FORECASTING THE DECISIONS OF THE US SUPREME COURT: LESSONS FROM THE 'AFFORDABLE CARE ACT' JUDGMENT.

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ABSTRACT

This paper examines the 2012 US Supreme Court consideration of the Affordable Care Act, and the resulting judgment, with a view to learning what lessons this landmark case can afford us into the way in which the US Supreme Court works, so helping us forecast its decisions. Although this is simply one judgment among many, a case is advanced here that the details of the way that the judgment was made can be used to help arbitrate between conflicting interpretations in the literature as to the way that the US Supreme Court reaches its decisions. It is argued that consideration of this case does provide particular insights which might usefully improve forecasts of future Supreme Court decisions.

1   INTRODUCTION

This paper examines the 2012 US Supreme Court decision on the Affordable Care Act (sometimes known as 'Obamacare') with a view to learning what lessons this case can afford us into the way that the US Supreme Court works. In so doing, we ask whether this single case can help discriminate between competing explanations of the way that Supreme Court decisions are reached, and hence help us arbitrate between various hypotheses as to the best way to forecast Supreme Court decisions. In particular, we argue that this case has special merit because the various ways used to forecast Court rulings, namely statistical methods, models and expert judgments, as well prediction markets, all apply. Moreover, there is a level of detail relating to each which is unusual, and key variables underpinning the various current forecasting models apply in this case in a way which helps discriminate the contribution of each.

Although some evidence does exist of a link between public opinion or the 'policy mood' (Stimson, 1991, 2004) and Supreme Court decisions, at least for non-salient cases (e.g. Casillas et al. 2011), the usual dependent

variable here is the general ideological direction of the Court, and changes in this over time. The value of this perspective in forecasting specific cases, and in particular the highly salient Affordable Care Act (ACA) case, is much less clear or defined.

In the current absence of an established predictive link between surveys of public opinion and the outcome of particular Supreme Court decisions, therefore, the focus of this paper is the use of other options found in the forecaster's tool kit.

In Part 1, the aim is to examine the way in which statistical methods, models, expert judgments, and prediction markets have been used to forecast the outcome of US Supreme Court decisions.

In part 2, we shall apply the same perspective to the 2012 Supreme Court decision relating to the Affordable Care Act of 2010.

Section 3 outlines the judgment, and Section 4 discusses and concludes.

We shall use the 2012 case to compare and contrast the relative performance of each of these forecasting methodologies.

2   FORECASTING US SUPREME COURT DECISIONS

2.1 STATISTICAL METHODS AND MODELS

It might seem reasonable to suppose that the decisions that will be announced by Supreme Court justices might in some ways be predictable based on the questions they ask, and the comments they make, during oral arguments. Black et al. (2011) test this in the context of emotionally charged word choice, utilizing the Dictionary of Affect in Language (Whissell, 1989) to provide an objective measure of the emotional content of language. In so doing, they are drawing upon the idea that individuals most often use emotive language when particularly concerned about the outcome of the decision-making process (Zeelenberg et al, 2008). A parallel argument is that it is possible to predict the outcome of cases based on the "tenor of the argument" (Greenhouse, 2008).[1] Supporting evidence is also found in Shullman (2004) and Wrightsman (2008) that justices' language may be related to Court decisions. A larger-scale study by Epstein et al. (2010) reached a similar conclusion.

Martin et al. (2004) employed a statistical forecasting model based on a handful of easily observable general case characteristics[2] derived from past

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[1] Greenhouse, Linda, 2008. Justices Indicate They May Uphold Voter ID Rules. New York Times, January 10, available at:

http://www.nytimes.com/2008/01/10/washington/10scotus.html?ref=lindagreenhouse &_r=0, 12:14.

