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FEDERALISM AND THE ROBERTS COURT

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Abstract

This article examines four decisions of the US Supreme Court rendered in the period 2011-2013 under the leadership of Chief Justice John Roberts relating to the issue of US federalism. While it is too soon to offer a definitive appraisal of the Court's federalism jurisprudence, these decisions suggest that the Court will continue, if not deepen, the narrowing construction of federal power favoured by its predecessor, the Rehnquist Court. Indeed, it seems fair to say that the Roberts Court is developing a federalism jurisprudence which seeks not only to limit federal power but to protect the "dignity" of the states as dual sovereigns with the federal government.

The four cases considered are: *National Federation of Independent Business v. Sibelius*, which upheld most of President Obama's health care legislation (but not under the broad power of the Commerce or Necessary and Proper Clauses of the Constitution); *Shelby County v. Holder,* which struck down key provisions of the Voting Rights Act of 1965 because Congress could not, unless justified by current conditions, impose on some states (which had a history of discrimination in voting) burdens not borne by others;, *United States v. Windsor*, which ruled Congress could not define marriage to exclude same sex marriages regardless of state law; and *Arizona v. United States,* which held that the strict Arizona immigration statute was preempted by federal law because the state "may not pursue policies that undermine federal law."

Key words: federalism; federal government; states; supreme court; sovereignty; health care; commerce clause; necessary and proper clause; voting rights; same sex marriage; immigration; preemption.

EL FEDERALISME I EL TRIBUNAL DE ROBERTS

Resum

Aquest article examina quatre decisions del Tribunal Suprem dels EUA preses durant el període 2011-2013 sota la direcció del president John Roberts en relació amb el federalisme dels EUA. Tot i que és massa aviat per fer avaluació definitiva de la jurisprudència federal del Tribunal, aquestes decisions suggereixen que el Tribunal continuarà, o fins i tot intensificarà, la construcció restrictiva del poder federal afavorida pel seu predecessor, el Tribunal de Rehnquist. En efecte, sembla just dir que el Tribunal de Roberts està desenvolupant una jurisprudència federal que persegueix no sols limitar el poder federal, sinó protegir la «dignitat» dels estats com a sobirans conjuntament amb el govern federal.

Els quatre casos considerats són: National Federation of Independent Business contra Sibelius*, que ratificava majoritàriament la legislació d'assistència sanitària del president Obama (però no sota el poder ampli de la Clàusula del Comerç i la Clàusula Necessària i Justa de la Constitució);* Shelby County contra Holder*, que va derogar les provisions clau de la Llei del Dret a Vot de 1965 per tal que el Congrés no pogués imposar, llevat que estigués justificat per condicions vigents, a alguns estats (que tenien una trajectòria de discriminació en el vot) càrregues no suportades per altres; els* Estats Units contra Windsor*, que va dictaminar que el Congrés no pogués definir el matrimoni de manera que exclogués els matrimonis entre persones del mateix sexe sense tenir en compte les lleis estatals, i* Arizona contra els Estats Units*, que va considerar que la llei federal tenia prevalença sobre l'estricte estatut d'immigració d'Arizona perquè l'estat «no pot seguir polítiques que minen la llei federal».*

Paraules clau: federalisme; govern federal; estats; tribunal suprem; sobirania; assistència sanitària; clàusula de comerç; clàusula necessària i justa; dret a vot; matrimoni entre persones del mateix sexe; immigració; prevalença.

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Summary

1 Introduction

Starting with the New Deal era,[1] the US Supreme Court took a broadly deferential view of Congress's power under the Commerce Clause of the Constitution to enact legislation establishing a social safety net and regulate the economy. That accommodating approach, however, was reined in by the Court under the leadership of Chief Justice Rehnquist. In 1995, for the first time since the New Deal, the Supreme Court struck down a statute enacted by the Congress as exceeding its power under the Commerce Clause.[2] Embracing a more stringent view of the limits of the Commerce Clause, the Rehnquist Court in *United States v. Lopez*[3] declared unconstitutional legislation which made it a federal crime to possess a gun in a school zone. Five years later, in *United States v. Morrison*,[4] the Court struck down the Violence Against Women Act of 1994 as unconstitutional. Both decisions appeared to embrace a new doctrine holding legislation aimed at regulating non-economic behaviour subject to a more stringent standard of review requiring a particularized showing of connection to interstate commerce. Where the conduct at issue was traditionally regulated by the states, federal intervention was especially suspect.[5] Indeed, some constitutional scholars considered a renewed emphasis on federalism to be one of the hallmarks of the Rehnquist Court.[6] While subsequent decisions may have moderated that view of the Court,[7] there is no doubt that challenges testing the limits of Congressional power under the Commerce Clause were newly in vogue.

Changes in the composition of the Supreme Court, including the accession to chief of Justice Roberts replacing Justice Rehnquist and the retirement of Justice O'Connor and her replacement by Justice Alito, raised the question of how the Roberts Court would deal with issues of federal power in relation to the states. While it is too soon to offer a definitive appraisal of its federalism jurisprudence, key decisions rendered in the 2011-2013 period give a clear indication that the Court will continue, if not deepen, the Court's narrowing construction of federal power favored by its predecessor. Indeed, it seems fair to say that the Roberts Court is developing a new federalism jurisprudence which seeks not only to limit federal power but also to protect the "dignity" of states as dual sovereigns with the federal government.

This article will examine four of these decisions and assess their implications for the future of federalism in the time of the Roberts Court. It will consider the Court's Commerce Clause jurisprudence, as well as decisions examining other sources of Congressional authority, particularly the taxing and spending clauses, the competence of Congress to enact laws which are "necessary and proper" in implementing other powers enumerated in the Constitution and its capacity to enforce the rights guaranteed by the 14th (due process and equal protection) and 15th (voting rights) Amendments.

1 The New Deal refers to the progressive programs enacted during the period 1933-38 under the Administration of President Franklin D. Roosevelt. It featured a series of measures to reform the U.S. economy, which had collapsed during the Great Depression and represented an unprecedented expansion of federal authority.

2 Under Art. 1, § 8, Congress has the power to "regulate Commerce with foreign Nations, and among the several states, and with Indian Tribes." Over the years and particularly in the New Deal period and thereafter, this power has been used to pass a host of measures, ranging from establishing the social safety net to protecting the environment.

3 514 U.S. 549 (1995).

4 529 U.S. 598, 617 (2000) ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local…. [The] regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States…. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.")

5 Kathleen M. Sullivan and Noah Feldman, Constitutional Law, 144 (18th ed. 2013).

6 Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. Pa. L. Rev. 1331 (2008); Sullivan and Feldman, Constitutional Law, 148 (18th ed. 2013).

7 See, e.g., *Gonzalez v. Raich*, 545 U.S. 1 (2005) upholding the federal ban on possession and cultivation of marijuana as applied to purely intrastate activity.

2 *National Federation of Independent Business v. Sibelius*—Health Care

In what is probably the Roberts Court's most consequential decision to date, the Court upheld most of the Patients Protection and Affordable Health Care Act ("ACA"), better known as the Obamacare law. But, it did so not under the Commerce Clause, the primary source of authority relied upon by the Congress and the Administration in defending the constitutionality of the ACA; rather the Court relied on the federal government's taxing power. Moreover, the Court struck down an important portion of the Act requiring that states expand health care coverage to low income individuals on pain of losing all funding under the Medicaid program, even though the federal government absorbed all of the additional costs associated with the enlarged coverage.

