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## Harlan on My Mind: Chief Justice Roberts and the Affordable Care Act

Timothy P. O'Neill\*

In June 2012, the *California Law Review* published a revised version of Judge Richard A. Posner's<sup>1</sup> recently delivered lecture titled *The Rise and Fall of Judicial Self-Restraint*.<sup>2</sup> The article analyzed James Bradley Thayer's famous contention that courts should presumptively defer to the judgments of legislatures.<sup>3</sup> More specifically, Thayer argued that a statute should be invalidated only if its unconstitutionality is "so clear that it is not open to rational question."<sup>4</sup> Posner noted that this is more than just a general spirit of judicial deference. Rather, "it's thumb-on-the-scale deference to legislative judgments that is the hallmark of Thayerism."<sup>5</sup> Posner then bluntly announced

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1. Richard Posner is an author and judge of the U.S. Court of Appeals for the Seventh Circuit. He has written over 2500 published judicial opinions and teaches at the University of Chicago Law School. His most recent books are *HOW JUDGES THINK* (2008), *LAW AND LITERATURE* (3d ed. 2009), *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* (2009). See *Richard A. Posner*, U. OF CHI. L. SCH., [www.law.uchicago.edu/faculty/posner-r](http://www.law.uchicago.edu/faculty/posner-r) (last visited July 10, 2012).

2. Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519 (2012).

3. See generally Symposium, *One Hundred Years of Judicial Review The Thayer Centennial Symposium*, 88 Nw. U. L. Rev. 1 (1993) (discussing James Bradley Thayer's work and his influence on constitutional jurisprudence).

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

5. Posner, *supra* note 2, at 537.

that Thayerism is now dead: “[t]here are no Thayerian originalists on the Supreme Court—no Thayerians on the Court, period.”<sup>6</sup>

On June 28, 2012, Chief Justice John Roberts delivered the opinion of the Supreme Court in the most anticipated case in the last decade: the constitutional challenge to the Patient Protection and Affordable Care Act.<sup>7</sup> And, in doing so, he proceeded to place one thumb on the Thayerian scale and the other in Posner’s eye. Roberts began his constitutional analysis by citing a nineteenth-century case for the proposition that proper respect for Congress mandates that the Court may strike down a statute only if “the lack of constitutional authority to pass [the] act in question is clearly demonstrated.”<sup>8</sup> He noted that the Supreme Court possessed “neither the expertise nor the prerogative to make policy judgments.”<sup>9</sup> The Constitution entrusts policy judgments “to our Nation’s elected leaders, who can be thrown out of office if the people disagree with them. It is not [the Supreme Court’s] job to protect the people from the consequences of their political choices.”<sup>10</sup> He went on, of course, to uphold the constitutionality of the Affordable Care Act.<sup>11</sup>

Chief Justice Roberts has never been shy about finding acts of Congress to be unconstitutional; in fact, on the same day he upheld the Affordable Care Act he also struck down the federal Stolen Valor Act.<sup>12</sup> So where did this newly minted Thayerian justice come from?

This Essay will attempt to answer that question. It will begin by further examining Posner’s article and the reasons he provided for the death of Thayerian review. It will then turn to an examination of one justice in particular whom Chief Justice Roberts has cited as his model: the younger Justice John Marshall Harlan, perhaps the last justice on the Court who exhibited Thayer-like restraint. It will conclude by contending that when faced with the most important case of his judicial career, Roberts took a Thayer-like approach that might have been similar to the approach his judicial model, Justice Harlan,

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6. *Id.*

7. The Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A (2010) (hereinafter “Affordable Care Act”); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, No. 11-393 (U.S. June 28, 2012).

8. *Nat’l Fed’n*, No. 11-393, slip op. at 6 (quoting *United States v. Harris*, 106 U.S. 629, 635 (1883)).

9. *Id.*

10. *Id.*

11. *Id.* at 44 (“The Affordable Care Act’s requirement that certain individuals pay a financial penalty . . . may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”).