[2] The case variables are circuit of origin, issue area of the case (e.g. 2nd, 3rd, DC, Federal Circuit), type of petitioner (e.g. US, an employer), type of respondent,

Supreme Court decisions, which disregarded information about the specific law or facts of the case. The model, which took into account all cases that the Court had decided prior to the 2002 term, was found to correctly predict 75.0 per cent of case outcomes during the October 2002 term. In forecasting the votes of individual justices, the predictions were 66.7 per cent accurate.[3]

Another method of predicting the decisions of justices is by evaluation of their ideological position. One such measure is the Martin-Quinn method[4], and scores derived from this method.[5] This technique has parallels with the DW-Nominate method[6] that estimates the ideology of members of Congress based on their voting records.[7]

Martin et al. (2004) also assessed the performance of legal experts in predicting court decisions. Their 'experts' consisted of 83 individuals who had "written and taught about, practiced before and or clerked at the Supreme Court." (p. 763). Each expert was asked to predict a case within their areas of expertise. No communication was allowed between experts, and forecasts were required before oral argument. They found that the expert predictions had an accuracy rate of 59.1 per cent, compared with a 75 per cent rate for the model, but the experts did marginally better (67.9 per cent accuracy) than the model (66.7 per cent) in predicting the votes of individual justices.

The model's relative success in this respect, argue Ruger et al. (2004), could be traced to its ability to predict more accurately the important votes of the then 'swing' justices, Kennedy and O'Connor.

Dividing the experts into 'legal academic', 'practicing attorney', 'former Supreme Court clerk', 'former Supreme Court non-clerk' and clerk to a currently sitting justice, they found that legal academics did worst (53%), followed by clerks to sitting justices (54%), former Supreme Court non-clerks (57%), former Supreme Court clerks (61%), and 92% for (the very small sample of) attorneys. Because of the sample sizes and the variation in the cases considered, it is difficult to draw significant conclusions about the relative performance of these sub-categories of expert, but what is interesting is that the experts who had clerked or were clerking at the Supreme Court showed no evidence of out-performing the experts as a whole. [8]

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ideological direction of the lower court ruling, whether the petitioner argued that a law or practice is unconstitutional.

[3] See Ruger et al. (2004), Martin et al. (2004) for a more complete description of the statistical model.

[4] See Martin, Andrew D. and Kevin M. Quinn (2002, 2007).

[5] For a critical perspective on the value of Martin-Quinn scores, see Farnsworth, 2007; Bailey, 2012.
http://www9.georgetown.edu/faculty/baileyma/CourtPref_July2012.pdf

[6] http://voteview.com/dwnomin.htm

[7] See also Corey Rayburn Yung (2010).

[8] http://www.washingtonpost.com/blogs/ezra-klein/files/2012/06/scotuschart.jpg

The statistical model also did particularly well in forecasting 'economic activity' cases (87.5% to 51.3%), while the experts did better than the model only in the 'judicial power' cases (73.7% to 50%). On issues of 'civil rights' and 'criminal procedure', the model out-performed the experts by about 20%, and marginally out-performed the experts on 'federalism' cases.[9]

2.2 PREDICTION MARKETS

Betting on the outcome of political outcomes has a long history,[10] which is well-documented in the case of presidential elections in the US (see Rhode and Strumpf, 2004, 2008, 2013), demonstrating a notable degree of forecasting accuracy. Betting on papal elections can be traced as far back as the early sixteenth century. The difference between these two types of election and decision-making is that the latter involves formal closed deliberations.

To this extent, Supreme Court decisions are closer in type to papal elections, about which the accuracy of the betting markets has been scrutinized elsewhere (e.g. Baumgartner, 1985, 2003; Hunt, 2012).

There has also existed since October, 2009, a crowdsourced[11] fantasy league (or 'prediction market'), FantasySCOTUS.net, designed for "jurisprudential speculation" (Blackman, Aft and Carpenter, 2012, p.126). During the October 2009 Supreme Court Term, over 5,000 members made more than 11,000 predictions for all eighty-one cases decided. Based on these data, Blackman et al. report that the market correctly predicted the outcome in more than fifty percent of the cases decided, and that the top-ranked predictors forecast 75 percent of the cases correctly. The FantasySCOTUS market rewarded participants with bragging rights (the 'golden gavel trophy') rather than monetary profit.