Obamacare was passed in 2010 to extend health care to some 50 million Americans and lower its costs. Among its many features, the ACA provided for the establishment of state and national markets for the purchase and sale of health care insurance, required that insurers offer a minimum level of coverage, prohibited insurers from refusing to cover illnesses resulting from conditions pre-existing the purchase of insurance, barred lifetime ceilings on coverage, provided for community (rather than individual) rating in setting premiums and allowed children up to the age of 26 to be included in their parents' plans. Recognizing that expanding coverage in this fashion would increase the risk borne by the insurance providers (e.g., who would now be required to cover pre-existing conditions), and therefore increase the cost of premiums substantially, Congress mandated that all individuals obtain "minimum essential" health insurance coverage. That "individual mandate" was intended to capture for the health insurance pool young people who are less likely to require costly medical care, thus offsetting the added cost to insurers of covering higher risk persons with pre-existing conditions. The individual mandate was designed also to address the problem of cost shifting: under federal and state law, hospital and doctors are required to provide critical care regardless of cost; through higher premiums, the cost of uncompensated care is shifted from those who cannot and do not pay for it to those who can and do.[8]

The individual mandate is enforced by requiring persons who fail to obtain health care insurance to pay a modest penalty related to income, but not to exceed the cost of coverage. The penalty is paid to the Internal Revenue Service with the payment of federal taxes. Acknowledging the cost-shifting problem, the ACA characterizes the penalty as a "shared responsibility payment."

Eliminating pre-conditions and other health related obstacles to obtaining coverage would go far to expand the number of insured. For persons too poor to afford health care insurance, Congress enlarged the Medicaid program. Under the pre-ACA version of Medicaid, Congress provided substantial federal financing to states to cover the cost of health care for poor families, pregnant women, the blind and the elderly. Obamacare expanded this federal-state partnership program to include all adults with an income up to 133% of the poverty level and increased federal funding accordingly (100% in the first year, gradually declining to 90% in 2020). While the federal government could not constitutionally compel the states to agree to this added coverage and accept the accompanying funding[9], Congress provided that states which did not do so would lose all Medicaid funding, including funding provided under the pre-Obamacare Medicaid legislation.

2.1 The challenge to Obamacare (apart from the Medicaid issue) focused on the constitutionality of the individual mandate. The issue was whether Congress had the power to require most Americans to purchase health care insurance from private companies, whether they wanted it or not. Before discussing the arguments for and against that proposition, it should be noted that no one challenged Congress's power to regulate the health insurance industry, including eliminating pre-existing conditions as a bar to coverage, banning the lifetime ceilings on coverage and the other reforms instituted by the legislation. As Justice Ginsburg put it, "Congress comprehensively reformed the national market for health-care products and services. By any measure, that market is immense. Collectively, Americans spent $2.5 trillion on health care

8 In her dissenting opinion joined by three other justices, Justice Ginsburg explained that "economists would describe what happens, the uninsured 'free ride' on those who pay for health insurance." *National Federation of Independent Business v. Sebelius,* 132 S. Ct. 2566, 2611 (2012) (Ginsburg, J., dissenting).

9 *New York v. United States*, 505 U.S, 144, 188 (1992) (The "Federal Government may not compel the States to enact or administer a federal regulatory program." This conclusion is based on the Tenth Amendment's reservation of powers to the states.)

in 2009 accounting for 17.6% of our Nation's economy."[10] Incontestably, Congress is empowered under the Commerce Clause to regulate that national market.[11]

For Chief Justice Roberts, the fatal flaw in terms of the constitutionality of the individual mandate is that, by definition, it did not involve the regulation of existing commerce. He put it this way:

> [g]iven its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product. (Footnote omitted)….
>
> The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous. …
>
> Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.' …
>
> The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.[12]

The four other more conservative justices (Alito, Kennedy, Scalia and Thomas) essentially agreed with the Chief Justice on the Commerce Clause issue, but wrote a separate concurring opinion.

Dissenting for herself and the three other more liberal justices (Breyer, Kagan and Sotomayor), Justice Ginsburg stressed the fact that "[v]irtually every person residing in the United States, sooner or later, will visit a doctor or other health-care professional."[13] Only the timing is uncertain. But by deferring the decision to insure against that at-risk individuals impose current costs in the form of higher premiums on those who do purchase health insurance. In addressing this problem of adverse selection by mandating that all individuals obtain health care insurance, Congress was regulating economic activity.

Reflecting on the Court's precedents under the commerce clause, Justice Ginsburg explained:

> Consistent with the Framers' intent, we have repeatedly emphasized that Congress' authority under the Commerce Clause is dependent upon 'practical' considerations, including 'actual experience.' [Citations omitted] We afford Congress the leeway 'to undertake to solve national problems directly and realistically.'…
>
> Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce…. [and that] their inability to pay for a significant portion of [their health care] consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability... Given these far-reaching effects on interstate commerce, the decision to forego insurance is hardly inconsequential or equivalent to 'doing-nothing'; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause…
>
> [The] minimum coverage provision [i.e., the individual mandate], furthermore, bears a 'reasonable connection' to Congress' goal of protecting the health-care market from disruption caused by individuals who fail to obtain insurance. By requiring those who do not carry insurance to pay a toll, the minimum coverage provision gives individuals a strong incentive to insure. This incentive, Congress had good reason

10 See *National Federation of Independent Business,* 132 S. Ct. at 2609. Of course, Congress could have gone much further. As the Ginsburg opinion notes, it could have adopted a single payer system in which the federal government, rather than the private insurance industry, would have provided health care coverage directly as it does under the Medicare program.

11 Justice Ginsburg's dissent points out that: "The provision of health care is today a concern of national dimension, just as the provision of old-age and survivors' benefits was in the 1930's. In the Social Security Act, Congress installed a federal system to provide monthly benefits to retired wage earners and, eventually, to their survivors. Beyond question, Congress could have adopted a similar scheme for health care. Congress chose, instead, to preserve a central role for private insurers and state governments. According to The Chief Justice, the Commerce Clause does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly regressive." *National Federation of Independent Business*, 132 S. Ct. at 2609.

12 Id. at 2586-87 (Roberts, J.)

13 Id. at 2610.

> to believe, would reduce the number of uninsured and correspondingly mitigate the adverse impact the uninsured have on the national health-care market.

In one respect, the difference between the opinions holding that the Commerce Clause does not afford Congress the authority to enact the individual mandate and Justice Ginsburg's dissent can be seen as turning on the weight to be given to strict textual analysis (the activity/inactivity distinction) versus the economic impact of the decision to forego purchasing health care insurance and the degree of deference to Congress's determination of how best to address a serious national problem. Given that the Court's post-New Deal Commerce Clause jurisprudence had taken an expansive view of Congress's power to address national economic problems, the majority position can be fairly characterized as retrogressive, even in comparison with that of the Rehnquist Court, which focused on limiting the use of Commerce Clause authority to deal with non-economic concerns (e.g., gun violence and schools).

