that invalidating the ACA was a doctrinally available outcome—the opinion *writes*—whether or not it would have been the best or most defensible outcome.[113]

Now consider that Chief Justice Roberts evidently believed not only that the absence of a federalism remainder was dispositive of the Commerce Clause and Necessary and Proper Clause arguments, but also that the best reading of the statute was that it imposed a "penalty" rather than a "tax."[114] And consider that it is beyond any real doubt that he had the votes to strike the law down *in its entirety*. To rely on

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108 *See* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

109 *See* United States v. Morrison, 529 U.S. 598, 613 (2000) (reaffirming the necessity of placing articulable limits on the reach of the Commerce Clause).

110 *See* Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 69–70 (2013).

111 *Cf.* Gonzales v. Raich, 545 U.S. 1, 22 (2005) (affirming Congress's power to regulate home-grown marijuana under both the Commerce Clause and the Necessary and Proper Clause).

112 *See Lopez*, 514 U.S. at 609 (Souter, J., dissenting); *see also Morrison*, 529 U.S. at 639 (Souter, J., dissenting).

113 Indeed, my own view is that striking down the individual mandate underestimates the role health insurance plays in the national economy. *See NFIB*, 132 S. Ct. 2566, 2609–10 (2012) (Ginsburg, J., dissenting).

114 *See id.* at 2593–94, 2600 (Roberts, C.J.).

constitutional avoidance to nonetheless uphold the law is almost pathologically narrow.

Notably, existing Taxing Power doctrine looked very different from existing Commerce Clause doctrine at the time *NFIB* was decided. *Lopez* and *United States v. Morrison*, which held that a federal civil remedy for victims of domestic abuse exceeded the federal government's Commerce Clause power,[115] had each been decided in the seventeen years leading up to *NFIB*. By contrast, the Court had not held that an exercise of the Taxing Power was unduly coercive or punitive and, therefore, an impermissible penalty, since the *Lochner* Era.[116] Chief Justice Roberts issued shots across the bow in *Wisconsin Right to Life* and in *NAMUDNO* that alerted Congress and the public to the Court's conservative instincts. *Lopez* and *Morrison* were the analogs in the Commerce Clause area. There was no equivalent with respect to the Taxing Power. Indeed, the joint dissent did not contest that the Taxing Power would give Congress the authority to enact the ACA if the individual mandate took the form of a tax.

It is fair to wonder whether the Chief Justice's opinion in *NFIB* may be called narrow in light of the fact that the elaborate Commerce Clause "holding" might be dicta. If the ACA's individual mandate is an acceptable exercise of federal taxing power, then it was "not necessary to decide more."[117] Note, though, that Chief Justice Roberts did not commit himself to the view that the mandate was an acceptable exercise of the Taxing Power. Indeed, he wrote that "[t]he most straightforward reading of the mandate is that it *commands* individuals to purchase insurance."[118] Brushing that command to the side required the Chief Justice to invoke a version of the avoidance canon. It is only a *version* of the canon because, on another reading of constitutional avoidance—sometimes called "modern avoidance"—its purpose is to obviate the need for precisely the constitutional analysis Chief Justice Roberts nevertheless indulged.[119] Choosing a more aggressive form of constitutional avoidance does not much undermine narrowness, however, since he still upheld the law. Indeed, this approach might *serve* narrowness in that Chief Justice Roberts upheld a law on avoidance grounds even after determining that it was otherwise unconstitutional.

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115 *Morrison*, 529 U.S. at 627.

116 *See* United States v. Constantine, 296 U.S. 287 (1935); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

117 *See* Georgetown Address, *supra* note 4.

118 *NFIB*, 132 S. Ct. at 2593 (emphasis added).

119 *See* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2116–17 (2015).

Narrowness does not mean abandoning one's substantive views; it means declining to *act* upon those views unless and until necessary.[120]

Even though Chief Justice Roberts's brand of avoidance in *NFIB* is consistent with narrowness, it does reflect a penchant for deep rather than shallow constitutional adjudication. Conducting avoidance in the way he did required him to write a *solo* opinion articulating an unprecedented theory of the reach of the Commerce Clause.