12. *United States v. Alvarez*, No. 11-210 (U.S. June 28, 2012) (finding the Stolen Valor Act, 18 U.S.C. § 704(b) (2006), facially invalid under the First Amendment); *see also Sorrell v. IMS Health, Inc.*, No. 10-779 (U.S. June 23, 2011) (finding the Prescription Confidentiality Law, a Vermont statute restricting the sale, disclosure, and use of records detailing the prescribing practices of individual doctors, invalid under the First Amendment); *Davis v. Fed. Election Comm’n*, 554 U.S. 724 (2008) (finding the Bipartisan Campaign Reform Act (the McCain-Feingold Act) unconstitutional on First Amendment grounds); *Brown v. Entm’t Merchs. Ass’n*, No. 08-1448 (U.S. June 27, 2011) (finding a California law barring the sale of certain violent video games to children without parental supervision invalid under the First Amendment).

would have taken. Thayer-like restraint may be dead, but it appears to have come back to life for at least one decision on June 28, 2012.

## I.

### THE RISE AND FALL OF JUDICIAL SELF-RESTRAINT

Judge Posner began his article by first distinguishing between three possible definitions of “judicial self-restraint.”<sup>13</sup> Type 1 is the idea that judges simply apply the law, they do not make it. This can be referred to as “legalism,” “formalism,” or “the law made me do it.”<sup>14</sup> Type 2 is a tendency to defer to decisions made by other officials, whether they are legislative or executive. Posner referred to this as “modesty” or “institutional competence” or “process jurisprudence.”<sup>15</sup> Type 3 is when judges are “*highly* reluctant” to find either legislative or executive action to be unconstitutional.<sup>16</sup> Posner called this “constitutional restraint.”<sup>17</sup>

Posner averred that James Bradley Thayer constructed the “best-known and best-developed” version of Type 3 judicial restraint in a *Harvard Law Review* article published in 1893.<sup>18</sup> As noted above, Thayer asserted that a court should invalidate a statute only if it could conclude that its unconstitutionality is “so clear that it is not open to rational question.”<sup>19</sup> Thayer took this formula from a highly deferential nineteenth-century standard for reversing a judgment based on a jury verdict.<sup>20</sup> It meant that it was not enough for a judge to merely believe the legislature was incorrect (i.e., passed an unconstitutional law). In Posner’s words, before invalidating a law a judge must go beyond this by finding that the legislature was actually “unreasonable or, equivalently, clearly erroneous or [committed] an abuse of discretion.”<sup>21</sup>

The test seems straightforward. But Posner noted that Thayer’s Type 3 “constitutional restraint” runs head-long into the Type 1, “the law made me do it,” kind of restraint.<sup>22</sup> Indeed, Types 1 and 3 exist in inverse proportion.<sup>23</sup> The more a judge believes she precisely understands what the law requires, the less willing she will be to defer to what she sees as an incorrect legal view being promulgated by the legislature. Conversely, the less a judge believes she—or anyone—is able to know exactly what “the law” requires, the more willing she should be to defer to the views of the elected legislature.

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13. Posner, *supra* note 2, at 520–21.

14. *Id.*

15. *Id.* at 521.

16. *Id.*

17. *Id.*

18. *Id.* at 522.

19. *Id.*

20. Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 5 (1993).

21. Posner, *supra* note 2, at 522.

22. *Id.* at 521.

23. *Id.*

Thus, Posner argued, “[t]he School of Thayer flourished when there were no cogent theories of how to decide a difficult case.”<sup>24</sup> His four examples of “Thayer’s Successors” are three Supreme Court justices—Oliver Wendell Holmes, Louis Brandeis, and Felix Frankfurter—and Professor Alexander Bickel.<sup>25</sup> Posner noted that the Thayerian Era ended with Bickel’s death in 1974.<sup>26</sup>

What changed? According to Posner, new kinds of constitutional theories became popular beginning in the last quarter of the twentieth century.<sup>27</sup> As Posner described it:

Modern constitutional theories—whether [Robert] Bork’s<sup>[28]</sup> or [Antonin] Scalia’s originalism,<sup>[29]</sup> or [Frank] Easterbrook’s textualism,<sup>[30]</sup> or [John] Ely’s representation reinforcement,<sup>[31]</sup> or [Stephen] Breyer’s active liberty,<sup>[32]</sup> or the Constitution as common law,<sup>[33]</sup> or the living Constitution,<sup>[34]</sup> or the moral reading of the Constitution,<sup>[35]</sup> or libertarianism,<sup>[36]</sup> or the Constitution in exile,<sup>[37]</sup> or anything else . . .—are designed to tell judges, particularly Supreme Court justices, how to decide cases *correctly rather than merely sensibly or prudently*.<sup>38</sup>

24. *Id.* at 522.