Another point of distinction is the concern expressed in the opinions striking down the individual mandate with the absence of any supporting precedent suggesting that if the Congress were to be vested with such a power, the Commerce Clause would be essentially transformed into a broad charter for the exercise of unlimited federal authority. The dissent went to considerable lengths to show that healthcare, with its cost shifting, mandated care provision and unavoidable need is a special and, therefore, limiting case. Finally, the controlling opinions can be seen as embracing a philosophically libertarian concern that a country in which the national government is empowered to mandate the purchase of an unwanted product, in the words of the Chief Justice, would not be "the country the Framers of our Constitution envisioned."[14]

2.2 Even if the individual mandate could not be sustained under the Commerce Clause, a further source of Congressional authority, the Government argued, could be found in the Necessary and Proper Clause of the Constitution. That provision empowers Congress to "make all laws which shall be necessary and proper for carrying into Execution the [Congressional powers enumerated in Art 1, Sec. 8]." In the famous formulation of Chief Justice Marshall in *McCulloch v. Maryland* decided in 1819,[15] this language operated to enlarge Congressional power where "the end be legitimate; let it be within the scope of the constitution; and all means which are appropriate; which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution." Or, as Justice Scalia wrote in his concurring opinion in *Gonzales v. Raich,* holding that the possession of marijuana could be banned under the Controlled Substance Act even if grown and consumed solely intra-state, "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power."[16]

The Ginsburg dissent found that test was met by the individual mandate seen in the context of the Affordable Care Act:[17]

> [w]hen viewed as a component of the entire ACA, the provision's Constitutionality becomes even plainer. The Necessary and Proper Clause 'empowers Congress to enact laws in effectuation of its [commerce] powe[r] that are not within its authority to enact in isolation.'(Citation omitted)
>
> Recall that one of Congress' goals in enacting the Affordable Care Act was to eliminate the insurance industry's practice of charging higher prices or denying coverage to individuals with preexisting medical conditions. The commerce power allows Congress to ban this practice, a point no one disputes.
>
> Congress knew, however, that simply barring insurance companies from relying on an applicant's medical history would not work in practice. Without the individual mandate, Congress learned guaranteed-issue and community-rating requirements would trigger an adverse selection death-spiral in the health insurance market: Insurance premiums would skyrocket, the number of uninsured would increase and insurance companies

14 Id. at 2589. Note, however, that Massachusetts did just that in exercise of its police power, enacting health care reform legislation which became the model for Obamacare. There is no reason to believe that other states could not take the same action under their police power depending, of course, on the applicable state constitutions.

15 17 U. S. 316 (1819).

16 *Gonzalez v. Raitch*, 545 U.S. 1, 37 (2005) (Scalia, J., dissenting). Note that Justice Scalia did not apply this test in *National Federation of Independent Business*.

17 132 S. Ct. at 2625-26.

> would exit the market. When complemented by an insurance mandate, on the other hand, guaranteed issue and community rating would work as intended, increasing access to insurance and reducing uncompensated care. The minimum coverage provision is thus 'an essential par[t] of a larger economic activity]'; without the provision, 'the regulatory scheme [w]ould be undercut.'

The Roberts opinion did not take issue with the conclusion that the individual mandate was "necessary" to the overall legislative scheme for regulating the national insurance market. Conceding this point, he nonetheless found that the mandate was not a "proper" exercise of Congressional power because it would "undermine the structure of government established by the Constitution. Such laws, which are not 'consist[ent] with the letter and spirit of the constitution' [are] not 'proper [means] for carrying into Execution' Congress's enumerated powers…. [The] individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms."[18] Just how sustaining the mandate under that provision would flout the "letter and spirit of the constitution" is not explained. There is no question of the ACA affording a pretext for the individual mandate;[19] the sole reason for the mandate is to facilitate the efficient implementation of the health care coverage reforms legislated by the Congress. Nor can the propriety of the individual mandate be impugned because of an intrusion on a function traditionally reserved to the states. The problem of access to affordable health care insurance is national in scope, cannot be resolved solely on a state basis and, apart from Massachusetts, no state had put in place an individual mandate.

2.3 Ultimately, the individual mandate was upheld as a tax. Here, the Chief Justice was joined by Justices Breyer, Ginsburg, Kagan and Sotomayor in construing the means chosen by the Congress to enforce compliance with the mandate to be the imposition of a tax within the power of the federal government to enact. Over the vigorous dissent of Justices Alito, Kennedy, Scalia and Thomas, he found that[20]:

> The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The '[s]hared responsibility payment,' as the statute entitles it, is paid into the Treasury by 'taxpayers' when they file their tax returns…. The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which… must assess and collect it 'in the same manner as taxes.' This process yields the essential feature of any tax: it produces at least some revenue for the Government….
>
> It is of course true that the Act describes the payment as a 'penalty,' and not as a 'tax.' But that label… does not... determine whether the payment may be viewed as an exercise of Congress's taxing power.

The fact that the individual mandate was intended to "affect individual conduct" was no barrier to its constitutionality under the federal government's taxing power.[21] Justice Roberts rightly recognized that "taxes that seek to influence conduct are nothing new." Indeed, every "tax is in some measure regulatory."[22]

2.4 *National Federation of Independent Business* raises one other issue of importance in ascertaining the Roberts Court's view of federalism—the constitutionality of the requirement that the states expand their Medicaid programs substantially to include a host of persons not previously covered on pain of losing all Medicaid payments, including payments provided under the Medicaid program as it existed prior to enactment of the ACA. The Congress has long relied on its spending power to induce states to adhere to its policy choices.[23] And, the Supreme Court had, until *National Federation*, always sustained Congress's imposition of conditions on the receipt of federal funds. Contrasting the Medicare defunding issue with spending conditions previously upheld by the Court, Chief Justice Roberts, writing for a majority of seven Justices (including, in addition to the four other conservatives, Justices Breyer and Kagan), explained:[24]

> In this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild' encouragement [sustained in other cases] --- it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human

18 Id. at 2592.

19 *McCulloch v. Maryland*, 17 U.S. at 418-21.

20 *National Federation of Independent Business*, 132 S. Ct. at 2594.

21 Id. at 2596.

22 Id.

23 Id. at 2579.

24 Id. at 2604-05.

> Services may declare that 'further payments will not be made to the State.' A State that opts out of the [ACA's] expansion in health care coverage thus stands to lose not merely 'a relatively small percentage' of its existing Medicaid spending, but *all* of it. Medicaid funding accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs….The threatened loss of over 10 percent of a State's overall budget...is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.

That, he ruled, constituted constitutionally impermissible coercion of the states out of step with the sovereign dignity of the states in a federal system.

In contrast, Justice Ginsburg, in a dissenting opinion joined by Justice Sotomayor, saw the Medicaid provisions of Obamacare as modifying, rather than supplanting, an existing program. As she pointed out, the original Medicaid legislation expressly contemplated that it would be amended as had been the case on several occasions. Looked at in this light, she would have upheld the conditions imposed by Congress on states refusing to expand their Medicaid programs. Taking issue with the Roberts' opinion, she explained:

> The Chief Justice calls the ACA new, but in truth, it simply reaches more of America's poor than Congress originally covered.
>
> Medicaid was created to enable States to provide medical assistance to 'needy persons.' …By bringing health care within the reach of a larger population of Americans unable to afford it, the Medicaid expansion is an extension of that basic aim. …
>
> Congress has broad authority to construct or adjust spending programs to meet its contemporary understanding of 'the general Welfare.'[25]

In the aftermath of *National Federation of Independent Businesses*, 25 states opted to participate in the expanded Medicaid program. Notwithstanding full federal funding for the expansion, 21 states opted out. And four are on the fence.

It should be noted that the Roberts opinion expressly refrained from fixing the boundary between permissible persuasion and forbidden coercion. "It is enough for today that wherever that line may be, this statute is surely beyond it."[26]

3 *Shelby County v. Holder*—Voting Rights

The issue in *Shelby County* was not the federal government's power under the Commerce Clause, but rather its authority under the 14th and 15th Amendments to the Constitution. In the aftermath of the Civil War, these Amendments were adopted to guarantee the newly-freed slaves full rights of citizenship, including the rights to due process and equal protection of the laws (the 14th Amendment) and the right to vote (the 15th Amendment). Each Amendment includes a section granting Congress the power to enforce its provisions "by appropriate legislation."

