

## FOREWORD

# The Non-Political Branch?

*Roger Pilon\**

The Cato Institute's Center for Constitutional Studies is pleased to publish this 11th volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the term just ended, plus a look at the cases ahead—all from a classical Madisonian perspective, grounded in the nation's first principles, liberty and limited government. We release this volume each year at Cato's annual Constitution Day conference. And each year in this space I discuss briefly a theme that seemed to emerge from the Court's term or from the larger setting in which the term unfolded.

Unlike the Court's 2010 term, the one just concluded had no shortage of highly charged cases, covering everything from immigration to television indecency, GPS surveillance, property rights, union dues, and more. But overshadowing all was of course the challenge that 26 states and others had brought against the Obama administration's signature accomplishment, the Affordable Care Act—"Obamacare" in common parlance. During its two-year run-up to the Court, 6 of the 12 federal judges who'd ruled on the merits had ruled important parts of the Act unconstitutional by the time the Court granted cert. And all had appealed to the Constitution's "first principles"—in particular, to Madison's admonition in *Federalist 45* that the powers of the new federal government would be "few and defined"—marking the case as one for the ages. The ultimate outcome, once the Court ruled, did not disappoint. But it left us with an unsettling question: Did the "non-political branch" hand down a political decision?

\* Roger Pilon is vice president for legal affairs at the Cato Institute, director of Cato's Center for Constitutional Studies, and publisher of the *Cato Supreme Court Review*.

## The Court's Reputation on the Line

Before turning to that question, let's stay with the run-up—the two may not be unconnected—then reflect more broadly on the underlying issue. As apprehension grew among ACA supporters about the ultimate outcome of the case, so too did the complaints we'd heard for some time from the Left—that for years the conservative Court had been driven as much by politics as by law. From *Bush v. Gore* to *Citizens United*—and before that in *Lopez*, *Morrison*, and other such cases—the Court's 5–4 decisions, they charged, amounted to little more than politics parading as law. During the three days of oral argument in late March those apprehensions over the ACA's constitutionality came to a head, nowhere more clearly than in the breathless words of CNN's Jeffrey Toobin, during a break in the argument, who described the situation in the Court as a “train wreck” for the administration. And so from the president himself to the *New York Times*, *The New Republic*, and other fonts of elite opinion, to say nothing of the legal professoriate that had confidently assured us that the ACA's constitutionality wasn't even a close call, the cry went out: The reputation of the Court—of *this* Court in particular—was on the line.

The charge of political judging is not new, of course. Indeed, many over the years have lodged it against no less than Chief Justice John Marshall and the 1803 decision that secured the very institution of judicial review, *Marbury v. Madison*. Today the “Lochner Era” is thought by most liberals and many conservatives alike to have been lawless. More recently, conservatives regularly berated what they took to be the Warren and Burger Court's “activism,” much as liberals since then have leveled the charge against the Rehnquist and Roberts Courts, and in each case, not without effect in the larger political world. Although polls show that the public understands our courts less well than our political branches, which may explain why they're generally held in higher regard, their reputation too dims, not surprisingly, in the teeth of mounting criticism from the court-watching class.

But are not the courts supposed to be immune from such pressures? Indeed, is that not precisely why we speak of the “non-political” branch—and why federal judges have life tenure, among other protections, to insulate them from political pressure? Yet despite those safeguards against both popular and elite pressure, the hard reality is that it's often not easy to distinguish lawful from lawless

judging, especially under modern statutory law. At the same time, neither is it all in the eye of the beholder. More can be said.

### **The Least Dangerous Branch**

Many of today's Court critics, especially on the Left, are disposed to think of the period that followed the New Deal constitutional revolution of 1937-38 as the "golden age" of judicial temperance. The *Lochner* Era behind it, the Court was largely deferential to the political branches, thus enabling a vast sea of federal and state redistributive and regulatory schemes to pour forth. Democracy itself was unleashed—majoritarian will, unencumbered by constitutional constraints.

