In **The Affordable Care Act Decision: Philosophical and Legal Implications**
F. Allhoff & M. Hall eds. (Routledge, 2014)

Reflections on the Rule of Law After NFIB v. Sebelius

Christopher D. Boom

> *The government of the United States has been emphatically termed a government of laws, and not of men.*
>
> *Marbury v. Madison*[1]

Alongside democracy and human rights, the rule of law is generally regarded as one of the most fundamental values of the liberal state. Nowhere else, perhaps, is this ideal more deeply engrained than it is in the history and political culture of the United States. Indeed, the quintessential American contribution to the world—the written constitution— is itself a vehicle for promoting respect with the rule of law. The U.S. Constitution enshrines this value not just implicitly with structural features such as the separation of powers, but also explicitly through provisions like the Due Process Clause and the prohibition on ex post facto laws. Above all else, respect for the rule of law is generally thought to be the distinctive concern of the courts. As an expression of traditional American legal values, Justice Alito exaggerated only slightly when he opined that "[t]he judge's only obligation . . . is to the rule of law."[2]

In this essay I argue that the Supreme Court's resolution of *National Federation of Independent Business v. Sebelius* (*'NFIB'*) should cause us to reflect anew on the nature and extent of fidelity to the rule of law in the American constitutional system. In particular, I claim here that *NFIB* involved noteworthy departures from requirements that are typically thought to be important aspects of that ideal. Moreover, I claim that such departures are not confined to the particular circumstances of the Patient Protection and Affordable Care Act ('ACA')[3] controversy, but rather that *NFIB* is merely a prominent exemplar of a pattern of such departures. Accordingly, I suggest a few possible causes for that pattern, propose some ways in which it might be reduced, and conclude by considering how these issues can be better studied empirically.

---

[1] 5 U.S. (1 Cranch) 137, 163 (1803).
[2] See Babington and Goldstein (2006).
[3] Pub. L. No. 111-148, 124 Stat. 119 (2010).

Before proceeding, I should clarify my aims in order to avoid a couple misconceptions that might immediately arise. At the outset, I should stress that in discussing *NFIB*'s departures from the rule of law, I will make no attempt to answer the question of whether the case was decided correctly. To be sure, if the rule of law means nothing else, it means that government officials must follow the law. In the context of judicial review, this seems to entail at the very least that a court's decision be legally sound (however legal soundness might be conceived). Call such an understanding of the rule of law a 'soundness model' of the ideal. In its most extreme permutation, this understanding of the rule of law might be coupled with the view that there is only one uniquely correct decision in any legal dispute, such that that one decision alone can be regarded as legally sound. Considering the close relationship between the soundness model and the majority of the debate over *NFIB*, the reader certainly ought to be forgiven if he or she were expecting an examination of the rule of law in relation to that case to contain some evaluation of the arguments for and against the ACA's constitutionality. Nevertheless, this essay offers no contribution to the important literature addressing that topic. I will confine my focus instead to a couple different notions typically associated with the rule of law. Specifically, this essay will explore the extent to which *NFIB* departed from the rule of law as it is understood to require predictability and judicial decisions based on legal judgment rather than judges' personal or political preferences.

Second, this essay is by no means intended to be an exercise in polemics. Despite what many supporters of the ACA feared right before *NFIB* came down, and what many of its opponents exclaimed immediately afterwards, it is most likely the case that—to adapt a quip by Mark Twain— rumors of the rule of law's demise have been greatly exaggerated. When this essay speaks about departures from that ideal, it should hopefully be clear that I refer only to matters of degree. Although I do claim that such departures raise significant issues, this is certainly not because they suggest that respect for the rule of law is generally or wholly absent in Supreme Court decision-making. Nor, importantly, will it be argued here that these departures necessarily ought to be remedied. Indeed, one major theme of the discussion below

is the extent to which *NFIB* makes salient the internal conflicts in the very notion of the rule of law.[4] While certain features of the decision are problematic on one understanding of the rule of law, those very same features may well be seen as victories on another. I must leave the question of whether and how these various conceptions of the rule of law might be brought together to form a single, unified concept for another occasion. Likewise, I will put aside for the time being questions about how these notions might be normatively ordered, both against each other and against other values of the liberal state. Rather, this essay has the more limited aims of (i) demonstrating that *NFIB* did in fact depart from what are often thought to be important aspects of the rule of law and (ii) attempting to situate, and contribute to the understanding of, these departures as part of a broader phenomenon.