3.1 For nearly one hundred years, these rights were honored more in the breach than in the performance in the Southern states. Blocked by the representatives of these states, Congress did little by way of enforcement. With the leadership of President Lyndon Johnson, the logjam finally was broken. Relying on the Commerce Clause and the 14th Amendment, the Civil Rights Act of 1964 prohibited discrimination "on the ground of race, color, religion, or national origin" in places of "public accommodation." Exercising its authority under the 15th Amendment, Congress passed what is widely regarded as the most successful piece of civil rights legislation—the Voting Rights Act of 1965.

Sec. 2 of the Voting Rights Act, as amended, bars all states from imposing any "standard, practice or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[27] Recognizing that enforcing this ban would require unending litigation testing new restrictions adopted to perpetuate discrimination, Congress also barred states and subdivisions with a

25 U.S. Constitution, Art. 1, § 8 ("Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States…"

26 *National Federation of Independent Business*, 132 S. Ct. at 2606.

27 42 U.S.C. § 1973(a).

history of racial discrimination in voting to preclear all election law changes with the Department of Justice or a three-judge federal court. The identity of jurisdictions subject to preclearance under Sec. 5 is determined in accordance with a formula set out in Sec. 4 of the Act. The statute also allows for covered jurisdictions to "bail out" of the preclearance requirement by demonstrating a history of compliance for a period of ten years along with making efforts to facilitate access to the ballot by blacks and Hispanics.[28] Additional jurisdictions could be included by order of a court based on a finding of violations of the 14th and 15th Amendments. The preclearance regime, originally set to expire within six years, was extended periodically by the Congress.

In reauthorizing the Act for an additional 25 years in 2006, the Congress had compiled an extensive record. As related in Justice Ginsburg's dissent, "[T]he House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages."[29] The legislation passed by vote of 98 to zero in the Senate and 390 to 33 in the House.

The issue in *Shelby County* was the constitutionality of the preclearance regime. The permanent ban on racially-discriminatory voting requirements which applies to all states was not challenged.

3.2 *Shelby County* was not the first test of the constitutionality of the preclearance regime of the Voting Rights Act. One year after its enactment, the Act was upheld by the Supreme Court in *South Carolina v. Katzenbach*.[30] Writing for a unanimous court, Chief Justice Warren ruled the Act constitutional as "a valid means for carrying out the commands of the Fifteenth Amendment."[31] In reaching that conclusion, the Court considered and rejected the argument that the Act violated "the doctrine of equality of States" by imposing on some the burden of federal preclearance not borne by others. Chief Justice Warren held "that doctrine only applies to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."[32]

In construing the Act in subsequent cases, the Court considered the tension between the preclearance regime and principles of federalism. Acknowledging that federal preclearance of state voting measures represented a significant intrusion on state control of important governmental responsibilities, the Court in *City of Rome v United States*[33] explained:

> principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.' Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.[34]

In so ruling, the majority rejected the dissenting views of Justices Powell and Rehnquist, who found the Act's encroachment on state sovereignty "especially troubling because it destroys local control of the means of self-government, one of the central values of our polity."[35]

Other cases dealing with issues of interpretation of the Act also discussed the federal encroachment issue. In *Lopez v Monterey County*,[36] the issue was whether the preclearance requirement applied to a county in

28 The Voting Rights Act was amended in 1975 to include protections for voters of Hispanic origin.

29 *Shelby County, Alabama v. Holder*, 133 S. Ct. at 2612, 2636 (2013) (Ginsburg, J., dissenting).

30 383 U.S. 301 (1996).

31 Id. at 337.

32 Id. at 328-29.

33 446 U.S. 156 (1980).

34 Id. at 179. See also Francita Tolson, *Reinventing Sovereignty:? Federalism as a Constraint on the Voting Rights Act, 65* Vand. L. Rev. 1195, 1236 (2012) (" In finding [*in Fitzpatrick v Bitzer*, 427 U.S. 445,456 (1966)] that Congress can authorize private suits against the states [for non-compliance with federal law regarding discrimination in employment] the Court noted that the Civil War amendments represented a 'carving out' of state sovereignty—that these amendments are an 'expansion of Congress'[s] powers with [a] corresponding diminution of state sovereignty,' a reduction in power that extends to the principle of state power embodied by the Eleventh Amendment.")

35 Id. at 201.

36 525 U.S. 266 (1999).

California which adopted a voting rights plan in conformity with state law. The State, unlike the county, was not a covered jurisdiction under the Act. Rejecting the State's argument that "requiring preclearance here would tread on rights constitutionally reserved to the States," the Court ruled "the Voting rights Act, by its nature, intrudes on state sovereignty" but the "Fifteenth Amendment permits this intrusion."[37] Considering the standard for approving a state voting initiative, the Court in *Reno v Bossier Parish School Board*,[38] opted for a narrowing reading to avoid exacerbating "the 'substantial' federalism costs that preclearance already exacts…perhaps to the extent of raising concerns about Sec.5's constitutionality…"[39] This restrictive reading of Sec.5 was followed in *Georgia v Ashcroft*,[40] in the context of determining the extent of a state's obligation under the Act to maximize the opportunity for minority representation in plans submitted for preclearance. It should be noted that Congress amended the Act in 2006 to override the Court's narrowing construction of Sec.5 in the *Bossier Parish* and *Georgia* cases.

The most recent voting rights decision (2009) of the Supreme Court prior to *Shelby* was *Northwest Austin v. Holder*.[41] Brought by a small utility district with an elected board in Texas, the case sought to have the Act struck down as applied, unless the district was permitted to gain the relief provided by the bailout provision. The Court ducked the constitutional issue by finding that the district was eligible for bailout relief. Writing for a majority of eight,[42] Chief Justice Roberts determined that the utility was entitled to seek to bail out of the preclearance requirements (even though it is not a state or political subdivision thereof).[43] But he went on to express grave misgivings about the constitutionality of Sec. 4 of the Act. Whatever the justification for the discriminatory treatment of covered states may have been when the law was enacted and for many years thereafter, Roberts wrote "the Act imposes current burdens and must be justified by current needs."[44] Precisely because of the Act's undeniable success in eliminating obstacles to voting by blacks, Hispanics and other minorities,[45] Robert's expressed doubt that this justification any longer existed. Lacking such current cause, the Act, in his view, offended "our historic tradition that all States enjoy 'equal sovereignty.'"[46] Two years later, this federalism concern would form the basis of his decision striking down Sec. 4 in *Shelby County*.

3.3 This time the issue of the Act's preclearance regime constitutionality could not be avoided. As foreshadowed by his opinion in *Northwest Austin*, Chief Justice Roberts, writing for a majority of five, held Sec. 4 of the Act unconstitutional. His opinion is founded on two pillars. First, he reiterated and reinforced his view that the state selection formula set out in Sec. 4 was based on a false premise—that voters in these states continued to be subjected to widespread discrimination in exercising their right to vote. Second, he again articulated the position that by subjecting some states to burdens (the preclearance requirement) not imposed on all, the Act violated a fundamental principle of federalism—that all states must be treated equally. In ruling Sec.4 unconstitutional, the majority opinion preserved Sec. 5, which establishes the preclearance mechanism. But without a basis for determining which states are required to preclear, Sec. 5 is a dead letter.[47]

On the issue of whether current conditions warranted continued enforcement of Sec. 4, Roberts noted that in

37 Id. at 284-85.

38 528 U.S.320 (2000).

39 Id. at 336. The question in *Bossier County* was whether §5 "extends to discriminatory but nonretrogressive vote-dilution purposes." Ibid. The Court held that preclearance is required only if the plan worsens the status quo ante; vote dilution even if for reasons of discrimination is insufficient absent retrogression.

40 539 U.S. 461 (2003).

41 557 U.S. 193 (2009).

42 Id. at 196.

43 Invoking the doctrine of refraining for deciding constitutional issues if not necessary to the disposition of the case, Chief Justice Roberts did not rule on the constitutionality of the Act.