An extended perspective on the value of properly formulated prediction markets in forecasting Supreme Court decisions can be found in Cherry and Rogers (2006). The theme of their argument is that the Supreme Court is particularly suitable for a prediction market, in ways which they list. First, the number of decision-makers is limited to the nine justices, so only nine votes need to be predicted. Further, it is possible to identify clear ideological preferences as well as past voting patterns for each of the judges. They also contend that adherence to precedent acts as a constraint on the number of possible outcomes, and that the universe of such outcomes is very limited, which makes prediction easier. They accept the potential weakness of a

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[9] http://www.washingtonpost.com/blogs/ezra-klein/files/2012/06/scotuschart2.jpg
[10] "All voting is a sort of gaming … and betting naturally accompanies it." (David Thoreau, 1848, quoted in Thoreau, 1967, p.36).
[11] Jeff Howe, The Rise of Crowdsourcing, WIRED, June 2006, 177.

prediction market, however, when just one person is making a decision, such as the appointment of a justice.[12]

3 BRIEF BACKGROUND TO THE 'AFFORDABLE CARE ACT' SUPREME COURT JUDGMENT

The Affordable Care Act consists of two pieces of legislation: the Patient Protection and Affordable Care Act (PPACA), enacted on March 23, 2010, and the Health Care and Education Reconciliation Act (HCERA), enacted on March 30, 2010. Jointly they are referred to as the Affordable Care Act (ACA).

Specifically, the Department of Health and Human Services was petitioning to reverse the judgment of the United States Court of Appeals, Eleventh Circuit, which had declared the Affordable Care Act's individual mandate to be unconstitutional and as such not a valid exercise of Congress' power.[13]

In summary, the Court heard oral argument on four separate questions, related to the Affordable Care Act: (1) is the individual mandate a penalty, or a tax, for purposes of the Anti-Injunction Act;[14] (2) is the individual mandate constitutional; (3) is the mandate severable from the rest of the law; and (4) is the law's Medicaid expansion excessively coercive upon the states?

The key issue relating to the constitutionality of the individual mandate can be separated into two parts. Is it constitutional under the Commerce Clause, which gives Congress, among other things, the power to regulate commerce among the states, and to pass all laws that are "necessary and proper" to pass these regulations? Secondly, is it constitutional under the taxing powers of Congress?

3.1 USING STATISTICAL METHODS TO FORECAST THE VERDICT

A study of the number of words directed, on the critical second day of oral arguments, at Solicitor General Donald Verrilli, the advocate for the Obama administration, and directed at Paul Clement and Michael Carvin, arguing against the Act, found major differences depending on the justice asking the questions.

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[12] "While information markets do an excellent job of aggregating information and making predictions, they are not mind-reading devices." (Cherry and Rogers, 2006, p.1160).

[13] Florida v. U.S. Dept. of Health and Human Servs., 648 F.3d 1235. 53 EBC 1649 (11th. Cir. 2011) [2011 BL 210461]
http://www2.bloomberglaw.com/public/desktop/document/Florida_v_US_Dept_of_H ealth__Human_Servs_648_F3d_1235_11th_Cir_20

[14] If the mandate was a tax for purposes of the Anti-Injunction Act, the Court could not hear any challenges to it until it after it was enforced, i.e. not until 2014.

It is interesting to observe that in the aggregate 54% of the words were directed at the side opposing the constitutionality of the mandate. An examination of the behaviour of the likely 'swing' justices (Roberts, Kennedy), however, shows a different picture. 83% of Roberts' words were directed at the Government lawyer, and 67% of those of Kennedy. This would indicate a 5-4 split in favour of striking down the mandate. Even so, the difference in word counts toward the two sides was lowest in the case of Kennedy, who is in any case one of the less predictable justices (see, for example, Epstein et al, 2010). In terms of the number of questions and interventions, it is interesting to note that the imbalance by Kennedy widens compared with the number of words, while Roberts' ratio stays about the same. Thomas did not ask any questions and his vote is inferred from his clear antipathy to the constitutionality of the mandate based on any informed reading of his prior policy and ideological preferences.