1. The Unpredictability of *NFIB*

In contrast to the idea that legal soundness is the central idea of the rule of law, most legal philosophers tend to agree that the key to the rule of law is instead the predictability of official action. Far and away, the single greatest influence on this understanding of the rule of law is the work of Lon Fuller.[5] Fuller is best known for his elucidation of eight desiderata that he labeled "the principles of legality."[6] Specifically, these are: (1) officials must follow general rules rather than engage in *ad hoc* decision-making; (2) those rules must be promulgated; (3) the rules must be primarily prospective, not retrospective; (4) the rules must be understandable; (5) the rules must not contradict each other; (6) rules must not be impossible to satisfy; (7) the rules must not be changed too frequently for those subject to the rules to comply with them; and (8) the rules must be applied consistently with how they are announced. As Colleen Murphy observes, these eight principles of legality are "generally agreed . . . [to] capture the essence of the rule of law."[7] Following close behind Fuller in influencing this understanding of the rule of law is Friedrich Hayek, who argued that "stripped of all technicalities [the rule of law] means that the

[4] See Waldron (2002).
[5] As Jeremy Waldron puts it, "[t]he pages of the law journals devoted to this topic often read like a set of footnotes to the scholarly work of Lon Fuller." (Waldron 2011), p. 7.
[6] See Fuller (1969), pp. 33-91.
[7] See, e.g., Murphy (2005), p. 240. Although Fuller typically used the term 'legality' rather than 'the rule of law', there is some textual evidence that he used the terms interchangeably. See Fuller (1969), pp. 209-19.

government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."[8]

Joseph Raz characterizes the basic notion underlying Fuller's and Hayek's accounts of the rule of law as 'action guidance'.[9] According to Raz, the "basic intuition" of the rule of law is that "the law must be capable of guiding the behaviour of its subjects."[10] For the rule of law to be satisfied, people must be able to know what the law is and must be able to act on it. Given this understanding of the rule of law, Raz argues that the morally relevant feature of the ideal is its promotion of a legal order which provides "a stable and safe basis for individual planning."[11] Because "respecting human dignity entails treating humans as persons capable of planning and plotting their future," he argued, the rule of law is a necessary condition for the law to respect dignity.[12]

Notice that action guidance is not simply reducible to the soundness model of the rule of law. For instance, depending on one's view of what constitutes a legally sound decision, one might think that in at least some cases we will not know which outcome or outcomes are sound. Consider, for example, Ronald Dworkin's infamous claim that there is always one right answer in any legal dispute. According to Dworkin, that right answer is a function of the best justification of the political morality of the parties' society. To illustrate this notion, Dworkin introduced the idea of an imaginary judge, Hercules, who has the superhuman power to review and analyze every statute, judicial precedent, and so forth, in order to determine what that justification is. As Dworkin of course recognized, however, human beings are not

---

[8] See Hayek (1944), p. 112.

[9] See Raz (1977). In invoking Raz's explication of action guidance and his account of its moral value, I do not mean to imply that the claims I make here about the relationship between action guidance and the ACA controversy are all ones which he would necessarily accept. Most importantly, Raz's account is somewhat ambiguous as to whether action guidance requires that people be able to predict the outcomes of instances of judicial law-making. See ibid., p. 217 n. 6. Insofar as one regards *NFIB* as an instance of judicial law-making, it is unclear whether uncertainty over its outcome is problematic on Raz's account. By contrast, it is clear Fuller would have regarded it as worrisome. See, e.g., Fuller (1969), pp. 228-29.

[10] See Raz (1977), p. 214.

[11] Ibid., 220.

[12] Ibid., 221.

Hercules, and thus can at best only reach partial justifications of our political moralities. Were we to embrace a theory of interpretation like Dworkin's, then, soundness and action guidance would seem to come apart in many instances. For if Hercules were to sit on the Supreme Court, he would presumably at times encounter a conflict between what we think is the best justification of our political morality and what he, in his infinite wisdom, realizes is actually best. And for him to embrace the correct legal decision in those situations would presumably deprive the law of its predictability.