44 557 U.S. 203.

45 "Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And, minority candidates hold office at unprecedented levels." Id. at 202.

46 Id. at 203.

47 Concurring with the opinion for the Court, Justice Thomas would have found § 5 unconstitutional. *Shelby County*, 133 S. Ct. at 2632 (Thomas, J., concurring).

extending the Act, Congress had not updated the formula used to identify those states which must preclear. Since that formula did not take into account the progress achieved as a result of the enforcement of the Act, the discriminatory treatment of states upon which it is imposed could no longer be sustained. He concluded: "[o]ur country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[48]

3.4 Justice Ginsburg disagreed with the position that Congress, in extending the Act, had not spoken to "current conditions." On behalf of herself and her four comparatively liberal colleagues, she examined in great detail the record amassed by Congress. That record, which included numerous instances in which changes to voting laws were proposed by covered states but rejected as burdening minority voting rights, was entitled to "substantial deference." Taking issue with the majority opinion, she wrote[49]:

> The basis for this deference is firmly rooted in both the constitutional text and precedent. The Fifteenth Amendment, which targets precisely and only racial discrimination in voting rights, states that, in this domain, 'Congress shall have power to enforce this article by appropriate legislation.'…So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end.[50]

Reviewing the record compiled by the Congress, she concluded that test had been met. "Volumes of evidence supported Congress' determination that the prospect of retrogression was real. Throwing out preclearance when it has worked and is continuing to work is like throwing away your umbrella in a rainstorm because you are not getting wet."[51]

The difference between the majority and dissenting opinions on this issue was twofold: the deference to be given to actions of the Congress under the Fifteenth Amendment[52] and the strength of the legislative record supporting extension of the Act. As to the second pillar of the Roberts's opinion, the doctrine of equal sovereignty, the divide was, if anything, even deeper. And, it is this doctrine which implicates the emerging and arguably distinctive jurisprudence of the Roberts's Court on federalism.

Chief Justice Roberts's opinion in *Shelby County* reiterated the doctrine stated in *Northwest Austin* that:

> there is ... a 'fundamental principle of *equal* sovereignty' among the States.[53] (Citations omitted) Over a hundred years ago, this Court explained that our Nation 'was and is a union of States, equal in power, dignity and authority.' (Citation omitted) Indeed, 'the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.' (Citation omitted)… [A]s we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.[54]

Justice Ginsburg's dissent challenges Robert's invocation of this "fundamental" federalism principle at its core. She found no basis in the Constitution or Supreme Court precedent for the existence of such a "principle" other than in a wholly inapposite context. As noted above, the Supreme Court in *Katzenbach* had made clear in sustaining the Voting Rights Act against a claim of unconstitutionally disparate treatment of certain states that the doctrine is limited to conditions imposed on states in connection with their admission to the Union. Chief Justice Roberts cites no supporting authority except for his own statement in *Northwest Austin* which, being not necessary to the holding in that case, was mere dictum.[55]

48 Id. at 2631.

49 Id. at 2636.

50 Id. at 2637.

51 Id. at 2650.

52 Writing in the *New York Review of Books*, retired Justice John Paul Stevens said in relation to this issue: "[t]he several congressional decisions to preserve the preclearance requirement—including its 2006 decision—were preceded by thorough evidentiary hearings that have consistently disclosed more voting violations in those states [the covered states] than in other parts of the country. Those decisions have had the support of strong majority votes by members of both major political parties. Not only is Congress better able to evaluate the issue than the Court, but it is also the branch of government designated by the Fifteenth Amendment to make decisions of this kind. John Paul Stevens, *The Court & the Right to Vote: A Dissent*, N.Y. Rev. of Books, Aug. 15, 2013.

53 *Shelby County*, 133 S. Ct. at 2623.

54 Id. at 2624.

55 In *NAMUDO's Non-Existent Principle of State Equality*, Zachary S. Price of the Stanford Law School argues that "[t]he

The Roberts enunciation of the equal treatment doctrine has also been challenged by constitutional scholars. Professor Akhil Reed Amar, a leading constitutional authority, has shown that the history of the Fifteenth Amendment "supports broad congressional power to administer strong and even selective medicine to individual states with poor democratic track records—the exact sort of medicine employed by Sec. 5 of the Voting Rights Act."[56] Judge Richard Posner of the 6th Circuit Court of Appeals, a highly regarded conservative jurist, dismissed this "principle" as "spurious" and "imaginary."[57] On the other hand, Prof. Issacharoff, a leading voting rights authority, has expressed support for the Roberts' view of the desuetude of preclearance, although he did not address the equal treatment principle.[58]

A further objection expressed by Justice Ginsburg focused on the potential breadth of the equal treatment doctrine. She cautions that the "extension of the equal sovereignty principle outside its proper domain-the admission of new States-is capable of much mischief. Federal statutes that treat States disparately are hardly novelties….Do such provisions remain safe given the Court's expansion of equal sovereignty's sway?"[59]

Presumably, the Court will provide the answer to that question in the years ahead.

4 *United States v. Windsor*—Same Sex Marriage[60]

U.S. v. Windsor[61] raised the question of the constitutionality of Sec. 3 of the Defense of Marriage Act ("DOMA"), which defined "marriage" and "spouse" to be limited to heterosexual couples for purposes of construing the more than 1,000 provisions of federal law which use those terms. At issue here was the exemption from taxation under the federal estate tax law of a bequest to a spouse in a same sex marriage.

Edith Windsor had married Thea Spyer, her partner for some 44 years, in Ontario, Canada. Both women were residents of New York, whose laws recognize their marriage. When Spyer died in 2009, she left her entire estate to Windsor. Because Sec. 3 of DOMA excludes a same sex partner from the definition of "spouse," the Internal Revenue Service denied the exemption, resulting in Windsor being required to pay $363,053 in taxes which would not have been assessed but for Sec. 3 of DOMA.

In his opinion for the Court, Justice Kennedy ruled that Sec. 3 "violates basic due process and equal protection principles applicable to the Federal Government."[62] Writing for himself and Justices Breyer, Ginsburg, Kagan and Sotomayor, he explained:

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suggestion that federal legislation must treat states equally is a chimera, without support in constitutional text, history, or precedent. It is particularly unfounded with respect to legislation, like § 5 of the VRA, that is based on Congress's authority under the Fourteenth and Fifteenth Amendments to eradicate discriminatory denials of the right to vote." N.Y.U. L. Rev. Online 24 (2013). In the annual forward to the Harvard Law Review's review of the last term of the Supreme Court, Prof. Reva Siegel had this to say about the majority opinion in Shelby County: "[i]t is hard to say which is the more striking feature of the opinion. One could focus on the Court's elevation of state dignity over citizen dignity. Or one could marvel at the Court's willingness to treat differentiation among states, in this context, as an affront, without ever explaining how it is different from other contexts in which Congress differentiates among states. Or one might marvel at the Court's readiness to substitute its judgment for Congress's, without law or apology." Reva B. Siegel, *Foreword: Equality Divided*, 127 Harv. L. Rev. 1, 71 (2013); Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 Geo. Wash. L. Rev. 1928, 1945 (2013) ("Scholars have argued that too much emphasis is placed on states' rights and not enough on the shared role of election administration between states and the federal government. Indeed, the right of Congress to intervene in the process of elections pursuant to its authority under the Fourteenth and Fifteenth Amendments is well-settled but unfortunately often ignored."); but see Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 Harv. L. Rev. 95, 100 (2013) (Professor Issacharoff generally endorses the outcome in Shelby County but acknowledges that "the equal dignity requirement may be of questionable constitutional pedigree.")