25. *Id.* at 525–32.

26. *Id.* at 533.

27. *Id.* at 535.

28. *See generally* Robert Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383 (1985); Robert Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599 (1989).

29. *See generally* ANTONIN SCALIA & AMY GUTMANN, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998); Kenneth Ward, *Originalism and Democratic Government*, 41 S. TEX. L. REV. 1247 (2000).

30. *See generally* Frank Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61 (1994); Frank Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998).

31. *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737 (2004).

32. *See generally* STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2006); Robert F. Bauer, *Democracy as Problem Solving Campaign Finance and Justice Breyer’s Theory of “Active Liberty,”* 60 U. MIAMI L. REV. 237 (2006).

33. *See generally* DOUGLAS E. EDLIN, *JUDGES AND UNJUST LAWS: COMMON LAW CONSTITUTIONALISM AND THE FOUNDATIONS OF JUDICIAL REVIEW* (2008); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

34. *See generally* DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353 (2007).

35. *See generally* RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1999).

36. *See generally* Randy E. Barnett, *Is the Constitution Libertarian?*, 2009 CATO SUP. CT. REV. 9 (2009).

37. *See generally* ANDREW P. NAPOLITANO, *THE CONSTITUTION IN EXILE: HOW THE FEDERAL GOVERNMENT HAS SEIZED POWER BY REWRITING THE SUPREME LAW OF THE LAND* (2007); William W. Van Alstyne, *The Constitution in Exile Is It Time To Bring It in from the Cold?*, 51 DUKE L.J. 1 (2001).

38. Posner, *supra* note 2, at 535 (emphasis added).

And this creates the conflict between Type 1 and Type 3 restraint: “[i]f there is a demonstrably right answer to even the most difficult constitutional question, it is natural to think it is the answer the judge *must* give, that any other answer would be lawless.”<sup>39</sup> If you sincerely believe your theory yields the one correct constitutional answer, then any concept of deference will seem intellectually dishonest.

Therefore, with the modern rise of constitutional theories, Posner concluded that “Thayerism is dead, but it has left a legacy.”<sup>40</sup> As part of the legacy he cited reasons why judges should be modest in the exercise of the awesome power of invalidating statutes.<sup>41</sup> But will the Supreme Court become more deferential to Congress? Posner ended by bluntly declaring “the Supreme Court is not about to relinquish power to other branches of government.”<sup>42</sup>

## II.

### NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS

So how do you explain Chief Justice Roberts’s decision in the Affordable Care Act case?

I wish to focus on only two parts of Roberts’s opinion: first, his articulation of the standard of review for evaluating the constitutionality of laws passed by Congress; second, his view of the Supreme Court’s responsibility to save—if possible—a congressional law from being found unconstitutional.

First, this is how Roberts set out the Court’s approach to constitutional review:

Our permissive reading of [congressional power] is explained in part by a general reticence to invalidate the acts of the Nation’s leaders. “Proper respect for a co-ordinate branch of the government” requires that we strike down an Act of Congress only if “the lack of constitutional authority to pass [the] act in question is clearly demonstrated.” *United States v. Harris*, 106 U.S. 629, 635 (1883). Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation’s elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.<sup>43</sup>

Second, Roberts addressed the problem of whether the Court could re-characterize the Affordable Care Act’s “shared responsibility payment”<sup>44</sup> as a

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39. *Id.* at 536.

40. *Id.* at 553.

41. *Id.* at 553–54 (listing the arguments for judicial timidity in constitutional adjudication in general as supportive of judicial restraint).

42. *Id.* at 556.

43. Nat’l Fed’n of Indep. Bus. v. Sebelius, No. 11-393, slip op. at 6 (U.S. June 28, 2012).

44. The “shared responsibility payment” refers to the exaction imposed by 26 U.S.C.

tax, even though the Affordable Care Act describes it as a penalty.<sup>45</sup> This way, the Affordable Care Act would be a constitutional exercise of Congress's taxing power.