Given the action guidance model of the rule of law, it is striking to observe that, of all the facts one might note about the outcome of *NFIB*, by far the most salient is how much it came as a surprise. Indeed, this seems to be the only thing that unites nearly everybody in their views about the case. When the Pew Research Center for the People & the Press administered a poll asking what word described respondents' reaction to the Court's decision, 'surprised' was the second most frequent word chosen by both those who approved and disapproved of it.[13] (The first, of course, were 'good' and 'disappointed', depending on which camp one fell into). Charles Fried sums up the consensus view in observing that "the actual outcome of the case came as a surprise—a bag of surprises, indeed—to almost everyone." [14] This does not seem to be a case of distorted memory, either: in a Bloomberg poll of twenty-one constitutional law scholars conducted before the decision but after oral argument, only eight expected the Court to uphold the ACA.[15]

Of course, the mere fact that many were surprised by *NFIB* does not necessarily mean the result was not reasonably predictable. It surely remains possible that many observers' personal feelings about the ACA clouded their legal analysis. But the sheer amount of surprise on both sides of the aisle suggests that this was not the case. Several other features of the ACA controversy also conspire to suggest the outcome was not predictable to even the most sober and politically neutral observer. For instance, President

[13] See Pew Research Center for the People & the Press (2012).
[14] Fried (2013), p. 51.
[15] Drummond (2012).

Obama insisted to the public that the individual mandate was not a tax.[16] Nor, as the joint dissent stressed, had any of the lower courts accepted the government's tax power argument.[17] Indeed, as Justice Roberts himself observed, this argument was unanimously rejected by an Eleventh Circuit panel.[18]

If the now widely accepted narrative according to which Justice Roberts switched his vote on the individual mandate is true, the worry that the outcome in *NFIB* was unpredictable grows even greater.[19] Unfortunately we may never know – at least likely not for many years – whether Roberts actually did change his vote. But, as Charles Fried observes, aside from the detailed reporting on his alleged switch, the fact that something odd occurred in this case is suggested by several unusual features of the dissent—such as its tenor, structure, and the fact that it was joint and unsigned.[20] Assuming that Roberts did change his vote, there seems to be no easy way to reconcile this fact with the ideal of action guidance. If after the briefs, oral argument, and all the other publically accessible information were in front of him, Roberts settled his mind and then later changed it, how could anyone else have predicted the outcome? Where even the very person who effectively determines the result of a case finds his initial legal conclusion mistaken, there does not seem to be much hope for the rest of us.

Before moving on, however, it is worth considering a couple of related objections that might be raised to the claim that *NFIB* departed from the ideal of action guidance.[21] The first derives from the fact that prior to oral argument, many commentators were very confident that the ACA would be upheld. Laurence Tribe, for example, predicted that the statute would be sustained by an 8-1 majority, with Justice Thomas being the sole dissenter.[22] What was surprising about *NFIB* was not so much the outcome itself, perhaps, but instead the closeness of the outcome. Likewise, one might add that *NFIB* was a hard case, and in a hard case it is by definition difficult to know what the law is (if there is actually a law at all). The surprise

[16] Klingebiel (2009).
[17] See *NFIB*, 2655.
[18] See ibid., 2581.
[19] This story was initially broken by Crawford (2012). For another widely read report of Robert's switch, see Jeffrey (2012), pp. 283-93.
[20] See Fried, (2013), pp. 63-5.
[21] I am particularly indebted to Dan Priel for his suggestions here.
[22] See Tribe (2011).

at the closeness of the outcome, one might then think, is due to the fact that many initially overlooked the complexity of the issues involved in *NFIB* prior to oral argument.

Yet instead of diminishing the worry that *NFIB* departed from action guidance, these factors are best regarded as themselves aspects of that very same worry. That many commentators did not even recognize *NFIB* as a hard case prior to oral argument suggests a still deeper uncertainty in the law than if the commentators were merely mistaken about how, given that *NFIB* was a hard case, the Court would decide it. For there to be such a disconnect between the Court and so many respected legal commentators simply about the complexity of the case speaks against the predictability of *NFIB* rather than for it. Obviously one would ordinarily expect some change in predictions after oral argument, but it seems inconsistent with action guidance that the predictions would change so drastically and simultaneously remain so inaccurate.

Nevertheless, it should be emphasized that the unpredictability of the outcome in *NFIB* is only problematic in proportion to the value we place on action guidance. One might very well adopt the position that the unpredictability of the outcome was an acceptable consequence of providing the justices with the opportunity to reach the best decision. Indeed, some degree of uncertainty may itself be an inevitable byproduct of a legal system that respects the soundness model of the rule of law. Insofar as we might distinguish the best decision in a given case from the decision observers predict the Supreme Court will issue, respect for the soundness model could very well be undermined by requiring greater predictability by the Court. For example, if we are to assume that the Commerce Clause holding in *NFIB* was correct, the Court would have clearly violated that ideal if it had voted in accordance with observers' initial predictions. The aim of this section is not to demonstrate that the ideal of action guidance is important enough to outweigh competing values. Nor, indeed, has the possibility that action guidance is of absolutely no normative value even been ruled out. Rather, the point is merely that *NFIB* did in fact depart from that ideal.