56 Akhail Reed Amar, *The Lawfulness of Section 5 – and Thus of Section 5*, 126 Harv. L. Rev. F. 109, 114 (2013).

57 Richard A. Posner, *Supreme Court 2013: The Year in Review*, Slate.com, June 26, 2013.

58 Samuel Issacharoff, *Beyond the Discrimination Model on Voting,* 127 Harv. L. Rev. 95 (2013). For a more robust defense of the Roberts opinion in *Shelby County,* see Ilya Shapiro, *Shelby County and the Vindication of Martin Luther King's Dream,* 8 N.Y.U. J. L. & Liberty 182 (2013). It should be mentioned that a brief review of some 116 law journal articles on *Shelby County* found no other full-throated endorsement of the Roberts opinion.

59 *Shelby County*, 133 S. Ct. at 2649.

60 Note that the issue in *Windsor* was not the validity of laws banning same sex marriage under the U.S. Constitution. That issue was raised in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), but not decided because the Court ruled the petitioners did not have standing. As a result, the decision of the District Court ruling the California proposition banning same sex marriage unconstitutional was reinstated.

61 133 S. Ct. at 2675.

62 133 S. Ct. at 2693 (Kennedy, J.)

> The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper… The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the [equal protection right as incorporated in the due process provision of the] Fifth Amendment.

In reaching that conclusion, Justice Kennedy went to great lengths to detail the federalism issue raised by DOMA. While concluding that "it is unnecessary to decide whether [the] federal intrusion on state power [represented by DOMA] is a violation of the Constitution because it disrupts the federal balance,"[63]he placed great stress on the fact that by "history and tradition the definition and regulation of marriage…has been treated as being within the authority and realm of the separate States."[64] In that regard, "[t]he recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens….Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations."[65] This policy is deeply rooted in the Nation's history; indeed, "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and state were matters reserved to the States."[66]

This history, as his opinion notes, has not been without exception. Limited "federal laws that regulate the meaning of marriage in order to further federal policy" are constitutional.[67] The vice with DOMA, he opined, lies in its "far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations."[68] And in so doing, "DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next."[69]

So, if Sec. 3 is unconstitutional not on federalism but on equal protection grounds, what are we to make of Justice Kennedy's extended[70] discussion of the federalism issue? This question has been the subject of much scholarly speculation.[71] The best answer appears to be that the history of state primacy over domestic relations established a presumption or burden to be overcome in justifying federal intervention. To be sure, the Kennedy opinion does not so state. But, it is difficult otherwise to mesh the importance he gives to federalism values with the holding that DOMA's failure rested with its denial of equal protection of same sex couples.

5 *Arizona v. United States*—Immigration

The three cases discussed above all addressed the constitutional limits of federal power. The fourth leading decision of the Supreme Court considered here, *Arizona v. United States*, concerned the constitutional limits

63 Id. at 2692.

64 Id. at 2680.

65 Id. at 2691.

66 Id., quoting from *Ohio ex rel Popovici v. Agler*, 280 U.S. 379, 383-84 (1930).

67 For example, a Virginia statute prohibiting interracial marriage was struck down as violating the 14th Amendment. *Loving v. Virginia*, 388 U.S. 1 (1967). And, marriages valid under state law are not recognized by the federal government in administering the immigration law "if entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant." 133 S. Ct. at 2690.

68 Id.

69 Id. at 2692.

70 By Justice Scalia's count, the Kennedy opinion devotes "seven full pages about the traditional power of States to define domestic relations initially fooling many readers…into thinking that this is a federalism opinion." Id. at 2705.

71 See, e.g., Courtney G. Joslin, *Windsor, Federalism, and Family Equality*, 113 Colum. L. Rev. Sidebar 156 (Oct. 14, 2013); Ernest A. Young & Erin C. Blondel, *Federalism. Liberty, and Equality in United States v. Windsor*, 2012-2013 Cato Sup. Ct. Rev. 117, 119 (2013). ("Federalism principles played a critical role in defining the contours of the equality right at stake, limiting which governmental interests could weigh against that right, and influencing the level of deference that the Court owed to how Congress had weighed those rights and interests.")

on state action in an area where the federal government has exercised its undoubted power, the hot button issue of the regulation of immigration. In 2010, Arizona enacted legislation intended to deter undocumented immigrants from taking up residence in that state. As a state with a long border with Mexico, Arizona has a particular interest in achieving that goal. While a number of states and local jurisdictions had passed laws with the same objective, Arizona's legislation was widely recognized as the most aggressive.

Exercising its powers to "establish a uniform Rule of Naturalization"[72] and regulate relations with foreign nations, Congress long ago enacted comprehensive immigration. Under the Immigration Reform and Control Act of 1986[73], Congress "specified categories of aliens who may not be admitted to the United States" [citations omitted], made "[u]nlawful entry and reentry into the country" federal offenses [citation omitted] and required aliens "to register with the Federal Government and to carry proof of status on their person [citation omitted]."

As Justice Kennedy explained in his majority opinion in *Arizona v. United States*,

> Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect. [Citations omitted] From the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes. The Supremacy Clause provides a clear rule that federal law shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' [Citations omitted]…. There is no doubt that Congress may withdraw specified powers from the States by enacting statute containing an express pre-emption provision. [Citations omitted]
>
> State law must give way to federal law in at least two other circumstances. First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. [Citation omitted] The intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive…that Congress left no room for the States to supplement it' or where there is a 'federal interest …so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' [Citation omitted]. Second, state laws are preempted where they conflict with federal law.[74]

5.1 The issue in *Arizona v. United States* was whether the Arizona law was preempted on either of these grounds. Four provisions were at issue. Sec. 3 made violation of the federal requirement that aliens carry registration documentation a violation also of state law. Under Sec. 5, aliens knowingly working or seeking to work in the state would commit a misdemeanor. State and local officials were empowered under Sec. 6 to make warrantless arrests of aliens reasonably suspected of residing in the state without proper documentation. Finally, Sec. 2 (B) called for officers to inquire into the immigration status of persons legally stopped, detained or arrested who were or could reasonably be suspected of being illegal aliens.[75]

The Supreme Court ruled that all of the provisions of Arizona law except for Sec. 2 (B) were preempted by federal law. Without reviewing the reasons for striking down each such section, suffice it to say that the Court considered that Arizona's statute, while designed to supplement federal with state enforcement, interfered with the policy carefully crafted by Congress. It bears noting that none of the contested provisions of the Arizona law expressly contravenes federal law. But as Justice Kennedy's opinion concludes:

> The National Government has significant power to regulate immigration. With power comes responsibility and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.[76]

Sec. 2 (B) was upheld for now because "it only requires state officers to conduct a status check during the

72 U. S. Constitution, Art. I, § 8, cl. 4. Congress's authority with respect to foreign relations is inherent in its power as a sovereign. *Arizona v. United States*, 132 S. Ct. 2492, 2494 (2012).

73 See PL 99-603, 100 Stat. 3359 (1986) (codified, as amended, at 8 U.S.C. §§1324a-1324b).

74 132 S. Ct. at 2500-01 (Kennedy, J).

75 Id. at 2501-08. See, *Federal Preemption of State Law – State Immigration Enforcement: Arizona v. United States* 126 Harv. L. Rev. 327, 328 (2012).

76 *Arizona v. United States*, 132 S. Ct. at 2510.

course of an authorized, lawful detention or after a detainee has been released" and does not interfere per se with federal enforcement policy.[77] The Court, however, left open the possibility of revisiting this holding in light of the actual enforcement experience.[78]

5.2 Justice Scalia's dissent, joined in part by Justices Alito and Thomas, raised serious federalism concerns. For him, the majority decision "deprives states of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there."[79] In so finding, he did not take issue with the federal government's power to displace state law in this area. Rather, he did not find sufficient evidence that was what Congress actually did.