His opinion eliminating certain conditions on the ACA's inducement of an expansion of Medicaid coverage was also both narrow and deep. The Court held that, because the cost of refusing to expand Medicaid was the possibility that the Administration might withhold all existing Medicaid funds, states had no practical choice but to accede to the expanded coverage.[121] Based on prior cases, the federal government does not have the authority to commandeer a state's executive or legislative apparatus to implement a federal program.[122] The ACA case represents the first time the Court had ever held that an exercise of Congress's spending power was unconstitutionally coercive.[123]

Still, the Court had previously held that coercion was a kind of omnibus prong of the relevant doctrinal test,[124] and here Chief Justice Roberts relied on facts unique to Medicaid in holding that the ACA crossed the line. Most significantly, federal Medicaid funding amounts to between ten and twenty percent of the average state's total budget, which is true of no other federal funding program.[125] The fact that this decision was susceptible to being read as good-for-this-case-only seems likely to have influenced the decision of two more liberal Justices, Justice Breyer and Justice Kagan, to join the Chief Justice's opinion.

It is also worth noting that Chief Justice Roberts was almost certainly correct that the threat of withdrawal of existing Medicaid funding would have been a but-for cause of many states' participation in the Medicaid expansion. As of this writing, nineteen states have refused to expand Medicaid in the way the ACA contemplates.[126] It is unlikely that the number would be nearly that high—or even non-zero—if the cost of non-compliance was a withdrawal of existing federal Medicaid

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120 *See* Citizens United v. FEC, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) ("It should go without saying, however, that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.").

121 *See NFIB*, 132 S. Ct. at 2604–05.

122 *See* Printz v. United States, 521 U.S. 898, 933 (1997); New York v. United States, 505 U.S. 144, 188 (1992).

123 *See NFIB*, 132 S. Ct. at 2643 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

124 *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987).

125 *NFIB*, 132 S. Ct. at 2604–05; *id.* at 2662–63 (Ginsburg, J., dissenting).

126 *Current Status of State Medicaid Expansion Decisions*, HENRY J. KAISER FAMILY FOUND. (Oct. 14, 2016), http://kff.org/health-reform/slide/current-status-of-the-medicaid-expansion-decision.

funding. To take just one typical example, Georgia, which has to date opted not to expand Medicaid, froze its existing expansion plan immediately when the Court issued its decision.[127] In the face of fairly demonstrable degrees of federal coercion, the decision to uphold the ACA in its enacted form would be a decision to ignore that coercion. That position would be a perfectly respectable one for a champion of the federal regulatory state to adopt, but it is also reasonable for a regulatory skeptic or a federalism proponent to take the opposite view.

Chief Justice Roberts's *NFIB* Medicaid opinion was deep rather than shallow, however. The fact that only two of his colleagues joined the opinion is some evidence of that depth.[128] So, too, is the Chief Justice's reliance on the absence of a meaningful choice—rather than a more specific doctrinal test—as a touchstone of a Spending Clause violation. The leading Spending Clause case prior to this one was *South Dakota v. Dole*,[129] in which the Court applied a multifactor test to uphold a federal program that denied highway funds to states with a drinking age under twenty-one.[130] Under *Dole*, a valid exercise of the Spending Power must be in pursuit of the general welfare, its conditions must be unambiguous, the conditions must be related to the federal interest in particular national projects, and the funding conditions must not violate an independent constitutional provision.[131] The *Dole* test provides the Court with multiple avenues through which it may invalidate a statute as exceeding the powers granted under the Spending Clause. Chief Justice Roberts did not recite the *Dole* test in his opinion, relying instead solely on an assessment of whether the federal law is coercive. In order to achieve consensus, this approach requires agreement on a single, vague, and highly normatively charged standard. Chief Justice Roberts's opinion deepened the Spending Clause test.

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127 *See* Misty Williams, *Medicaid Overhaul Postponed*, ATLANTA J.-CONST., July 14, 2012, at A1.

128 As noted above, the reason Justices Scalia, Kennedy, Thomas, and Alito did not join portions of the Chief Justice's opinion that they appeared to agree with is not transparent. *See supra* note 103.

129 483 U.S. 203 (1987).

130 *See id.* at 207–08.

131 *See id.*

C. *Other Examples*

Many other examples suggest Chief Justice Roberts's maximinimalism, his commitment to narrow but deep decision-making strategies.