2. Law Versus Will

Aside from the soundness model and action guidance, we can identify a third line of thought at work in how people often understand the rule of law. Specifically, people often think of respect for the rule of law as the antithesis of a state of affairs in which government officials treat the law simply as a means for promoting their own goals or the goals of certain individuals or classes of individuals. Such a view is implicated in Hayek's claim that where we observe general rules, "we do not serve another person's end, nor can we properly be said to be subject to his will."[23] We also find it expressed by John Locke, where he argues that "Freedom of Men under Government, is . . . . [a] Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man."[24] Let's call this aspect of the rule of law 'will independence'.

The central notion associated with the strand of thought labeled here as will independence seems to be the requirement that government officials dispose of persons' interests in accordance with legal propositions[25] not the ends of other individuals. Somewhat more precisely, we might say that will independence is respected insofar as the resolution of A's interests by officials does not depend directly on B's ends (and/or C's ends, D's ends, and so on), but instead on one or more applicable legal propositions. Pertinent to the current discussion, this entails that will independence is respected in regards to a judicial decision to the extent that decision is not causally determined by the individual preferences of the judge(s) from whom it is issued. Will independence would obviously be violated, for example, where a judge decides a case in a certain way simply because that result promotes some purpose or purposes she finds desirable. At a bare minimum, it is a necessary condition for will independence to be respected that there be one or more legal propositions which adequately explain that decision. By contrast, it is

[23]Hayek (1960), p. 221.
[24] Locke (1689), p. 284.
[25] For lack of a better term, I use 'legal propositions' here as a catch-all that includes legal rules, principles, standards, practices, and anything else one might think provides the content of law. The advantage of setting forth will independence in this way is that it permits distinctions to be drawn between views that are permissive as to what kinds of considerations demarcate legal judgment from will versus views which are more restrictive, such as Hayek's position precluding the use of relatively open-textured terms such as "fairness" or "reasonableness" in statutory provisions.

presumably at least a sufficient condition for will independence to be respected that only legal propositions explain that decision.

To be sure, there is a large degree of overlap between will independence and the other aspects of the rule of law discussed above. As a general matter, for instance, it seems reasonable to think that soundness and will independence ordinarily go together. But they are separable. Consider a judge who wholly resists any temptation to issue a decision based on his personal preferences, deciding instead in accordance with what he thinks in good faith is the best analysis of the facts in light of the relevant legal propositions. However, that judge is mistaken about the facts, or misunderstands the relevant propositions, or so forth. In such a scenario, the judge's decision will have fallen short of the ideal of legal soundness yet conform to will independence.

Moreover, as the quotes above from Hayek and Locke make clear, there is a particularly strong connection between will independence and action guidance. Again, however, there are important differences between these ideas. First, it is possible that one could predict with a high degree of certainty how government officials will react to one's behavior even where no applicable legal propositions exist or officials disregard the applicable propositions. After all, *NFIB* would have been an extremely easy decision to predict if the justices simply adopted the practice of always voting along partisan lines. And one of the central lessons of the American Legal Realist movement is that, although judicial decisions cannot be adequately explained by legal propositions, they can often be predicted on the basis of psychological and sociological facts that are common among the judiciary.[26] Second, the normative case for respecting will independence generally appeals to a different sort of moral value than action guidance. Whereas action guidance is justified by reference to planning agency, the moral value will independence promotes is more akin to notions of personal sovereignty. By ensuring that A's interests not be disposed according to B's ends, A's ends and B's ends are treated as being of equal moral status.[27] These different

[26] On this point, see Leiter (1997), pp. 28-30.
[27] Cf. Hayek (1944), p. 115.

values can be contrasted by considering again the scenario in which a judge decides a case in a certain way solely as a means of promoting purposes she finds desirable. For the value of planning agency, what would be fundamentally objectionable about a world in which this kind of adjudication were the norm is the interference it would create with respect to people's ability to effectively make and carry out their plans. However, for the value of personal sovereignty, the fundamental worry here is instead the subordination of the ends of those subject to the law to the judge's ends. And this would remain a worry for personal sovereignty regardless of how predictable the judge's decision is.