Yet judicial deference is no measure of judicial responsibility, as became crystal clear once the civil rights movement started to intrude on that pacific world. And few wrestled more with the clash that followed than a young Alexander Bickel, clerking for Justice Felix Frankfurter when *Brown v. Board of Education* was decided in 1954, although his main ruminations on the matter would appear only eight years later in *The Least Dangerous Branch*, written from his influential post at the Yale Law School. In a *SCOTUSblog* symposium last month marking the book's 50th anniversary, I and other contributors took note of Bickel's struggle to come to grips with the very institution of judicial review. His two central themes—the "countermajoritarian difficulty" and the "passive virtues"—show plainly that at his core he was, like so many coming out of the New Deal, a small "d" democrat, trying to square judicial review with democracy.

And a particular concern was to show that *Brown* had been rightly decided, yet to show also that the Court had been right a year later when it indulged the "passive virtues" by deciding not to decide *Naim v. Naim*, a challenge to Virginia's anti-miscegenation statute. As I wrote in the *SCOTUSblog* symposium, Bickel granted that the principle was the same in both cases, but given the intensity of the opposition to *Brown*, especially in the South, he asked whether it would have been "wise," in that context, for the Court to have decided *Naim*. That's a political question, of course, which the Court answered, implicitly, by ducking the issue, which Bickel defended. When he wanted or needed to, therefore, he could rise "above" principle; and he could because he seems to have been working with multiple principles, not all of them grounded in the Constitution.

Well is it proper for the Court to indulge the “passive virtues,” by which Bickel meant mainly the nonjusticiability principles? Clearly it is in many cases, given the Constitution’s Case or Controversy Clause, although there will be close calls. But in *Naim* it was not a question of ripeness, mootness, and the like. Rather, it was the prior question of whether the Court should take the case at all, whether it should exercise its discretion to deny a petition for *certiorari*, as authorized by the Judiciary Acts of 1891 and, more fully, 1925. Bickel drew our attention to this as perhaps the most “political” of the Court’s legitimate powers, and it is. Here especially there will be close calls, but in this case, where the equal-protection principle was the same as in *Brown*, I believe the Court (and Bickel) erred—easy to say, I grant, at this historical distance.

In other cases, however, the Court would be perfectly correct in declining to grant review, and correct as a matter not simply of discretion but of principle. Setting aside the mixed posture of the case, and the litigation below of a federal question, where might the decision not to decide have been better made, I submit, than in *Roe v. Wade*? The question there was quintessentially one of line-drawing under a state’s general police power. Unlike in *Naim* or, later, in *Griswold v. Connecticut*, where the challenged state statutes were protecting no plausible rights, but indeed were interfering with plausible rights—the right to marry in *Naim*, the right to sell and use contraceptives in *Griswold*—in *Roe*, reasonable people could have reasonable differences about when right-claiming life begins and hence about when the general police power, which belongs to the states, comes into play. As in so many other line-drawing contexts, that is a decision for the people, through their political institutions, to make, not for the courts to decide. Given that it *is* a political question, when courts do decide such matters, often in split decisions and contrary to the express decisions of the people, they cease to act as the non-political branch.

### **To the Core of the Matter**

But the main problem today concerning the “non-political” branch has far deeper roots. In fact, it’s implicit in the very “countermajoritarian difficulty” that so perplexed Bickel and others of that post-New Deal era. Courts are indeed “countermajoritarian” institutions. But so is the Constitution, the very document that authorizes and empowers our courts. The Constitution is replete with *checks* on majoritarian

will, including the check afforded by judicial review, a practice implicit in a written constitution that vests “the judicial Power” in the courts the document authorizes. Those courts will be seen as a “difficulty,” however, only if you imbue democracy—and hence majoritarianism, its practical manifestation—with greater scope and power than the Constitution authorizes. And that, precisely, is what the New Deal “constitutional revolution” brought about.