For example, in another controversial opinion, *Parents Involved in Community Schools v. Seattle School District No. 1*,[132] he wrote a plurality opinion that labeled two public school districts' race-conscious integration plans as impermissible "racial balancing."[133] *Parents Involved* is obviously deep rather than shallow: Chief Justice Roberts's denunciation of race-conscious school assignment plans as "patently unconstitutional"[134] threatened to neuter the ability of local governments to remedy racial segregation in schools. The Chief Justice's commitment to this restricted view of government power in this domain was so strong that he declined to alter his opinion sufficiently to obtain Justice Kennedy's vote and thereby create an opinion of the Court.[135] Still, it is easy to overlook that, for all its polemics, Chief Justice Roberts's *Parents Involved* opinion sought to distinguish rather than overrule the Court's opinion in *Grutter v. Bollinger*,[136] which upheld the race-based affirmative action plan of the University of Michigan Law School.[137] An individual judge who departs from precedent without feeling the need to formally overrule it is pursuing a narrow path.[138]

More broadly, Chief Justice Roberts is attracted to a number of doctrinal areas that speak to his narrowness. For example, a narrow judge has a relative preference for delaying merits adjudication of constitutional questions. To wit, other than summary reversals, Chief Justice Roberts has never authored or joined a Supreme Court opinion that argued that the state court judgment in a case governed by the habeas provisions of the Antiterrorism and Effective Death Penalty Act was contrary to or involved an unreasonable application of clearly established federal law. He has also never authored or joined an opinion denying qualified immunity to a state officer accused of a constitutional violation. Indeed, along with all of his colleagues, he joined Justice Alito's 2009 opinion in *Pearson v. Callahan* holding that a federal court,

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132 551 U.S. 701 (2007).

133 *Id.* at 729–30.

134 *Id.* at 730 (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2003)).

135 *See id.* at 787–88 (Kennedy, J., concurring in the judgment).

136 539 U.S. 306 (2003).

137 *See id.* at 343.

138 Consider also Chief Justice Roberts's self-consciously fact-sensitive opinion upholding the right of members of the Westboro Baptist Church to picket on a public sidewalk near the funeral of a U.S. soldier killed in action. *See* Snyder v. Phelps, 562 U.S. 443, 460 (2011) ("Our holding today is narrow.").

including the Supreme Court, was not obligated to reach the merits of the underlying constitutional question once it decides that qualified immunity attaches.[139] The natural effect of *Pearson* will be to retard the development of substantive constitutional doctrine.

This Article's characterization of Chief Justice Roberts as narrow and deep is a general one, and it admits of exceptions. To take one example, the Chief Justice's opinion in *McCullen v. Coakley* held that Massachusetts's law creating a buffer zone around abortion clinics need not be analyzed under strict scrutiny (because it was content-neutral) but nonetheless failed constitutional scrutiny because it was not narrowly tailored.[140] This holding was both narrow—it focused intently on the facts of the particular Massachusetts law—and shallow—it did not rely upon a broad First Amendment theory and managed to reach a result that garnered the support of all nine Justices.

Another counterexample is *Graham v. Florida*,[141] the 2010 opinion holding that juveniles who were not convicted of a homicide are categorically ineligible for a mandatory sentence of life without parole.[142] Chief Justice Roberts wrote a concurring opinion in which he argued that eligibility for mandatory life without parole should be decided on a case-by-case basis but agreed that the petitioner should not receive such a sentence.[143] Had the Chief Justice's opinion been a holding of the Court, it would have been both narrow and shallow.

More generally, the October 2015 Court Term, which was bifurcated by Justice Scalia's death, presented numerous opportunities for narrow and shallow opinions, which the Roberts Court often exploited. In *Zubik v. Burwell*,[144] the Court disposed of a controversial case involving the procedure by which the federal government exempts religious employers from the ACA birth control mandate by ordering the parties to settle on terms the Court itself devised.[145] In *Spokeo, Inc. v. Robins*,[146] the Court sidestepped an important question of Congress's capacity to found Article III standing on a violation of the Fair Credit Reporting Act and simply remanded the case back to the Court of Appeals for a second look.[147] In *United States v. Texas*,[148] the Court divided 4-4 and, therefore, it affirmed the judgment of the Fifth Circuit

139 Pearson v. Callahan, 555 U.S. 223, 236–38 (2009).
140 McCullen v. Coakley, 134 S. Ct. 2518, 2534, 2537 (2014).
141 560 U.S. 48 (2010).
142 *See id.* at 74.
143 *See id.* at 86 (Roberts, C.J., concurring in the judgment).
144 136 S. Ct. 1557 (2016).
145 *See id.* at 1559–60.
146 136 S. Ct. 1540 (2016).
147 *See id.* at 1544–45.
148 136 S. Ct. 2271 (2016) (per curiam).

enjoining the Administration's deferred immigration enforcement program.[149] Per custom, the Court issued no opinion in support of its affirmance by an equally divided Court, thereby effecting a decision that was both narrow—it created no precedent outside of the Fifth Circuit—and shallow—the Justices' substantive views were entirely obscure.