Here, Roberts applied the standard of constitutional review that he previously outlined:

The text of a statute can sometimes have more than one possible meaning. . . . And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so. . . . The question is not whether [describing it as a “tax” rather than a “penalty”] is the most natural interpretation of the mandate, but only whether it is a “fairly possible” one. As we have explained, “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read . . . .<sup>46</sup>

These quotations are filled with Thayerian perspectives. Certainly the citation to *Harris*<sup>47</sup> established an “all things being equal, we must uphold” approach, similar to Thayer’s presumption of constitutionality. The same is true with Roberts’s comments explaining that it is not the Court’s job to make “policy judgments.”<sup>48</sup> As Posner described Thayerians, “[t]heir emphasis was not on the inability of judges to understand difficult cases and devise effective remedies, but on the legislature’s superior competence, in the sense either of legitimacy or of ability, or both, to legislate with a free hand.”<sup>49</sup> This same idea likewise applies to the Court’s decision to characterize the “penalty” as a “tax” in order to save the statute.<sup>50</sup>

Predictably, the other eight justices split 4-4 based on whether they were appointed by a Republican or Democratic president. Yet Roberts, a Republican appointee, joined the four Democratic appointees to uphold the Affordable Care Act. What might explain Roberts’s seemingly anomalous position?

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§ 5000A(b) on taxpayers who fail to meet the requirements set forth in § 5000A(a) or exceptions listed in § 5000A(e). The amount of payment is determined by taxable income, dependents, and filing status. §§ 5000A(b)(3), (c)(2), (c)(4). The shared responsibility payment is enforced by the IRS, which under § 5000A(g)(1) and subchapter 68B of the Internal Revenue code, must assess and collect it “in the same manner as taxes.” I.R.C. § 5000(A)(g)(1).

45. 26 U.S.C. §§ 5000A(b), (g)(2).

46. *Nat’l Fed’n*, No. 11-393, slip op. at 31–32 (citations omitted).

47. *Id.* at 6.

48. *Id.*

49. Posner, *supra* note 2, at 524.

50. *Nat’l Fed’n*, No. 11-393, slip op. at 32.

III.  
THE JUDICIAL PHILOSOPHY OF JOHN ROBERTS:  
SOME HINTS FROM THE PAST

It is instructive to go back and look at the first statements Roberts made after being nominated to the Supreme Court. These appear in his answers to a 67-page questionnaire that he filled out for his confirmation hearings before the Senate Judiciary Committee.<sup>51</sup>

Roberts said he did not have an “all-encompassing” approach to deciding cases.<sup>52</sup> He said “[j]udges must be constantly aware that their role, while important, is limited.”<sup>53</sup> He noted that “[i]t is not part of the judicial function to make the law.”<sup>54</sup> The proper judicial temperament “requires a degree of modesty and humility in the judge, an ability to recognize that preliminary perceptions may turn out to be wrong, and a willingness to change position in light of later insights.”<sup>55</sup>

Roberts’s insistence that he possesses no “all-encompassing” approach to deciding cases<sup>56</sup> would seem to distinguish him from the textualism of Justice Scalia, the originalism of Justice Thomas, and the “active liberty” of Justice Breyer. According to Posner, this refusal to embrace “grand theory” would place Roberts within a prior generation of judges.<sup>57</sup>

And this was borne out in a speech Roberts gave to students at Wake Forest University on February 25, 2005, when the Wake Forest students asked then-Judge Roberts to name his favorite justices.<sup>58</sup> For collegiality he named William Brennan and William Rehnquist, the justice for whom he had clerked.<sup>59</sup> For quality of writing he chose Robert Jackson.<sup>60</sup> But the most interesting choices are the justices he chose for “analytical clarity”: Felix Frankfurter and the second John Marshall Harlan.<sup>61</sup>

The choices of Frankfurter and Harlan should make us return to Judge Posner’s article on judicial self-restraint. As you may recall, Posner singled out four persons as successors to Thayer; one of them was Felix Frankfurter.<sup>62</sup> What did Posner say about Harlan? In the article, Posner remarked, “[there are]

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51. Roberts’s responses are summarized in David G. Savage and Maura Reynolds, *High Court Nominee Sides with Restraint*, L.A. TIMES (August 3, 2005), <http://articles.latimes.com/2005/aug/03/nation/na-roberts3>.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Posner, *supra* note 2.

58. The Los Angeles Times obtained a tape of the speech; highlights are summarized in Maura Reynolds, *Judge Roberts’ View from the Bench*, L.A. TIMES (Aug. 10, 2005), <http://articles.latimes.com/2005/aug/10/nation/na-roberts10>.