Although less appreciated than legal soundness and action guidance, the notion of will independence bears an even stronger resonance than those ideas to one of the most ubiquitous criticisms of the judiciary. Specifically, I refer here to the contrast often drawn between the rule of law and 'the rule of judges'. We might understand this contrast as a more particular case of the distinction drawn between a government of laws and a government of men found in the quote from *Marbury v. Madison* that begins this essay. There, the worry was that if the law did not provide a remedy for the violation of a legal right, government officials outside the judiciary would act according to their own will rather than what the law requires. However, a corresponding worry is frequently raised with respect to judges: that judges often decide cases not according to legal propositions, but rather in line with the policy outcomes they prefer. And this worry is not most naturally expressed within the language of either action guidance or legal soundness. For, as discussed above, it is conceivable that we might find it problematic that a judge decides a case on the basis of her preferences even if that decision were fully predictable in advance. Similarly, even in an instance in which two competing results are equally legally justified, we may still find it worrisome that a judge adopts one of those results rather than the other merely because the one he adopts better promotes his own goals.

Where the worry that NFIB departed from the ideal called here will independence has been raised, the debate has primarily focused on Justice Roberts's role in the decision. On one influential account of NFIB, Roberts cowed to political pressure, his desire to protect his legacy as Chief Justice, or some like

force. On another, Roberts's tax and severability holdings were victories for legal judgment over political will.[28] Likewise, while the discussion has understandably centered on Roberts' decisive tax power votes, a similar debate might be had over Breyer's and Kagan's crossing partisan lines to join Roberts's Spending Clause opinion.[29]

Unfortunately, we are obviously ill-equipped to know what truly motivated Roberts's tax and severability holdings (or, for that matter, why Breyer and Kagan joined his Spending Clause opinion). Yet the worry that NFIB departed from will independence extends beyond these particular questions. For it remains the case that on the crucial Commerce Clause and Necessary and Proper Clause issues, the parties voted exactly as political expectations would predict. All of the justices nominated by a Democrat voted to hold the ACA constitutional under those clauses, and all of the justices nominated by a Republican voted to hold it unconstitutional. What seems to best explain the results with respect to the Commerce Clause and Necessary and Proper Clause, then, is not some identifiable legal proposition, but rather the number of justices on the bench affiliated with the Democratic party compared to the number affiliated with the Republican party. And the justices' written opinions make clear that what drove them to their votes is not likely to be found directly in the precedent, dictionaries, and other sources they cite. Consider, for instance, the joint dissent's extended sermon on liberty.[30] Or Ginsburg's repeated references to the poor.[31] These differences in rhetorical emphasis are precisely what one would expect if the judges were motivated by their publically known political beliefs. Even if we can count NFIB as a victory in the battle for will independence, then, it is far from a victory in the war.

Before we proceed, however, it bears noting that the same caveat we encountered in the previous section applies with equal force here as well. The argument of this section has not been that, all things considered, NFIB's departure from will independence ought to be regarded as a cause for concern.

---

[28] See, e.g., Rosen (2012).
[29] See, e.g., Fried, (2013), p. 65
[30] See *NFIB*, 2655-77 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).
[31] See, e.g., ibid., pp. 2629, 2630, 2634 . (Ginsburg, dissenting). Of the twelve uses of the word in the opinion, all of them occur in Ginsburg's dissent.

Indeed, it even remains possible that this departure might be considered a positive result. Perhaps, for instance, it is healthy for a society to resolve its most contentious legal disputes through a strategic competition among judges representing the prevailing political forces of that society.[32] If so, then we might not find it problematic at all that NFIB departed from the ideal of will independence. Again, the argument just is that the case did depart from that ideal.

3. *NFIB* in Context

We examined above how NFIB departed from the rule of law understood as action guidance and will independence. Because space here is limited, we have confined our attention to just a few of the most noteworthy examples of such departures.[33] Yet while these are particularly striking, they are by no means confined to this case alone. Indeed, I suspect many readers will be somewhat surprised to see these concerns spelled out explicitly because they are so used to seeing them. In the end, it might seem that it's only (a bit) more of the same.

There is often a large degree of uncertainty involved in predicting Supreme Court decisions. Especially in a case involving contentious political issues, that case's result—not to mention its precise holdings—can rarely be forecasted with a high degree of confidence. Even more importantly, there is a widely held belief that Court outcomes are significantly influenced by the personalities and political

[32] Similarly, as Neil Siegel argues, it may be true that judges should be receptive to political pressures in order to ensure the legitimacy of the Court. See Siegel (2013), pp. 207-9. Indeed, on certain theories of what counts as a 'legal' proposition, this kind of consideration might be consistent with will independence.