5.3 *Arizona v .United States* is not the only preemption case recently decided by the Supreme Court. In *Arizona v. Inter Tribal Council of Ariz. Inc.*,[80] the Court ruled that Arizona's law imposing requirements for voting in federal elections beyond those mandated by Congress in the National Voting Registration Act was preempted thereby. In an opinion by Justice Scalia, the Court found that the Arizona statute conflicted with the federal law's requirement that the states "accept and use" the prescribed federal form, which did not provide for the documentary evidence of citizenship mandated by Arizona. In *Mutual Pharmaceutical v. Bartlett*,[81] the Court found that the branding requirements of the Federal Food, Drug and Cosmetic Act trumped state law requiring warnings inconsistent with the labeling requirements of the Food and Drug Agency. To similar effect, the Court, in an opinion by Justice Thomas writing for a six to three majority in *Kurns v Railroad Friction Products Corporation,* ruled that a state common law claim for damages resulting from exposure to asbestos in the brake pads of a locomotive was barred by a federal statute regulating their design and manufacture, even though the act did not expressly preempt state law and the regulations thereunder did not address the issue of when warnings of hazardous materials were required.[82]

6 Intimations for the Future

So, what do these decisions, two of them of seminal importance, tell us about the future direction of the Roberts court in determining the constitutional limits of federal and state power? I would offer five observations.

First, the four more conservative justices, with the likely but not always certain support of Justice Kennedy, appear determined to rein in federal authority, picking up the mantle from the Rehnquist Court. This is not to say that the Court is bound on a course to restore the highly restrictive view of federal authority which predated the New Deal. Rather, the new focus on state sovereignty and state dignity foreshadows a possible restoration of states' rights now shorn of its racist connotations in the post-civil rights era.

This direction is most clearly apparent in the majority view in the Obamacare case that Congress lacked the authority, under either the Commerce Clause or the Necessary and Proper Clause, to impose the individual mandate. Most telling in that respect is the ground articulated by Chief Justice Roberts for rejecting the position that the mandate is supported as "necessary and proper" to the unchallenged federal power to regulate health care under the Commerce Clause. His rationale did not take issue with the claim that the mandate was "necessary";[83] after all, it is economically fully integrated into the scheme of the legislation. Nor did he cite any provision of the Constitution or precedent of the Supreme Court in fashioning his position that the mandate was not a "proper" exercise of Congressional authority. Rather, he invoked a rhetorically broad and constitutionally unanchored notion that authorizing the mandate would "undermine the structure of government established by the Constitution," would not be '"consist [ent] with the letter and spirit of

77 Id. at 2509.

78 Id. at 2510.

79 Id. at 2511 (Scalia, J., dissenting).

80 *Arizona v. Inter Tribal Council of Arizona, Inc.,* 133 S. Ct. 2247 (2013).

81 *Mutual Pharmaceutical v. Bartlett*, 133 S. Ct. 2466 (2013).

82 *Kurns v. Railroad Friction Products Corporation*, 132 S. Ct. 1261 (2012).

83 As the Robert's opinion noted, "[a]s our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress's determination that a regulation is 'necessary.' We have thus upheld laws that are 'convenient,' or 'useful or conducive' to the authority's 'beneficial exercise.'" *National Federation of Business v. Sibelius*, 132 S. Ct. at 2591-92.

the Constitution,'" and, therefore, would not be a "*proper* [means] for carrying into Execution" Congress's enumerated powers.[84]

Of course, the Commerce Clause is such an enumerated power. But, in Robert's view, a conception of the Necessary and Proper Clause which would encompass the individual mandate "would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside it."[85] This is, of course, a reiteration of his principle objection to Commerce Clause authority for the individual mandate. Ignored is the reason for reliance on Necessary and Proper power—that it is a necessary means of implementing Congress's proper goal of regulating health care. After all, the mandate is the tail, not the dog. And, without the dog, there would be no tail. The body of Obamacare can hardly be dismissed as a pretext for enlarging Congressional power to encompass the individual mandate.

The Roberts Court's treatment of the Medicaid issue is fully consistent with this view of the Court's federalism jurisprudence. Recall that the principle objection to the ACA's conditioning eligibility for funding on extension of the program was that it amounted to holding a gun to the heads of the states; in other words, it robbed the states of the dignity of choice inherent in their status as dual sovereigns in a federal system.

So, at bottom, the Roberts opinion in the Obamacare case, backed in this regard by the separate opinion of Justices Alito, Kennedy, Scalia and Thomas, endorses a sort of free-floating federalism based not on constitutional text or clear precedent, but a sense of what is implied by the federal structure itself.[86]

This reading of the federalism jurisprudence of the Roberts Court is supported by the Court's decision in *Shelby County*. Once again, the majority opinion by Chief Justice Roberts strikes down a federal statute, here the Voting Rights Act of 1965, on the ground not of constitutional text or court precedent, but a theory of federalism. As we have seen, there is no support for the opinion's key premise, that equal sovereignty of states is a fundamental constitutional principle. The only precedents cited in the majority opinion are limited to a situation not present in *Shelby County*—the imposition of continuing conditions for admission to the Union by certain states. Nor is this doctrine rooted in any Constitutional text.[87] Here, too, the driving consideration appears to be the Justices' take on the implications of federalism itself. Moreover, the holding in *Shelby County*, seen in the context of the concerns expressed by conservative justices in upholding federalism values in prior Voting Act cases, represents the culmination of a long held but never before realized determinative position. If that is so, then it follows that one should expect the Roberts Court to hold to an aggressive posture in terms of circumscribing federal power in relation to the states. It should be noted that Justice Kennedy, frequently the swing vote between the more conservative and more liberal factions, is a strong and consistent proponent of protecting the dignity of states as sovereigns.[88]

Second, there are reasons for concluding that the limitation on Commerce Clause power established by the majority in the Obamacare case may not have much practical application going forward.[89] It is most unlikely

84 Id. at 2592.

85 Id.

86 See, John F. Manning, *Federalism And The Generality Problem In Constitutional Interpretation*, 122 Harv. L. Rev. 2003, 2062-63 (2009). (("[T]he term 'proper'… [is] a vehicle for enforcing extratextual norms *if the existence of those norms can otherwise be independently established*. …Hence, its utility as a freestanding source of judicially enforceable 'federalism' depends entirely upon the Court's capacity to identify such a freestanding federalism norm, quite apart from the Necessary and Proper Clause.").

87 Overarching interpretive doctrines such as "originalism" and "living constitution" offer no guidance to the Court's federalism jurisprudence in these cases. None of the opinions invoked either philosophy. As discussed, the focus was on the structure of the federal system as such and, in that context, considerations of state sovereignty.

88 Hence, the lengthy discussion of state primacy over the regulation of domestic relations in *U.S. v. Windsor*, supra, even though the decision did not rest on federalism grounds. See *United States v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). ("[Federalism] was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."

89 As a technical matter, the majority opinion on the commerce clause issue is dictum, since it is not necessary to the holding that the individual mandate is constitutional under the Congress's taxing power. But, that technical point is only that. Should the Court

that the Congress would seek to enact a version of the individual mandate in other contexts.[90] Similarly, the equal sovereignty doctrine seems unlikely to have significant impact beyond the case at hand, although Justice Ginsburg thought otherwise. While the doctrine could be read as calling for equal treatment in terms of legislation by the Congress not involving an intrusion on state authority over its own affairs (which is not now and has never been the case),[91] the principle enunciated in *Shelby County* is best understood as driven by considerations of the dignity of states as sovereigns, rather than concerns with the equal allocation of federal largess. Needless to say, there are countless laws enacted by Congress which do not treat all states equally, and for good reason—not all state have the same needs, for example. It is difficult to conceive of a ruling by the Supreme Court striking down these enactments.