59. *Id.*

60. *Id.*

61. *Id.*

62. Posner, *supra* note 2, at 530–31.



no apostles of restraint on the current Supreme Court. The last restrained justice . . . was the second Justice Harlan who retired [in 1971].”<sup>63</sup> Posner then parenthetically added, “I could have added Harlan to my list of advocates of type (3) restraint but have not done so because although a very fine Justice he did not contribute to the theory.”<sup>64</sup>

So the only two justices Roberts named for their “analytical clarity” also happen to be two of the five people named by Judge Posner as examples of judicial self-restraint—including the last “restrained justice” to ever sit on the Supreme Court.<sup>65</sup>

Even more interesting is the connection between Frankfurter and Harlan. As Charles Nesson expressed it, “Frankfurter deliberately set out to become Harlan’s teacher” once Harlan joined the Court in 1955.<sup>66</sup> In a letter to Learned Hand, Frankfurter explained that he gave Harlan a law review article that he hoped would educate Harlan in the area of judicial self-restraint.<sup>67</sup> According to Frankfurter, when he put it in Harlan’s hands he said “[p]lease read it, then reread it, and then read it again and then think about it long.”<sup>68</sup>

And the name of the law review article? *The Origin and Scope of the American Doctrine of Constitutional Law* by James Bradley Thayer.<sup>69</sup>

Obviously, there is a large volume of literature on Felix Frankfurter,<sup>70</sup> and for this reason I am more interested in examining Justice Harlan’s legacy. What can the career of “the last restrained justice” teach us about John Roberts and his decision in the Affordable Care Act case?

#### IV.

##### THE LEGACY OF THE SECOND JUSTICE HARLAN

The second Justice John Marshall Harlan was appointed to the Supreme Court by President Eisenhower in 1955 and served until 1971.<sup>71</sup> His

63. *Id.* at 533–34.

64. *Id.* at 534.

65. *Id.*

66. Charles Nesson, *The Harlan-Frankfurter Connection An Aspect of Justice Harlan’s Judicial Education*, 36 N.Y.L. SCH. L. REV. 179, 179 (1991). Frankfurter emphasized his close friendship with his law school classmate Emory Buckner. Buckner had been Harlan’s great mentor both at Root, Clark, Buckner & Howland and in the United States Attorney’s Office for the Southern District of New York. An unknown person once described Harlan as “Frankfurter without mustard.” Louis R. Cohen, *A Biography of the Second Justice Harlan*, 91 MICH. L. REV. 1609, 1610 n.6 (1991).

67. Letter from Felix Frankfurter to Learned Hand (June 30, 1957) (Felix Frankfurter Papers, Langdell Library, Harvard Law School).

68. *Id.*

69. See Thayer, *supra* note 4.

70. See, e.g., H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981); MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* (1991); HELEN SHIRLEY, *FELIX FRANKFURTER: SCHOLAR ON THE BENCH* (1960); CLYDE EDWARD JACOBS, *JUSTICE FRANKFURTER AND CIVIL LIBERTIES* (1974); RICHARD G. STEVENS, *FRANKFURTER AND DUE PROCESS* (1988).

71. TINSLEY E. YARBROUGH, *JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT* viii (1992).

grandfather, John Marshall Harlan, also served on the Supreme Court and wrote the famous dissent in *Plessy v. Ferguson*.<sup>72</sup> He graduated from Princeton and was a Rhodes Scholar at Oxford.<sup>73</sup> He practiced with the Wall Street firm of Root, Clark, Buckner & Howland, where he became a legendary litigator.<sup>74</sup> His World War II exploits earned him both the Legion of Merit from the United States as well as the Croix de Guerre from France.<sup>75</sup> He served briefly as a judge on the U.S. Court of Appeals for the Second Circuit before moving up to the Supreme Court.<sup>76</sup>

The subtitle of Tinsley E. Yarbrough's biography of Justice Harlan accurately sums up his career as a Supreme Court justice: Harlan was the "Great Dissenter of the Warren Court."<sup>77</sup> Harlan wrote 613 opinions during his tenure on the Court. Of those, 317 opinions were either opinions for the Court or concurrences.<sup>78</sup> But almost as many—296—were written dissenting opinions.<sup>79</sup> From 1963 to 1967—the heyday of the Warren Court—Harlan averaged 62.6 dissenting votes per Term.<sup>80</sup>