A closer examination of the transcript for Day 2[15] reveals the use just twice of what might be termed negative, clearly emotive language, both times by Justice Scalia in interchange with Solicitor General Verrilli[16] The tone and content of an exchange between Chief Justice Roberts, in which Roberts asked Verrilli to clarify why Congress didn't call the mandate a tax, is also instructive in relation to the question of whether the individual mandate could be construed as a tax for purposes of assessing its constitutionality. In that exchange, the Chief Justice allows Solicitor General Verrilli to explain why Congress used the word 'penalty' instead of 'tax', and then re-stated Verrilli's view, without challenge.

An alternative predictive model, based on the more sophisticated statistical approach of Bailey and Maltzman (2011)[17], employs the ideological preferences of the justices[18] to forecast the vote of each individual justice if ideology was the only factor guiding them. On this basis, the model predicts almost certain overturning of the law.[19]

Bailey and Maltzman argue that ideology is not the only factor motivating justices, however, and that legal doctrine, notably deference to precedent, judicial restraint (deference to the legislative and executive branches) and a

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[15] Will the Supreme Court Overturn Obamacare? American Prospect, Nov. 21, 2011. http://www.washingtonpost.com/wp-srv/politics/documents/supreme-court-health-care-arguments-transcript-03272012.html

[16] p.35, line 20: Scalia, responding to General Verrilli: "We're not stupid."
p.52, lines 14 to 16. General Verrilli: "It's justifiable under its tax power". Scalia: "Extraordinary."

[17] http://prospect.org/article/will-supreme-court-overturn-obamacare

[18] See Bailey, Michael A.and Forrest Maltzman (2011), Bailey M. (2007) for details.

[19] http://themonkeycage.org/wp-content/uploads/2011/11/Blog_IdeolOnly_Nov2011.jpg

strict interpretation of the First Amendment's right to free speech, are also factors in the decisions reached, though for some more than others.[20]

To these the revised model adds to the 2011 model the 'deference to precedent' variable. Bailey and Maltzman's 2011 model predicted that the Affordable Care Act would be struck down 5-4 based on the Court's standard voting alignments, but when deference to precedent is added in, the forecast changes. This additional factor has a major effect on Kennedy's likelihood to overturn (from almost certain to 46%), and a smaller effect on Roberts and Scalia. Taken together, Bailey and Maltzman predicted the likelihood of overturning the Act at just 30%.

Surprisingly, perhaps, they do not include the additional variable of 'judicial restraint'. This is particularly critical in light of a statement made by Chief Justice Roberts in 2006 – "Members of Congress have been chosen by hundreds of thousands of people, millions of people. Not a single person has voted for me … And that is, to me, an important constraint. It means that I'm not there to make a judgment based on my personal policy preferences or political preferences."[21]

In light of the stated reasoning in Chief Justice Roberts' majority opinion, read on June 28, 2012, in support of his decision to uphold the key tenets of the Act, this might seem to be a key omission in predicting the actual outcome.[22]

3.2 USING EXPERT JUDGMENTS TO FORECAST THE VERDICT

Forecasts by expert judges can be divided into those of political scientists, those of legal scholars and those of journalists in the field.

In a prediction made on November 11, 2011, political scientists Michael Bailey and Forrest Maltzman (see above) forecast that the Court would uphold the ACA by either 6-3 (Roberts, Kennedy, Ginsburg, Breyer, Sotomayor, Kagan voting to uphold) and or 7-2 (with the addition of Alito).

In a prediction released on March 25, 2012, political scientist Jeffrey A. Segal forecast that the Court would strike down the ACA by 5 to 4, with Roberts, Scalia, Kennedy, Thomas and Alito in the majority.[23] This is consistent with the attitudinal model of decision-making espoused by Segal and Spaeth (2002), whereby the decisions of justices are driven by their personal policy preferences.

In terms of legal scholars, a survey was conducted by 'Purple Insights' between May 30 and June 4, 2012, of 38 former clerks of then current

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[20] See Bailey and Maltzman (2008) for details.

[21] Chief Justice Roberts quoted in Barnes, Robert (2006), New Justices Take to the Podium, Putting Personalities on Display, Washington Post, November 20, A15.

[22] 567 U.D. (2012) 31, Opinion of ROBERTS, C.J.