We might have to wait many decades before we know Chief Justice Roberts's role in these dispositions. What we do know is that in the most significant cases of his tenure, he has consistently proceeded both narrowly and deeply. Narrowness is in line with his public comments about his judicial philosophy, but depth is not. The next Part offers a normative assessment, and qualified defense, of a Supreme Court Justice's marrying of narrowness to depth.

III. ASSESSMENT

This Part offers a tentative, and generally positive, assessment of the Chief Justice's lived preference for narrowness and depth in important and controversial constitutional cases. In brief, the combination of narrowness and depth—maximinimalism—is consistent with a dialogic approach to constitutional law that appropriately softens the strongest form of judicial review but does so without abandoning an equally appropriate commitment to judicial transparency. Whether or not Chief Justice Roberts has succeeded in striking the right notes in the cases discussed, the aspiration towards narrowness and depth, while not without flaws, has much to commend it.

Framing this assessment requires some clarification of its normative criteria. Many of the Chief Justice's detractors are likely to dispute this Article's characterization of *Citizen's United*, *Shelby County*, or *NFIB* as narrow opinions. Some are likely to view lack of deference to Congress's considered judgment as necessarily broad.[150] Others are likely to view Chief Justice Roberts's positions in these cases as substantively unreasonable and therefore as evidence of his bad faith.[151]

The response to both of these objections is about the same. For minimalism to qualify as something other than judicial abdication or ad hoc adjudication, it must guide and qualify some set of substantive commitments. This Article assumes that the rule of law under a system

149 *See id.* at 2272; Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015).

150 *See, e.g.*, Diane S. Sykes, Lecture, *Minimalism and Its Limits*, 2015 CATO SUP. CT. REV. 17, 33 (referring to *Citizens United* as "decidedly nonminimalist").

151 *See generally* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 889 (2016) (identifying varieties of bad-faith constitutional interpretation and diagnosing the absence of a discourse of bad faith in constitutional doctrine).

of judicial review occasionally requires courts to invalidate acts of Congress. It also assumes that in deeply contested constitutional cases, there typically exist reasonable, lawyerly arguments that support a range of ideological commitments and case outcomes. In my view, each of the cases discussed in this Article fit that pattern; those who disagree can assume arguendo for the purposes of this Part that good-faith legal arguments exist in support of the Chief Justice's positions.

Minimalism is not about not having views of the law or not pushing it in one's desired direction when the law is uncertain. It is about doing that pushing incrementally. Narrow opinions move the law gradually rather than all at once. The significant downside of narrowness is lack of legal clarity and predictability. But this downside is most salient in private and administrative law, where legal uncertainty can prevent coordination and planning and can upset investment-backed expectations. In cases in which constitutional or other public rights are at issue, by contrast, legal uncertainty can turn from vice to virtue. In such cases, the Constitution itself is typically unclear, leaving citizen movements and organized interest groups to vie for the law's ear. Allowing this process to play out for longer rather than cutting it off through what Robert Cover called "jurispathic" court decisions can serve the values of a pluralistic, participatory democracy.[152]

Narrow decisions leave open just this kind of deliberative space. In the years that follow a narrow shot across the bow such as *Wisconsin Right to Life* or *NAMUDNO*, Congress, states, or localities can change the law either to conform, respond to, or challenge the Court's decision; members of the general public or the media can criticize the Court and influence the politics of the nomination process;[153] and individual Justices can retire, pass away, or change their views in response to public discourse.[154] The lived experience of constitutional law is the evolution

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152 Robert M. Cover, Foreword, Nomos *and Narrative*, 97 HARV. L. REV. 4, 40 (1983); *see also* SUNSTEIN, *supra* note 5, at 54 (arguing that minimalism "allows democratic processes room to maneuver"*); id.* at 59 ("The case for minimalism is especially strong when the area involves a highly contentious question now receiving sustained democratic attention.").