[33] Most notably, perhaps, are the numerous action guidance issues raised by the case for the future. Take, for instance, Siegel's criticism of Justice Roberts for failing to make clear whether he was employing the classical doctrine of constitutional avoidance or its modern variation. See ibid., p. 199. Although the Chief Justice stated that he could not resort to a saving construction until after concluding that the individual mandate was invalid under the Commerce Clause and Necessary and Proper Clause, Siegel notes that modern constitutional avoidance is triggered simply where there serious doubts about a statute's constitutionality. Thus he argues that "[i]f [Roberts] was embracing the classical avoidance canon going forward – perhaps in light of criticism of the modern canon – then he owed the legal system an explanation to this effect in light of the rule-of-law values of guidance, predictability, reliance, and transparency." Ibid. 199. Indeed, due to the uncertainty this very question creates about judicial review practices, he arguably should have clarified this point either way.

views of the justices.[34] Bush v. Gore[35] is perhaps the high water mark in support of this view, but many other examples could certainly be cited. Shelby County v. Holder,[36] for instance, comes immediately to mind as a representative example from the most recent term. Indeed, the assumption that justices vote in line with their personal and political preferences is deeply engrained in legal practice. It is no secret, after all, that Supreme Court litigators regularly target their briefs to the political and idiosyncratic sensitivities of the justice(s) they expect will be most decisive to their chances of victory. This is particularly true in politically charged cases, as these often result in 5-4 decisions with one swing justice (typically—but, as is abundantly clear from NFIB, not always—Kennedy) effectively determining the outcome.

The belief that justices tend to vote in line with their preferences, moreover, receives at least some support from the social sciences. Research on the impact of the justices' political views is particularly well-developed. Indeed, the most influential account of how justices decide cases is Jeffrey Segal and Harold Spaeth's attitudinal model, according to which justices' votes are primarily a function of their political views.[37] Of course, this is not to say the attitudinal model is without its critics.[38] NFIB itself is instructive that the justices' political preferences are not always a completely reliable indicator of how cases will be decided. Precisely how much personality and politics affect the Court's decisions is undoubtedly a highly contested issue. Yet few would deny that these factors play a significant role in determining Court outcomes.[39] And because the only thing that seems to distinguish the circumstances of the ACA controversy from other politically contentious cases is just the degree of contention involved, the factors which lead the Court to depart from action guidance and will independence generally are most likely the very same factors that led to such departures in NFIB.

---

[34] A robust version of this view has been defended by theorists associated with the Critical Legal Studies movement. But here I speak just of the far more modest claim that politics and personality are significant, albeit not (or, at least, not always) decisive in determining Supreme Court outcomes.
[35] See 531 U.S. 98 (2000).
[36] See 570 U.S. 2 (2013).
[37] For the most recent comprehensive defense of this model, see Segal and Spaeth (2002).
[38] See, e.g., Bailey and Maltzman (2011).
[39] For instance, in a study critical of the view that political ideology can explain the existence of consensus on the Court, Paul H. Edelman, David E. Klein, and Stefanie A. Lindquist nevertheless observe that "[e]ven critics of the attitudinal model's dominance often agree that ideology plays a major role in justices' decision making." See (Edelman, Klein, and Lindquist 2012), p. 130.

4. Understanding Rule of Law Departures

The question of why any departure from the ideal of the rule of law would arise is a fundamentally empirical one. Yet to study this question at all, we first need to have some hypotheses to test. Unfortunately, we do not have space here to consider more than just a bare sketch of a few of the most likely causes of rule of law departures. With that caveat in mind, however, common sense suggests the following as obvious places to start:

A. *Politicized practice for selecting justices.* Supreme Court justices are currently selected through a partisan political process. Presidents are most likely to nominate justices who share their ideological values and/or political associations. So too are Senators in voting to confirm them.[40] As a result, the system is naturally biased in favor of the selection of justices with strong political ties and/or ideological views.

B. *Attitudes towards politicization on the Court.* Despite perceptions that justices often decide cases based on their personal and political views, there has been relatively little push for change. Indeed, there is some evidence to suggest that the more people think the Court is politicized, the more they are likely to want justices selected on political grounds.[41] Thus Presidents and Senators have little incentive (and perhaps even a disincentive) to change the status quo.