[23] http://www.newsday.com/news/health/historic-supreme-court-case-ponders-health-care-law-1.3622608

Supreme Court justices, and 18 attorneys who had argued before the Court. The sample was determined to be a representative division of the populations of former clerks.

The 'experts' were asked to judge on a scale of zero to 100 the probability that the Court would find the individual mandate unconstitutional. Just prior to oral arguments, the average score was 57 per cent. After oral arguments, this fell to 35 per cent.[24]

Legal expert opinion can also be gauged by an analysis of the American Bar Association Special Issue Preview of the case, published in 2012, which identified a "select group of academics, journalists, and lawyers, who regularly follow and/or comment on the Supreme Court. Each expert participant completed the questionnaire separately without knowing what anyone else's predictions would be. Experts were told that their votes would be anonymous to encourage candid responses." (p.32).[25] The survey was apparently taken before the oral arguments stage.

These were the key findings:

EXPERT POLL
Is the Individual Mandate Constitutional?

YES
Breyer (100%) Ginsburg (100%) Kagan (100%) Sotomayor (100%) Roberts (69%) Kennedy (53%)

NO
Thomas (100%) Scalia (62%) Alito (59%)

*Percentages indicate the proportion of experts polled who believe a justice will vote in a given way.

Will the Supreme Court Uphold the ACA? YES 85%; NO 15%

What will be the Deciding Issue in the Case? Individual Mandate (91%); Anti-Injunction Act (9%).

3.3 USING PREDICTION MARKETS TO FORECAST THE VERDICT

The real-money prediction market, Intrade, opened a market on January 30, 2011 on whether the Affordable Care Act would be ruled unconstitutional. The market opened at an implied probability of 37%, and traded (to relatively

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[24] http://americanactionforum.org/sites/default/files/Purple-AAF-CF%206.2012%20Topline.pdf
[25] American Bar Association;
http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/preview-healthcare.authcheckdam.pdf

low volumes) in that region until the oral arguments of late March, after which (to much higher volumes[26]) it rose to in excess of 60%. By the day preceding the ruling, the market had risen to approaching 80%. Those who sold the contract at the peak won about four times the amount of their monetary exposure.

FantasyScotus.net prediction market

The forecasts offered by the Harlan Institute's FamilyScotus.net prediction market, were less negative about the unconstitutionality of the Affordable Care Act, and in particular the individual mandate, and were less affected by the oral arguments. The majority did predict, however, that suit would be permitted by the Anti-Injunction Act (strongly so). A clear majority (though less so) also believed that the individual mandate would be ruled unconstitutional.[27] In retrospect, the issue could have been posed as a two-part question, i.e. would the individual mandate be ruled constitutional under the Commerce Clause, and would it be ruled constitutional under the taxing powers of Congress.

4   THE JUDGMENT

Supreme Court judgment – 5-4 majority decision (joined by Justices Breyer, Ginsburg, Kagan and Sotomayor), written by Chief Justice Roberts:
D. (2012) 31, Opinion of ROBERTS, C.J.[28]

The Court concluded that the Anti-Injunction Act did not bar challenges to the health care law from being ruled on immediately, instead of when the mandate would actually go into effect. The Anti-Injunction Act is a statute that says people cannot challenge a tax until after it is enforced.

"The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act. The Anti-Injunction Act therefore does not apply to this suit, and we may proceed to the merits."

The Court ruled that the individual mandate was not permissible under Congress's Commerce Clause power, which had been seen as the central issue of the case.

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[26] The volume of trading is shown in green.
[27] http://medcitynews.com/2012/06/obamacare-fantasyscotus-league-well-kept-secrets-and-possible-stock-market-winners-and-losers/fantasyscotus-2/
[28] http://healthcarereform.procon.org/sourcefiles/supreme-court-decision-PPACA-June-28-2012.pdf

"The Framers gave Congress the power to regulate commerce, not to compel it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now …The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to "regulate Commerce."

Though the Court concluded that the mandate wasn't justified under the Commerce or Necessary and Proper clauses, Roberts added, "That is not the end of the matter."