The revolution’s roots were in the ideas of the earlier Progressives, who rejected Madison’s Constitution for liberty through limited government. As I wrote in the Bickel symposium, they drew variously from German ideas about good government (Bismarck’s social security scheme), British utilitarianism (replacing natural rights theory), and the emerging social sciences (enter the social engineer), all to reorient us toward seeing law as “policy” and hence as legislation aimed at providing the greatest good for the greatest number. That vision stood in sharp contrast with the older Madisonian idea of law mainly as principle, grounded in liberty, property, and contract, secured by courts enforcing those rights as well as such legislation as might be necessary to flesh them out, to provide a limited set of “public goods,” strictly defined, and to do whatever else might otherwise be constitutionally authorized.

Such was the main business—although, alas, not the only business—of the “Old Court,” nowhere more evident than in its splendid *Lochner* decision in 1905. But as legal realism, with its conflation of politics and law, took hold in American legal thought, the Court began to cave, doing so systematically after President Franklin Roosevelt’s notorious Court-packing threat. The Constitution’s core doctrine of enumerated powers was eviscerated in 1937; the Bill of Rights and judicial review were bifurcated in 1938, with economic and property rights the main victims; and the nondelegation doctrine was jettisoned in 1943, giving us the modern executive state. To oversimplify, but not by much, the Constitution became a largely empty vessel, to be filled by transient majorities, though more realistically by those best situated to work the new system—and the courts were “restrained” from hearing a vast array of regulatory and redistributive complaints.

That “restraint” might be thought to keep the courts out of politics and hence to preserve their role as the non-political branch—and many of today’s conservatives and liberals alike have argued

just that point. But that view is deeply mistaken. It ignores, when it does not champion, both the constitutional inversion the New Deal Court brought about and the means by which it brought it about. The inversion turned a document that for 150 years was understood by all as authorizing only limited government into one that authorized the opposite. The idea that for 150 years, starting from the time it was written and ratified, the Constitution was fundamentally misunderstood simply strains credulity. Moreover, the systematic inversion was brought about through political pressure from the top: the judicial decisions that achieved the inversion were political, plain and simple, responding to that pressure, not to constitutional imperative. Finally, in the name of a purported diminished role for the courts, this view ignores the political judging that was institutionalized once the inversion was completed.

First, with the demise of the doctrine of enumerated powers, the courts were now faced with a surfeit of political acts—legislation—all of which required them to interpret and apply vast statutory schemes to the controversies before them. Because law is often unclear, especially the kind of law that was now pouring forth from Congress, the odds of the Court making political rather than legal judgments multiplied exponentially. Does growing wheat in excess of the statutory limit (*Wickard v. Filburn*), unlike carrying a gun near a public school (*United States v. Lopez*), “affect” interstate commerce? Is that a political or a legal question? Only Justice Clarence Thomas, in *Lopez*, has seemed willing to speak plainly: “Clearly, the Framers could have drafted a Constitution that contained a ‘substantially affects interstate commerce’ clause had that been their objective.” They did not.

Second, even if the courts might try to avoid hearing cases brought in the name of rights by invoking the bifurcation that flowed from (in)famous footnote four of *Carolene Products*, they would still have to decide which groups were “discrete and insular minorities” and, far more often, which rights were and were not “fundamental” and what level of judicial scrutiny was accordingly appropriate. None of that is in the Constitution, of course. Yet here too, all of it requires judges to make the kinds of value judgments that are, inescapably, political judgments. Take the simple case of *Lawrence v. Texas*. Was the sexual freedom at issue there a “fundamental” right? If so, *Lawrence* wins; if not, he likely loses. But why is that political question even

before the Court? It is because the New Deal Court carved out a class of “lesser” rights relating to “ordinary commercial transactions,” thus rendering “rationally based” economic regulations effectively immune from judicial scrutiny—and that was pure politics.