For this reason, Justice Harlan was for years the forgotten man of the Warren Court.<sup>81</sup> Academic attention focused on Chief Justice Warren and Justices Brennan, Douglas, and Marshall—the "winners" during the Warren Court years. In 1991, twenty years after Harlan's retirement, Professor James F. Simon observed that "[i]t is remarkable, given Justice Harlan's accomplishments, that so little study has been devoted to his life and work."<sup>82</sup>

But around this time, Harlan's reputation began to grow. One source was the Supreme Court itself. David Souter at his confirmation hearings in 1990 named Justice Harlan as one of the justices he most admired.<sup>83</sup> Several years later at Ruth Bader Ginsburg's confirmation hearing, Ginsburg stated that "[Justice Harlan] is one of my heroes as a great Justice . . . ."<sup>84</sup> Samuel Alito, when asked at his confirmation for his favorite Supreme Court justices, listed

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72. *Id.*; *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

73. YARBROUGH, *supra* note 71, at 9–13.

74. *Id.* at 13–14.

75. *Id.* at 61.

76. *Id.* at 80–83.

77. *See id.*

78. *Id.* at viii.

79. *Id.*

80. *Id.*

81. *See* Tinsley E. Yarbrough, *Mr. Justice Harlan Reflections of a Biographer*, 36 N.Y.L. SCH. L. REV. 223, 223–25 (1991).

82. James F. Simon, *Foreword The New York Law School Centennial Conference in Honor of Justice John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 1, 2 (1991). *See generally* Tinsley E. Yarbrough, *Mr. Justice Harlan Reflections of a Biographer*, 36 N.Y.L. SCH. L. REV. 223 (1991).

83. Liang Kan, *A Theory of Justice Souter*, 45 EMORY L.J. 1373, 1383 (1996); TINSLEY E. YARBROUGH, *DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT* 130 (2005).

84. *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 172 (1993).

Justice Harlan as one of four.<sup>85</sup> And, as noted above, Chief Justice Roberts also included Justice Harlan on his own list of favorite justices.<sup>86</sup>

But it was not only Supreme Court justices who began publically admiring Harlan. Berkeley Law Professor Jesse Choper called Justice Harlan “the finest legal craftsman ever—I underline the word ever—to sit on the Supreme Court.”<sup>87</sup> Henry Friendly, the legendary judge of the U.S. Court of Appeals for the Second Circuit, said that there had never been a justice who had maintained such a high quality of performance and who enjoyed such nearly uniform respect from judges at all levels than Justice Harlan.<sup>88</sup> Indeed, in a poll of two hundred law professors conducted in 1998, Hugo Black and John Harlan were the last justices to serve on the Supreme Court who were regarded as “great.”<sup>89</sup>

Why did Harlan’s stock rise during the 1990s? In an era full of grand constitutional theories touting “correct answers” to constitutional law issues, perhaps it was Harlan’s unpretentious modesty that seemed such a breath of fresh air. Charles Fried identified this as Harlan’s “simple humility—an unwillingness to think he possessed all of the insight into the resolution of a problem.”<sup>90</sup> As Kent Greenawalt has noted, Harlan’s “philosophy was not systematic; it was mainly expressed in what he did and articulated when needed as particular issues arose.”<sup>91</sup>

If Judge Posner is correct that Harlan was the “last restrained justice” on the Supreme Court,<sup>92</sup> what did Harlan have to say on the subject? Harlan once stated that

Judicial self-restraint . . . will be achieved . . . only by continual instance upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.”<sup>93</sup>

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85. Todd S. Purdom, *A Justice Not Like the Others*, N.Y. TIMES (Nov. 3, 2005), [www.nytimes.com/2005/11/03/politics/politicsspecial1/03justice?\\_r=1](http://www.nytimes.com/2005/11/03/politics/politicsspecial1/03justice?_r=1).

86. Reynolds, *supra* note 58.

87. Jesse H. Choper, *Remarks on Justice Harlan and the Bill of Rights*, 36 N.Y.L. SCH. L. REV. 127, 127 (1991).

88. See Henry J. Friendly, *Mr. Justice Harlan, As Seen by a Friend and Judge of an Inferior Court*, 85 HARV. L. REV. 369, 370 (1971). Friendly and Harlan were attorneys at the same Wall Street law firm of Root, Clark, Buckner & Howland. In the 1930s, they worked together on a high-profile case concerning the estate of the Wendel family in New York. DAVID M. DORSEN, HENRY FRIENDLY: GREATEST JUDGE OF HIS ERA 38–41 (2012). It is legitimate to wonder if Judge Friendly passed on his opinion of Harlan to his law clerk in 1979, a young man fresh out of Harvard Law School named John G. Roberts, Jr.

89. HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 372 (1999).

90. Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L. SCH. L. REV. 33, 39 (1991).

91. Kent Greenawalt, *Justice Harlan’s Conservatism and Alternative Possibilities*, 36 N.Y.L. SCH. L. REV. 53, 55 (1991).

92. Posner, *supra* note 2, and accompanying text.

93. *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

Indeed, Norman Dorsen has called federalism “the central theme of his judicial universe.”<sup>94</sup>

But to Harlan, federalism is not a static quality.<sup>95</sup> Rather, it is a state of equilibrium that must be achieved by constant monitoring by all government actors.<sup>96</sup> As Norman Dorsen expressed it, Harlan’s “idea of federalism is, itself, a kind of balance—a way of dividing governmental authority to prevent a too-easy dominance of public life by a single institution or faction.”<sup>97</sup> Dorsen, who had clerked for Harlan, perceived that he exhibited a “deep, almost visceral, desire to keep things in balance.”<sup>98</sup>

This balance included keeping the Court out of the legislative sphere.<sup>99</sup> Harlan was concerned that the actions of the Warren Court would lead to “a substantial transfer of legislative power to the courts.”<sup>100</sup> As for the Court’s exercise of legislative power, Harlan remarked that “[a] function more ill-suited to judges can hardly be imagined.”<sup>101</sup>

As Charles Fried has expressed it, Harlan possessed a “willingness to give broad scope to the legislative process as a vehicle to correct the nation’s ills.”<sup>102</sup> Conversely, he refused to view the Supreme Court as “a legitimate engine of political reform.”<sup>103</sup>

At this point it is clear that Justice Roberts would find much in Justice Harlan’s philosophy of judicial self-restraint that would support his decision to both defer to Congress and to uphold the Affordable Health Care Act.

But what about Roberts’s tactic of re-characterizing a “penalty” as a “tax” in order to find that the law was a proper exercise of Congress’s taxing

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94. Norman Dorsen, *John Marshall Harlan, Civil Liberties, and the Warren Court*, 36 N.Y.L. SCH. L. REV. 81, 101 (1991).

95. *Id.* For example, in his dissent in *Poe v. Ullman*, Justice Harlan wrote that formulaic decision making was ill-equipped to handle due process cases:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation . . . has struck between that liberty and the demands of organized society. . . . A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

96. Perhaps Harlan’s clearest articulation of this idea was in a major speech he delivered in 1963 to the American Bar Association titled *Thoughts at a Dedication Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943 (1963).

97. Dorsen, *supra* note 94, at 105.

98. *Id.* at 100.

99. His grandfather agreed. *See Lochner v. New York*, 198 U.S. 45, 74 (1905) (Harlan, J., dissenting) (“No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people’s representatives.” (quoting *Atkins v. Kansas*, 191 U.S. 207, 223 (1903))).

100. Harlan, *supra* note 96, at 944.

101. *Id.*

102. Fried, *supra* note 90, at 42.

103. *Id.* at 43.

power?<sup>104</sup> Would Justice Harlan have gone this far in trying to uphold a Congressional act?

On this topic, it is instructive to read Justice Harlan's opinion in *Welsh v. United States*.<sup>105</sup> Welsh was a religious agnostic who was opposed to participation in war in any form. During the Vietnam War, he tried to claim conscientious objector status based solely on moral and ethical views.<sup>106</sup> The problem was that the statute in question allowed conscientious objector status based only on "religious training and belief."<sup>107</sup> A four-justice plurality held that Welsh's agnostic ethical beliefs were nonetheless "religious" under the statute.<sup>108</sup> Three justices dissented, holding that a purely personal code could not be considered "religious" under the statute.<sup>109</sup> Because Justice Blackmun did not participate, the deciding vote was left to Justice Harlan.