"The Government's tax power argument asks us to view the statute differently than we did in considering its commerce power theory. In making its Commerce Clause argument, the Government defended the mandate as a regulation requiring individuals to purchase health insurance. The Government does not claim that the taxing power allows Congress to issue such a command. Instead, the Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy the product.
The text of a statute can sometimes have more than one possible meaning. To take a familiar example, a law that reads 'no vehicles in the park' might, or it might not, ban bicycles in the park. And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so …The most straightforward reading of the mandate is that it commands individuals to purchase insurance… But … the Commerce Clause does not give Congress that power. Under our precedent, it is therefore necessary to ask whether the Government's alternative reading of the statute – that it only imposes a tax on those without insurance – is a reasonable one … The question is not whether that is the most natural interpretation of the mandate, but only whether it is a 'fairly possible' one. … As we have explained, 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read …" (Chief Justice Roberts).

In summary, the Court ruled that the penalty imposed on those who fail to purchase health insurance 'looks like a tax in many respects' and that it is permitted under the previous case law of the court.

5   DISCUSSION AND CONCLUSIONS

This paper examines the case of the 2012 US Supreme Court decision on the constitutionality of the Affordable Care Act ('Obamacare') as a case study of the relative merits of different methods of forecasting the decision (statistical methods, models, expert opinion and betting or prediction markets).

There is some evidence to suggest that the relative number of words and questions directed at the different parties to the legal dispute, as well as the tone and content of the language used can serve to help predict the eventual decision. Other models use specific case characteristics or the ideological positions of the justices to help forecast the outcome.

There is other evidence to suggest that the opinions of legal experts and/or experienced Supreme Court observers can be used to help forecast the outcome of the decision-making process.

Unlike open elections, there is much less evidence on the value of prediction markets in forecasting Supreme Court and other closed-door decisions, though in the last few years some evidence, offering a mixed message, has emerged.

In this paper, the forecasts offered by each of these methods are examined with respect to their accuracy regarding the Supreme Court decision announced on June 28, 2012 relating to the Affordable Care Act and in particular regard to the constitutionality of the Act and of the individual mandate contained in the Act.

In terms of the statistical methods for predicting the vote, it is true that more words (54% to 46%) were directed at Clement and Calvin, arguing against the Act, than at Verrilli, arguing for the Act, yet five of the justices directed significantly more words at Verrilli than at Clement/Calvin (in the case of Roberts, 83% to 17%). In terms of ideological preferences, the Bailey and Maltzman (2011) model predicted that the Act would not be upheld. Adding in a 'deference to precedent' variable, however, they find that the likelihood of overturning the Act would reduce to just 30 per cent, in significant part because Kennedy was now given just a 46% probability of voting to overturn the Act. Bailey and Maltzman choose not to include another potentially relevant variable, 'judicial restraint', in their model, but this omission was actually quite critical if one quite reasonably interprets Roberts' pivotal decision on these grounds.

Even so, Bailey and Maltzman interpret the outcome as inconsistent with the claims of the attitudinal model that personal policy preferences drive Court outcomes, but instead is consistent with a combination of legal considerations and external constraints, including the justices' values abut law and views about the appropriate role of the Supreme Court.

Closer inspection of the Bailey-Maltzman analysis reveals some apparent deficiencies. In particular, Bartels argues that that they incorrectly implied that the Court would find the mandate constitutional under the commerce

clause, under the 'deference to precedent' principle (citing in particular the precedents of Wickard v. Filburn and Gonzales v. Raich).[29]

In contrast, the analysis offered by political scientists Segal and Evans was correct in their forecast of 5-4 for striking down the constitutionality of the ACA if their analysis is understood to refer to the Court's decision on the constitutionality of the mandate under the Commerce Clause. Yet neither picked up the tax power argument that saved the individual mandate. In any case, a forecast of the individual votes which was grounded in the relative importance of ideological preferences over legal precedent and judicial restraint, would probably have generated a more accurate assessment of the actual votes of the justices in this case, with the arguable exception of Chief Justice Roberts.