Third and finally, those political judging problems were only exacerbated after the Court jettisoned the nondelegation doctrine, notwithstanding the very first sentence of Article I—“All legislative Powers herein granted shall be vested in a Congress.” After its legislative powers were unbridled with the demise of the doctrine of enumerated powers, Congress soon discovered that it could no longer manage all the legislation it was enacting, so it began delegating its legislative powers to the vast administrative agencies it was creating (well over 300 today), thus effectively putting those mostly executive branch agencies in the lawmaking business. With both the enumerated powers and the nondelegation brakes released, the surfeit of legislation coming from Congress became a flood coming from the agencies, all of which led to ever more refined, often inscrutable deference doctrines coming from the Court, evincing nothing so much as political judging.

The result is a body of “constitutional law” that today is so far removed from the document Madison gave us as to be in many respects its mirror opposite. And nowhere is that more true than with the concern that most animated the founding and subsequent generations, up to the Progressive Era—to create a government that was effective where it was authorized but limited to those authorizations, leaving us otherwise free to pursue happiness as we thought best. Is there any better example of our having abandoned that inheritance of liberty through limited government than the 2,700-page monstrosity known colloquially as Obamacare?

### **The Obamacare Decision**

In a truly free society of the kind the Founders and Framers envisioned, health care would be offered and purchased in the market, just like food, clothing, shelter, education, art, or any other private good. As such, its variety, quality, and cost would be entirely a function of market forces. Individuals would be free to come together to provide and receive such care and also to insure against unexpected large losses, as they do now regarding their lives, homes, autos, incomes, retirement, and the like, entering into such arrangements as

seem best for them. That's the very model of individual freedom and responsibility, with government there to secure that freedom and to enforce whatever contractual arrangements are made, but not to dictate them. And government might also assist those few for whom private charity proved insufficient to enable them to handle the responsibilities required in a free society.

Here too, that's a model far removed from what we have today. In vast areas of life, individual freedom and responsibility have been replaced by social obligations and responsibilities, backed by government sanctions, both positive and negative. And few areas have been more collectivized, especially after passage of the ACA, than health care. In the minutest detail, the ACA regulates health care providers, recipients, and associated businesses. No one remotely understands the whole undertaking, not least because the tens of thousands of regulators, federal, state, and local, who are filling in the details are far from finished, if ever they will be. It's a textbook example of the kind of hubristic social engineering and folly that the late F.A. Hayek and other economists have warned against over the years.

The question before the Court, however, was not whether the ACA was wise policy but whether it is constitutional. That was a legal question, calling not for a political but for a legal answer. As a preliminary matter, two points are in order. First, the sheer complexity of the ACA, as just noted, made it highly unlikely that the justices would not be making political judgments in the course of trying to offer legal answers—another textbook example of the point made above, that unclear law fairly invites judges to make political judgments, the more such law the more such judgments.

Second, if the question were whether the ACA is authorized by the Constitution, as distinct from modern constitutional law, the answer would be an easy "no." Article I, Section 8 of the Constitution lists only 18 areas in which Congress may legislate; health care and health insurance are not among them. More precisely, Congress's power to tax to provide for the "general Welfare of the United States" was defined by Madison in *Federalist 41* and elsewhere, and by others too, as informed by the 17 enumerated powers or ends that followed; if it had been understood as an independent power to tax "for the general welfare," as the New Deal Court would hold, no further enumerations would have been needed, since money can be used to accomplish anything. Nor would Congress's power to regulate



interstate commerce suffice as authority for the ACA; as originally conceived, functionally, the commerce power was granted to enable Congress to ensure a free national market, especially as against the protectionist impediments that states had erected under the Articles of Confederation. If the commerce power had been understood as authorizing Congress to regulate anything that “affected” interstate commerce, for any reason, as the New Deal Court would also hold, the Constitution would never have been ratified. Nor finally would the Necessary and Proper Clause suffice, since it authorizes Congress only the means for carrying into execution its other powers; there being no primary power, there can be no instrumental power.