C. *Small number of justices*. As the number of justices decreases, the possibility that any one justice's personal characteristics and political views will significantly affect Court outcomes increases. With only nine justices on the Supreme Court, the personality and politics of each individual justice likely has a relatively large impact on the Court's decisions.

D. *Unsystematic theories of constitutional interpretation.* Existing theories of interpretation do not formally incorporate all the considerations which seem to actually guide justices' votes. This reduces the predictive value of written opinions and provides cover for biased decision-making.

[40] Confirmation voting may actually be becoming more partisan. See Shipan (2008).
[41] See Bartels and Johnston (2012).

If the above-mentioned factors are indeed significant, several alternative practices come immediately to mind as possible ways of counteracting them. First and foremost, while attitudes towards politicization on the court are unlikely to change until the root causes which result in politicization are changed, it is possible that politicization can be diminished directly. For instance, legal restrictions might be imposed on the extent of justices' political involvement prior to nomination or during their tenure on the Supreme Court. Likewise, presidents might be prevented from nominating persons to the Court who previously ran for office, served as political appointees, and/or held party leadership positions. Another, more substantial change would be to utilize or create a non-partisan body (or bodies) for the selection of justices (à la the U.K.'s supreme court and South Africa's constitutional court). Second, the number of justices could be increased to lessen individual justices' influence on outcomes. Indeed, nine justices is a relatively small number compared to other high courts. The U.K. supreme court has twelve judges, for example, whereas the German constitutional court and the Belgian court of cassation both have sixteen members. Finally, alternative theories of interpretation could be adopted which more systematically incorporate social values into judicial decision-making (e.g., versions of the teleological and contextual approaches to interpretation influential in many E.U. countries, Israel, and elsewhere).[42]

In order to better understand the causes of, and solutions to, rule of law departures, there is an obvious need for a more rigorous approach to studying these questions. Over the past few decades, there has been a major push to measure compliance with the rule of law empirically by the World Bank, the World Justice Project, and similar organizations. However, existing indicators have generally been created and used primarily for issues affecting developing countries, such as determining where international political pressure ought to be applied, promoting conditions for economic growth and political stability, and so forth. In contrast, there has been far less attention focused on how rule of law indicators might be used to understand the relationship between institutional designs and the more nuanced issues discussed in this essay.

[42] For one influential statement of the teleological approach, see Barak (2005). This suggestion, of course, raises deep questions about what constitutes appropriately 'legal' sources that are beyond the scope of this essay.

Unfortunately, because they are primarily targeted to the most flagrant abuses of the rule of law, existing indicators are ill-suited for the task at hand. Insofar as we wish to acquire knowledge about the causes and potential solutions to these subtler threats to the rule of law, a different set of tools are necessary. As a preliminary suggestion, it may be possible to study action guidance through systematic polling of the predictions of ordinary citizens, lawyers, legal academics, and lower court judges on supreme/constitutional court decisions in different countries. And we already have a way to begin studying will independence in the form of the various tests for measuring political ideology and party affiliation on Supreme Court outcomes. Through a comparative study on the relative predictive power of these factors across different countries, we can start the process of determining which institutional designs lend themselves to departures from this ideal and why. Again, a far more extensive consideration of these and other proposals than I am able to provide here is obviously necessary. But, at a minimum, these indicate potentially fruitful avenues for future exploration.

5. Conclusion

In this essay I have attempted to accomplish two goals. First, to demonstrate that *NFIB* departed from the rule of law as understood as action guidance and will independence. Second, to contribute to the understanding of these departures as examples of a broader pattern. Insofar as we consider action guidance and will independence to be important aspects of the rule of law, this essay might be regarded as valuable in providing preliminary suggestions for avoiding future threats to that ideal. To be sure, however, this essay does not mark the end of an inquiry but the continuation of one. After all, it remains to be determined how, if it is indeed possible, action guidance and will independence might be conceptually unified alongside the soundness model into a single coherent notion of the rule of law. Likewise, it remains to be determined whether and to what extent those ideals ought to be regarded as worthy of respect. I must leave these important questions for another discussion. If nothing else, though, I hope this essay demonstrates that there is an ongoing need for such a discussion.

Bibliography

Babington, Charles and Amy Goldstein. 2006. "Alito Stresses 'Rule of Law' in Opening Statement." *Washington Post*. Jan 10. http://www.washingtonpost.com/wp-dyn/content/article/2006/01/09/AR2006010900669.html.

Bailey, Michael A., and Forrest Maltzman. 2011. *The Constrained Court: Law, Politics, and the Decisions Justices Make*. (Oxford and Princeton, NJ: Princeton University Press).