Indeed, in terms of the expert opinion of individual legal scholars, and journalists, there was some tendency to over-weight the role of legal precedent (e.g. Kerr, Tribe, Sacks, Greenhouse) and also the judicial restraint of at least some of the justices (e.g. Adler, Tribe, Sacks), though the latter variable might have some weight in explaining Roberts' vote.

Teles develops the judicial restraint argument a little further, arguing for the attitudinal model (e.g. Segal and Spaeth, 2002) but constrained to fit a broader politics which includes deference to Congress and separation of powers. "Roberts, no doubt influenced by his position as Chief Justice, made the call that he could pull at the seam of the law pretty hard but couldn't unravel it completely … There is an element in Supreme Court decision-making that can be explained by statesmanship rather than jurisprudence … On no really important aspect of jurisprudence did Roberts actually break from his conservative brethren, but he did make a different political judgment than they did – not on what the Court could get away with, but what was really appropriate for it to do on a matter of such great policy significance."[30]

A strategic interpretation, therefore, can be seen as viewing the actions of justices as motivated by the maximization of their personal preferences, but in the case of Roberts this might be best achieved by a decision which he wrote which not only reinforces the status and role of federal power but also limits the scope of the Commerce Clause. It also circumscribes the reach of the tax clause justification for the mandate. In particular, the penalty for non-compliance could not be punitive, and for good measure his opinion made the extension of Medicaid in the states a voluntary matter for them.

A strategic interpretation of the actions of justices would also explain cases where justices might switch from their ideal vote (in a one-vote Court) to join the majority opinion where this would give them the opportunity to

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[29]   http://themonkeycage.org/2012/07/19/evaluating-forecasts-of-the-supreme-courts-health-care-ruling/

[30] http://www.scotusreport.com/2012/07/12/roberts-health-care-decision-statesmanship-not-jurisprudence/

write and shape the opinion (an opportunity in the gift of the Chief Justice, where he is a member of the majority).

In summary, some of the experts, notably those polled before oral arguments, performed well overall in forecasting the outcome, to the extent (in the American Bar Association survey) of identifying Chief Justice Roberts as being significantly more likely than Justice Kennedy to uphold the mandate.

The statistical methods and models offered mixed results, forecasts based on the number of questions or words directed at the parties performing poorly, in large part because of the vote of the Chief Justice. There was a special factor at play in this particular case, however, i.e. the distinction between constitutionality of the mandate under the Commerce Clause and under the taxing power of Congress. Chief Justice Roberts directed a lot of his attention in oral arguments at Solicitor General Verrilli regarding the Commerce Clause, which clearly had an effect in terms of skewing the indicator on this occasion.

The Bailey and Maltzman forecast, derived from their model of constrained decision-making where ideological preferences are tempered by, for example, deference to precedent and judicial restraint, seems (like a number of the other expert forecasts) to have overweighted the deference to precedent variable.

In terms of the prediction markets, Intrade performed poorly, notably after the oral arguments. Before the arguments, the betting was more indicative of the actual result. The FantasySCOTUS information-aggregating prediction market, in contrast, was somewhat less affected by the oral arguments, but for several months prior to the decision implied (though not strongly) that the individual mandate would be struck down.

Most importantly, the findings produced by this study of a landmark ruling would seem to strengthen the case for applying less weight than is usual in current models of constrained decision-making to the 'deference to precedent' and (to a perhaps less uniform extent) the 'judicial restraint' variable. An explanation consistent with the evidence of this case is also that federal power is an important policy preference for Chief Justice Roberts alongside his other policy preferences. The politics of operating in a nine-member setting might also be included as a factor in forecasting the voting strategies of individual justices who seek to maximize the realization of their policy preferences. Wider political judgments might also play a factor, including for the Chief Justice at least some notion of the reputational integrity of the Court.

Overall, a close examination of this Supreme Court opinion would seem to strengthen the attitudinal model, albeit the preferences of justices might perhaps be drawn more widely than is conventional in these models in defining the objectives they seek to maximize. The realisation of these preferences might also be best viewed in terms of the dynamics of a nine-member Court, rather than a one-member Court, in determining how the

individual justices will act and vote in seeking to realize the most they can of their preferences.

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