But the case was litigated not under the Constitution but under post-New Deal “constitutional law,” which in relevant part at the time of litigation authorized Congress to regulate any economic “activity,” interstate or not, that in the aggregate affected interstate commerce. And the principal question before the Court—at least the one on which I will focus—was whether that commerce power, or any other, authorized the ACA’s individual mandate, which requires applicable individuals to purchase a government approved health insurance policy from a private vendor or pay a penalty.

Invoking a “bootstrapping” problem, ACA opponents argued that Congress’s commerce power, however far the modern Court has stretched it, had never been read as authorizing Congress to compel individuals to *engage* in commerce so it could then regulate that commerce under its power to regulate interstate commerce. Congress had regulated all manner of economic “activity,” but never “inactivity”—like not buying insurance. If that were permitted, Congress’s regulatory power would be effectively unlimited, since at any moment we’re all engaged in an infinite number of inactivities. Moreover, opponents argued, the mandate was neither a necessary nor a proper means under the Necessary and Proper Clause for regulating the interstate health insurance market, since there is no predicate power for which the clause would afford necessary and proper means.

As so often happens under the tangled web that is modern constitutional law, the case produced multiple opinions, with justices joining or declining to join various parts and sub-parts of each others opinions. The essays below treat those opinions in some detail. Here it will suffice to draw forth just a few points. With respect to the individual mandate, the Court’s five conservative justices (I use

the conventional labels), with Chief Justice John Roberts writing separately, ruled that Congress had exceeded its power under the Commerce Clause when it sought to *compel* commerce in order then to regulate it, since allowing such compulsion would have rendered Congress's commerce power truly unlimited. In so arguing, the majority invoked the broad, fundamental principle that Congress's powers are enumerated and thus limited, as evidenced by the very first sentence of Article I, by that enumeration, by the Tenth Amendment, and by the original understanding, itself reflected in countless sources. That said, plus there being no precedent to the contrary, the majority's holding rests not on politics but on law, and in particular on the law of the Constitution, however much the Court may have sanctioned Congress's unlawful expansion of that law over the years. By contrast, the Court's four liberal justices, in abject deference to Congress's reading of its power, would have upheld this latest—doubtless, ultimate—congressional power-grab, even though the government, in all of the litigation over the question, had never been able to offer a single example of something Congress couldn't regulate under its commerce power.

Given that holding, the government's appeal to Congress's instrumental power under the Necessary and Proper Clause should have been easy for the conservative majority to reject, as noted above, but the justices felt compelled to square their reasoning with two recent, dubious precedents, *Gonzales v. Raich* and *United States v. Comstock*—although their opinions can be read to have narrowed those precedents slightly. Roberts held that even if the mandate is necessary to realize the ACA's core reforms, it is not a proper means toward that end because it expands Congress's power to create the necessary predicate. For their part, the four other conservatives held that since there were many other ways in which the ACA might have achieved its ends, the unprecedented and unbounded mandate was not a necessary means. Here too, then, as with the government's Commerce Clause argument, given that no constitutionally granted power was wrongly checked by an "activist" Court—the charge we've heard from the Left in recent years—the majority's opinions are based on law, not politics, even if here the precedents on which they largely rest are themselves unwarranted expansions of congressional power. And here too, again, the four liberal justices would have expanded those precedents even farther.

## Taxing Questions

But that did not end the matter, because the government had a second argument: namely, that if the individual mandate is not justified under the commerce power, it is under Congress's taxing power. When the decision came down, to the surprise of all, Chief Justice Roberts agreed. On this decisive point he was joined by the Court's four liberals. The remaining four conservatives filed an unusual joint dissent from the ruling.

Let's take Roberts's argument one step at a time. He begins by invoking the long standing canon of constitutional avoidance: if a statute has multiple interpretations, a court should avoid those that would render it unconstitutional. Here, Roberts grants, "the most straightforward reading of the mandate is that it commands individuals to purchase insurance." But that's not the *only* way to read the statute, he continues. It can also be "fairly possible" to see it as imposing a tax on those who do not buy insurance. On this reading, therefore, the mandate is not a legal *command* to buy insurance, as it would be if justified under the Commerce Clause; rather, it "can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS." Thus, the question is whether this is a reasonable reading.