153 *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–78 (2001) (discussing the prospect of gradual constitutional change through capture of the nomination process by political partisans).

154 Consider, for example, the narrow decision in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), which held that the First Amendment prohibits a public sector union from collecting agency fees from home health care workers, who are quasi-private sector employees and who do not enjoy the same benefits from collective bargaining as many other workers. *See id.* at 2638, 2644. It seems probable that the votes existed on the *Harris* Court to rule more broadly by overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which permits such fees and which Justice Alito's majority opinion heavily criticized. *See Harris*, 134 S. Ct. at 2652–53 (Kagan, J., dissenting) ("Readers of today's decision will know that *Abood* does not rank on the majority's top-ten list of favorite precedents—and that the majority could not restrain itself from saying (and saying and saying) so."). In the 2015 Term, prior to Justice Scalia's death, the Court again

of what Robert Post calls the "constitutional culture."[155] Narrowness gives that culture breathing room.

But there is a problem with combining narrowness with shallowness, as Sunstein generally urges. The benefit of narrowness is that it tees up an issue for additional public deliberation without actually deciding it. But effective teeing up of constitutional issues requires a measure of transparency about the Court's disposition and intentions. Inasmuch as shallow decisions obscure the basis for the Court's decisions, they undermine the deliberative advantages, such as they are, of proceeding narrowly. Individual Justices and the Court itself enable public accountability by supplying reasons for their decisions. As Bickel emphasized, offering principled reasons for their decisions differentiates judges from other political actors who have the discretion to act expediently.[156]

Consider, then, the situation after *Wisconsin Right to Life*, after *NAMUDNO*, and after *NFIB*. The Court had not, respectively, struck down BCRA section 203, any part of the Voting Rights Act, or—in the main—the Affordable Care Act. At the same time, it had alerted Congress and the American public of its distaste for each of these laws and the constitutional theories that supported them. There was no real mystery as to what the Court would do with the next similar case, and yet the Court had not meaningfully acted. This maximinimalist posture has obvious advantages over a Court that implements its ideological agenda either immediately and without pretense or incrementally but obscurely.

What this posture calls to mind is a relatively strong version of weak-form judicial review. Weak-form review describes a range of approaches of courts around the world that lie between the poles of legislative and judicial supremacy. A weak-form model encourages dialogue between political and judicial institutions. For example, Stephen Gardbaum has identified what he describes as the "new commonwealth model," common to Canada, the United Kingdom, and New Zealand, where under courts are empowered to engage in review under a bill of rights but the legislature is formally given the last word in response to a declaration of unconstitutionality or incompatibility with

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heard oral argument over whether *Abood* should be overruled. *See* Transcript of Oral Argument, Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016) (No. 14–915). Justice Scalia died before an opinion could issue, and the Court divided 4-4, thereby failing to produce a binding legal precedent. *See Friedrichs*, 136 S. Ct. at 1083. This sequence of events illustrates both the risk and the opportunity inherent in a narrow approach to constitutional adjudication.

155 Robert C. Post, Foreword, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

156 BICKEL, *supra* note 17, at 69.

established law.[157] In Germany, where the Constitutional Court has the final word, the Court has nonetheless been known to sever its opinion from its mandate to give additional time for the political branches to respond to a declaration of unconstitutionality.[158] This approach reflects a degree of respect for the constitutional capacity of the political branches and social movements in the context of highly charged constitutional controversies.

CONCLUSION

Chief Justice Roberts arrived at the Court espousing a shallow, and perhaps narrow, approach to adjudication. In significant constitutional cases, his approach has instead been narrow and deep, what this Article calls maximinimalism. Sunstein describes this combination as rare. "[A] deep account will in all likelihood have applications to cases other than the one before the Court," he writes. "Ambitious reasoning typically produces width."[159]

In being atypical, Chief Justice Roberts lights the way to an intriguing jurisprudence, one that engages nonjudicial actors to participate in constitutional law without abdicating judicial supremacy. Maximinimalism exposes the Court's ideological seams but preserves the option of pivoting, drawing back, or accelerating in a later case. With Chief Justice Roberts, we have gotten what we have seen. Just not right away.

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157 *See* STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE (2013).

158 *See* Susanne Baer, *Equality: The Jurisprudence of the German Constitutional Court*, 5 COLUM. J. EUR. L. 249, 274 (1999).

159 SUNSTEIN, *supra* note 5, at 18.