Third, the Court's opinion on the Medicaid issue in the Obamacare case is most likely to be tested, as Congress seeks to address social safety net issues through partnerships with the states. The Roberts opinion conspicuously refrained from drawing a line between permissible conditions for receiving federal funding provided under Congress's spending power and impermissible coercion.[92] Here, as in the voting rights case, the Court seems to be driven by an insistence on shoring up the dignity of states as equal sovereigns. It will not escape the attention of the majority that drawing too tight a boundary would encourage less, rather than more, federalism in that the alternative to federal-state partnership is direct and exclusive national action (e.g., a federally financed public health care system essentially modeled on Medicare).

Fourth, while the Court has not yet considered the constitutionality of state laws prohibiting same sex marriage, the decision in *Windsor* can be read as foreshadowing a decision of the Supreme Court holding such laws unconstitutional on equal protection grounds. As noted, that view was expressed with customary vigor by Justice Scalia in his dissenting opinion.[93] Chief Justice Roberts separately dissented to emphasize his position that no such implication should be drawn from the majority opinion.[94]

As discussed above, Justice Kennedy's majority opinion found it "unnecessary to decide whether this [DOMA's definition of marriage] federal intrusion on state power… disrupts the federal balance."[95] In *Windsor*, the dictates of federalism (here, recognition of the states' traditional primacy over matters of domestic relations) and equal protection were aligned because New York recognized Windsor's same sex marriage. When the issue of state law definitions of marriage as limited to heterosexual couples comes before the Court, that question will be unavoidable. Given Justice Kennedy's opinion that such restrictive definitions deny to a disfavored class the equal protection of the law, it would seem likely that state laws banning same sex marriage would fare no better than the DOMA definition struck down in *Windsor.*[96] The remarkable shift in public opinion in favor of same sex marriage, needless to say, encourages such an outcome.[97]

be faced with a challenge to the Congress's commerce clause authority, who can doubt it would take the same position as set forth in the Roberts majority opinion?

90 The hypothetical posed by opponents of the individual mandate that sustaining it would empower Congress to mandate the purchase of broccoli on the ground that this would contribute to improving the health of all Americans and thus reduce the cost of health care is just that, a hypothetical. The notion of Congress actually doing this is, to say the least, fanciful. But, even if one were to suppose, there is nothing in the market for vegetables remotely comparable to the health care system.

91 *Shelby County*, 133 S. Ct. at 2649 ("Federal statutes that treat States disparately are hardly novelties.") (Ginsburg, J., dissenting).

92 The Chief Justice declined to "'fix the outermost line'" where persuasion gives way to coercion," declaring that "[i]t is enough for today that whatever that line may be, this statute is surely beyond it." 132 S. Ct. at 2606.

93 *United States v. Windsor*, 133 S. Ct. at 2707-09 (Scalia, J., dissenting).

94 "I write only to highlight the limits of the majority's holding and reasoning today, lest its opinion be taken to resolve not only a question that I believe is not properly before us- DOMA's constitutionality-but also a question that all agree, and the Court explicitly acknowledges, is not at issue." *United States v. Windsor,* 133 S. Ct. at 2697 (Roberts, J., dissenting). That question is the issue of the validity of state definitions of marriage which exclude same sex couples.

95 Id. at 2691 (Kennedy, J.).

96 In the aftermath of *U.S. v. Windsor*, the constitutionality of state bans of same sex marriage has come before U.S. District Courts in Utah, Oklahoma, Virginia, Texas, Michigan, Oregon and Pennsylvania In all of these cases, the state law has been ruled unconstitutional. In addition, the states of Kentucky, Ohio and Tennessee have been required to recognize out-of-state same sex marriage. Most of these decisions have been stayed pending the outcome of appeals taken from the decisions of the lower federal court. As of this writing, these appeals are underway. It is highly likely that the issue will be taken up by the Supreme Court in 2015.

97 A May Gallup poll found that 55% of all Americans support same sex marriage, the highest level recorded by Gallup and an astonishing increase over the level in recent years.

Fifth, the Court's consistent upholding of federal preemption demonstrates a willingness to give federal power full sway over conflicting, inconsistent or unharmonious state action where the Congress legislates within its proper sphere. This position is certain to inform future decisions by the Court as the issue arises with much frequency.

It should be noted that the Court's ruling in *Arizona v Inter Tribal Council* has implications for federal voting rights law going far beyond the preemption issue at hand. As Justice Scalia's opinion recognizes, the Elections Clause of the Constitution[98] expressly "empowers Congress to pre-empt state regulations governing the 'Times, Places and Manner' of holding congressional elections."[99] Indeed, the Elections clause makes Congress a partner in the process of regulating Congressional elections by giving it a veto over laws enacted by the states. As Justice Scalia explained, "[t]he Elections Clause has two functions. Upon the States it imposes the duty ("shall be prescribed") to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." So, the Court's concern with upholding the sovereignty of the states should not pertain to actions of the Congress under the Elections Clause because the "power" that provision "confers is none other than the power to pre-empt."[100] In other words, there is no undignified beseeching of the federal government to approve state actions that otherwise would take effect on their own. Where federal elections are concerned, the states had no reserved power and derive their authority solely from the Constitution itself, subject to the role played by the Congress as established in the Elections Clause.

As Professor Issacharoff has proposed, this reading of the Elections Clause provides a firm constitutional foundation for "a new constitutional guarantee of the right to vote outside the formal strictures of the Voting Rights Act, and not resting on the historically central question of racial exclusion."[101] On this basis, he proposes that Congress replace the Voting Rights Act with new legislation which applies to all the states and imposes uniform standards of election integrity — a new approach for a post- Shelby world.

Based on the Elections Clause, the Issacharoff proposal is limited to federal elections. Others have offered to extend versions of this model to the states based on the 14th and 15th Amendments, preserving what is left of the Voting Rights Act, or as part of an entirely new piece of legislation.[102]

98 Art. I, Sec.4, cl.1

99 133 S. Ct. at 2253.

100 Id. at 2257.

101 Issacharoff, *Beyond the Discrimination Model on Voting*, supra at 107. *See also Tolson, Reinventing Sovereignty*, supra.

102 Tolson, *Reinventing Sovereignty*, supra at 1232-33. ("Because the Elections Clause is not a federalism provision, and instead concerns decentralization and autonomy, the Court is obliged to defer to Congress where it has exercised its "veto power" over the states. Such deference is also warranted where Congress has acted pursuant to other provisions, such as the Fourteenth or Fifteenth Amendments, in light of the fact that these provisions redefined the relationship between the state and federal government to give the latter more authority with respect to regulating the franchise. Thus, the fact that the Elections Clause does not give Congress a veto over pure state election practices does not preclude congressional authority to intervene. The Court has also recognized the Fourteenth and Fifteenth Amendments as express limitations on the state's authority over elections; thus, congressional actions pursuant to these provisions also represent a type of 'veto power' over state electoral authority.") (footnotes omitted). Whether this view survives *Shelby County* could depend on how Congressional power over state elections is exercised. For example, preclearance would not survive Supreme Court scrutiny but after the fact remedies would stand a better chance of being sustained. A variation of Professor Issacharoff's proposal for a new federal election integrity law of universal application was offered by Professor Spencer Overton in *Voting Rights Disclosure: Responding to Samuel Issacharoff, Beyond the Discrimination Model on Voting*, 129 Harvard L. Rev. Forum 19 (2103). It also is based on the Elections Clause but would draw upon the Fifteenth Amendment as well, so that coverage would extend to both federal and state elections.)