Roberts proceeds to answer that by taking a functional approach to the question of whether the mandate's enforcement entails a tax. The exaction "looks like a tax in many respects," he writes. It's paid into the Treasury by taxpayers pursuant to normal tax rules. The requirement is found in the Internal Revenue Code and is enforced by the IRS. And it's expected to produce at least some revenue. To be sure, the ACA describes the payment as a penalty, not as a tax, he continues; but that choice, as shown by the Court's precedents distinguishing a tax from a penalty, does not control "whether an exaction is within Congress's constitutional power to tax." Rather, the Court has been concerned only with an exaction's practical operation. And here, the exaction is low, relative to the cost of insurance; there is no scienter requirement, as with typical punitive statutes; and, again, it is administered by the IRS—"except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution." All of which suggests that what the ACA calls a "penalty" *may* be viewed as a tax.

None of which is to say, Roberts continues, that the payment is not intended to affect conduct. But that hardly distinguishes it from many other taxes or tax policies, like those that encourage home purchases, professional education, or energy efficiency. Penalties also are meant to affect conduct, of course, but they do so ordinarily by punishing *unlawful* behavior. The mandate's exaction, however, cannot be read plausibly as punishing unlawful behavior. As the government argued, if individuals choose to pay the exaction rather than obtain health insurance, "they have fully complied with the law."

Thus, the Court's precedents, Roberts concludes, demonstrate that Congress had the power to impose the exaction under its taxing power, whatever it said it was doing, and that the mandate need not be read to do more than impose a tax. "This is sufficient to sustain it."

The joint dissent responded that Roberts had effectively rewritten the statute. The ACA's sponsors and supporters in the White House and Congress all were clear that the mandate imposed a penalty, not a tax. Indeed, if the penalty had been deemed a tax the ACA would likely not have passed. Despite Roberts's noting "the most straightforward reading" of the statute, he never discussed this legislative history. In direct answer to Roberts, the joint dissent concludes that "the issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so." And it did not.

But *is* that the issue, the *constitutional* issue (suggesting that if Congress *had* framed the provision as a tax, there would be no question of constitutionality)? Or is it instead just the opposite—not whether Congress *did* frame the mandate as a tax, but whether it had the *power* to do so? As Roberts writes, quoting *Woods v. Cloyd W. Miller Co.*, "The 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" Suppose an Act were before the Court for which Congress had cited no constitutional authority, as was true of the Gun-Free School Zones Act of 1990 until the government offered the Commerce Clause during the course of the *Lopez* litigation: In such a case, should the Court rule summarily against the government, for Congress's failure to cite any authority? Or suppose, as just suggested, that the government came back to the Court with the exact same Act, except that the express source of authority this time were the Tax Clause and "penalty" were everywhere replaced by "tax."

To be sure, for a court to ignore Congress's recitals of its source of authority and to then cast about the Constitution for a "proper" source—all in service of constitutional avoidance—may seem the very essence of judicial "activism"—"rewriting" the statute. But the question, again, is not whether what Congress has *said* it has done is authorized but whether what it has *done* is authorized. And that turns not on Congress's recitals, which often, regrettably, are little more than boilerplate, but on what Congress has actually authorized the executive branch (here, the IRS) to do.

Questions remain, however. To start, regardless of what Congress may have said, what kind of a tax is this? Both the majority and the dissent wrestle inconclusively with that question, not surprisingly, because the problem is more with the Constitution and with early tax decisions than with either of the two sides. If this is a "direct tax," Article I, Section 9, clause 4 requires that it be apportioned so that each state pays in proportion to its population. But as Roberts writes, "even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a "head tax" or a "poll tax"), might be a direct tax." He concludes, after looking briefly at the history of the matter, both that "a tax on going without health insurance does not fall within any recognized category of direct tax" and that the exaction is "not a direct tax that must be apportioned among the several States." That still leaves unresolved the question of whether this is a constitutionally cognizable tax.