Harlan vehemently disagreed with the plurality.<sup>110</sup> He held that it would do violence to the English language to insist that Welsh's clearly non-religious views could somehow be construed as "religious" under the statute.<sup>111</sup> On the other hand, he disagreed with the dissent that the statute could constitutionally restrict conscientious objector status only to "religious" views.<sup>112</sup> Harlan held that the statute's refusal to allow non-religious, yet sincere views was a violation of the Establishment Clause of the First Amendment.<sup>113</sup>

At this point, Harlan said there were two possible remedies.<sup>114</sup> The Court could declare the statute a nullity and thus order that the statute could not benefit those the legislature intended to benefit; or the Court could extend the coverage of the statute to include people such as Welsh who constitutionally should have been covered.<sup>115</sup>

Justice Harlan chose the latter remedy, even though he admitted that it was "tantamount to extending the statute"<sup>116</sup> and that the remedy was "more

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104. Nat'l Fed'n of Indep. Bus. v. Sebelius, No. 11-393, slip op. at 11-13, 44 (U.S. June 28, 2012).

105. *Welsh v. United States*, 398 U.S. 333 (1970).

106. *Id.* at 335.

107. *Id.* at 338 (noting that 50 U.S.C. app. § 456(j) (The Universal Military Training and Service Act) exempted those persons who, "by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form").

108. *Id.* at 335-44. Justice Black, who wrote the plurality, was joined by Justices Douglas, Brennan, and Marshall.

109. *Id.* at 367-74. Justice White, who wrote the dissent, was joined by Chief Justice Burger and Justice Stewart.

110. *Id.* at 344-67 (Harlan, J., concurring in the result).

111. *See id.* at 354 ("Unless we are to assume an Alice-in-Wonderland world where words have no meaning, I think it fair to say that Congress' choice of language cannot fail to convey to the discerning reader the very policy choice that the prevailing opinion today completely obliterates . . .").

112. *Id.* at 356-59.

113. *Id.* at 358-60.

114. *Id.* at 361.

115. *Id.*

116. *Id.* at 363.

analogous to a graft than amputation.”<sup>117</sup> But he chose to preserve the statute by adding to it because the policy of exempting conscientious objectors is one of “longstanding tradition in this country.”<sup>118</sup> He therefore concluded,

When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it.<sup>119</sup>

Now, compare what Chief Justice Roberts did in the Affordable Care Act case with what Justice Harlan did in *Welsh*. To save the statute, Roberts merely re-characterized a “penalty” as a “tax.”<sup>120</sup> On the other hand, Justice Harlan was willing to go much further in order to save a statute. When the basic legislative policy was important enough, Justice Harlan was actually willing to *add* to a statute in order to keep it from being declared constitutionally void.<sup>121</sup>

### CONCLUSION

What does Chief Justice Roberts’s opinion in the Affordable Care Act case tell us about the role judicial self-restraint will play in his future opinions? Perhaps nothing. One case does not a Thayerian make. Roberts’s opinion may be analogous to the way Laurence Tribe described *Bush v. Gore*<sup>122</sup>: a “One Time Only Equal Protection Offer.”<sup>123</sup>

Yet every once in a while it is good to see “conventional wisdom” take a pratfall. Just this year Professor Eric J. Segall began his book about the Supreme Court by stating “[i]t is no great secret that the Supreme Court’s constitutional law decisions reflect the personal values of the Justices. . . . I will show how the Court prevents the American people and our elected leaders from resolving these issues democratically through our representative system of state and federal elections.”<sup>124</sup>

Or not.

But at the very least it should make us remember that Chief Justice Roberts called Justice Harlan and Justice Frankfurter models before he was even nominated to the Supreme Court.<sup>125</sup> It should make us curious about what Roberts learned as a young law clerk working for the legendary Henry

117. *Id.*

118. *Id.* at 365.

119. *Id.* at 366.

120. Nat’l Fed’n of Indep. Bus. v. Sebelius, No. 11-393, slip op. at 44 (U.S. June 28, 2012).

121. *Welsh*, 398 U.S. at 366.

122. *Bush v. Gore*, 531 U.S. 98 (2000).

123. Laurence H. Tribe, *Erog. v Hsub and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 270 (2001).

124. ERIC J. SEGALL, *Preface* to SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES (2012).

125. *See supra* Part III.

Friendly.<sup>126</sup> It should make us wonder exactly what Judge Friendly may have told him about his former colleague and close friend John Harlan—whom he regarded as a model Supreme Court justice.<sup>127</sup>

The hardest judicial decision John Roberts Jr. ever had to make may have revealed more than we ever expected to learn about his conception of his role as Chief Justice of the United States Supreme Court.

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126. See Dorsen, *supra* note 94, at 365 and accompanying text.

127. See *supra* Part III.