Barak, Aharon. 2005. *Purposive Interpretation in Law*. (Princeton, New Jersey: Princeton University Press).

Bartels, Brandon L., and Christopher D. Johnston. 2012. "Political Justice?: Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process," *Public Opinion Quarterly*, vol. 76, no.1, pp. 105-116.

Crawford, Jan. 2012. "Roberts Switched Views to Uphold Health Care Law." *CBS News*. July 1. http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/.

Drummond, Bob. 2012. "Obama Health Law Seen Valid, Scholars Expect Rejection." *Bloomberg*. June 22. http://www.bloomberg.com/news/2012-06-22/law-experts-say-health-measure-legal-as-some-doubt-court-agrees.html.

Dworkin, Ronald. 1977. *Taking Rights Seriously*. (Cambridge, MA: Harvard University Press).

Edelman, Paul H., David Klein, and Stefanie A. Lindquist. 2012. "Consensus, Disorder, and Ideology on the Supreme Court," *Journal of Empirical Legal Studies* vol. 9, no. 1, pp. 129-148.

Fried, Charles. 2013. "The June Surprises: Balls, Strikes, and the Fog of War," in *The Health Care Case: The Supreme Court's Decision and Its Implications*, ed. Nathaniel Persily, Gillian E. Metzger, and Trevor W. Morrison (New York: Oxford University Press), pp. 51-68.

Fuller, Lon L. 1969. *The Morality of Law* (Rev. ed., New Haven, CT: Yale University Press).

Hayek, Friedrich. 1944. *The Road to Serfdom: Text and Documents – The Definitive Edition,* ed. Bruce Caldwell (Chicago: University of Chicago Press, 2007).

Hayek, Friedrich. 1960. *The Constitution of Liberty: The Definitive Edition*, ed. Ronald Hamowy (Chicago: University of Chicago Press, 2011).

Klingebiel, Jacqueline. 2009. "Obama: Mandate is Not a Tax." *ABC News*. Sep. 20. http://abcnews.go.com/blogs/politics/2009/09/obama-mandate-is-not-a-tax/.

Leiter, Brian. 1997. "Rethinking Legal Realism: Toward a Naturalized Jurisprudence," in *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*, ed. Brian Leiter (New York: Oxford University Press, 2007), pp. 15-58.

Locke, John. 1689. *Locke: Two Treatises of Government – Student Edition*, ed. Peter Laslett. (Cambridge: Cambridge University Press, 1988).

Murphy, Colleen. 2005. "Lon Fuller and the Moral Value of the Rule of Law," *Law and Philosophy*, vol. 24, no. 3, pp. 239-262.

Pew Research Center for the People & the Press. 2012. "Division, Uncertainty over Court's Health Care Ruling." July 2. http://www.people-press.org/2012/07/02/division-uncertainty-over-courts-health-care-ruling/.

Raz, Joseph. 1977. "The Rule of Law and its Virtue," in *The Authority of Law* (2nd ed., New York: Oxford University Press, 2011), pp. 210-229.

Rosen, Jeffrey. 2012. "Big Chief." *New Republic*. July 13. http://www.newrepublic.com/article/politics/magazine/104898/john-roberts-supreme-court-aca.

Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. (Cambridge: Cambridge University Press).

Shipan, Charles R. 2008. "Partisanship, Ideology, and Senate Voting on Supreme Court Nominees," *Journal of Empirical Legal Studies*, vol. 5, no. 1, pp. 55-76.

Siegel, Neil S. 2013. "More Law Than Politics: The Chief, the "Mandate," Legality, and Statesmanship," in *The Health Care Case: The Supreme Court's Decision and Its Implications*, eds. Nathaniel Persily, Gillian E. Metzger, and Trevor W. Morrison (New York: Oxford University Press), pp. 192-214

Toobin, Jeffrey. 2012. *The Oath: The Obama White House and the Supreme Court* (New York: Random House).

Tribe, Laurence. 2011. "On Health Care, Justice Will Prevail." *New York Times*. February 7. http://www.nytimes.com/2011/02/08/opinion/08tribe.html.

Waldron, Jeremy. 2002. "Is the Rule of Law an Essentially Contested Concept (In Florida)?," *Law and Philosophy*, vol. 21, no. 2, pp. 137-64.

Waldron, Jeremy. 2011. "Thoughtfulness and the Rule of Law." Working paper. 11-13. New York University School of Law. New York. Feb. 10. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1759550.