Roberts asks finally whether, if it's troubling under the Commerce Clause to impose a penalty on omissions, it's not equally troubling under the Tax Clause to impose a tax on omissions. He offers three answers. First, and most important, the Constitution offers no guarantee "that individuals may avoid taxation through inactivity." And he adds that because "Congress's use of the Taxing Clause to encourage buying something is not new," this decision "does not recognize any new federal power." Second, there are limits to Congress's use of the taxing power to influence conduct, although he admits that "more often and more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures." Finally, the taxing power gives Congress less control over the individual than the regulatory power, since the individual is still free to do or not do the act in question as long as he is willing to pay the tax.

In sum, Roberts concludes that because it “can reasonably be read as a tax,” and because “the Federal Government does have a power to impose a tax on those without health insurance,” the mandate is constitutional.

### **A Boundless Taxing Power?**

And so we come to the question with which we began: In so ruling, did the “non-political branch” hand down a political decision, as some have argued? Given the state of our “constitutional law” today, that’s not an easy question to answer.

Let’s start with the obvious implication of this decision: it further reinforces the idea that Congress, through its taxing power, can “encourage,” if not command, individuals to do or not do what Congress wishes. Thus, the distinction between that power and Congress’s direct regulatory power under the Commerce Clause—between taxes and penalties—turns on criteria the Court has fashioned over the years that leave considerable discretion in the hands of judges—discretion that often amounts to their having as much political power as legal judgment. It may be true, as Roberts writes, quoting *Oklahoma Tax Comm’n v. Texas Co.*, that “the power to tax is not the power to destroy while this Court sits,” but, alas, *this* Court will not always be sitting.

The problem is deeper, however. It concerns what has become of the very first of Congress’s 18 enumerated powers, the power to tax. The Framers placed that power first, and the power to borrow second, because they understood that the new government could pursue its other enumerated powers and ends only if it had the means to do so. But those were *revenue-raising* measures. The Framers could hardly have meant for the taxing power to be used as it is today, as a vast *policy* tool, with a tax code so interlarded with incentives, disincentives, and transfer provisions that no one remotely does or can understand it all. Remember, after all, that they had just fought a war in large part over taxes. We cannot imagine that they intended anything like what we have today.

In fact, as noted earlier, Madison, Jefferson, and many others were clear about the Tax Clause: taxation, as specified, was authorized “to pay the Debts and provide for the common Defense and general Welfare of the United States,” not the welfare of particular parties, sections, or factions but “of the United States,” as defined by the

enumerated powers that followed and by a narrow set of “public goods.” Unfortunately, however, as noted just above, there seems never to have been a clear understanding about the types of taxes that were constitutionally authorized; in fact, as Roberts observes, “soon after the framing, Congress passed a tax on ownership of carriages, over James Madison’s objection that it was an unapportioned direct tax,” and the Court upheld it unanimously.

The decisions that have followed over the years, but especially during and after the New Deal, have taken us only farther from the Framers’ understanding. In the case of the Commerce Clause, there was before the Court here at least a clear line, because never had Congress compelled someone to *engage* in commerce. No similar line concerning the taxing power was before the Court. On the contrary, numerous precedents sanctioned the use of the taxing power for policy objectives. This was just one more such case.

And so the answer to the question of whether the “non-political” branch handed down a political decision is ultimately unclear. Insofar as the Court relied on precedents that were themselves political, the answer might be “yes”—as it certainly would be if the question turned on whether the decision was consistent with the Constitution itself. But that brings us to the dilemma today’s Court faces when before it is any large and complex matter: Does it follow the Constitution—or modern “constitutional law”? The huge welfare schemes that came from the New Deal and the Great Society would find no sanction under Madison’s Constitution. But can the Court say that today? Bickel’s “passive virtues” may give the Court some refuge. In the end, however, the ultimate remedy is in the hands of the people. And nowhere is that more needed than as concerns our tax system, a pale reflection of which in earlier days gave rise to war.