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Connection may offer context for chief justice's 'Obamacare' decision

The subject of this monthly column is criminal procedure. Yet because so much criminal procedure is constitutionally predicated, its focus is often on the U.S. Supreme Court.

This month I am discussing what was the most eagerly awaited Supreme Court case of the 21st century — the Patient Protection and Affordable Care Act decision. *National Federation of Independent Business v. Sebelius*, No. 11-393 (decided June 28). As you know, Chief Justice John G. Roberts Jr. surprised most of the legal world by casting the deciding vote to uphold "Obamacare." In trying to understand Roberts' motivation, we may learn something about his conception of his role as chief justice that may shed light on future criminal law decisions.

The issue that faced the court was whether the federal Affordable Care Act violated the Constitution. In deciding this, the first question a court must answer concerns the proper "standard of review," i.e., how much — if any — deference should be given to Congress?

In 1893, professor James Bradley Thayer of Harvard Law School wrote a law review article contending that the Supreme Court should give broad deference to Congress when deciding the constitutionality of a federal statute. Because of separation of powers concerns, Thayer contended the court should invalidate a federal statute only if its unconstitutionality is "so clear that it is not open to rational question." This theory of judicial restraint influenced early 20th century justices such as Oliver Wendell Holmes and Louis Brandeis.

But Richard A. Posner recently argued that this kind of Thayerian "thumb-on-the-scale deference to legislative judgments" was dead. Posner, "The Rise and Fall of Judicial Self-Restraint," 100 California L. Rev. 519 (2012). Posner bluntly announced "[t]here are no Thayerian originalists on the

Supreme Court — no Thayerians on the Court, period."

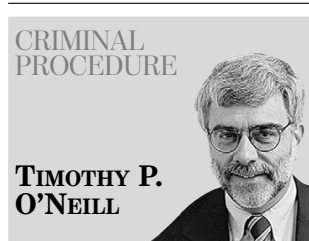
So Roberts proceeded to put one thumb on the Thayerian scale and the other in Posner's eye. He started his opinion by citing a 19th century Supreme Court case for the proposition that the court should presume congressional legislation is constitutional and it should find otherwise only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." He stressed that the court possessed "neither the expertise nor the prerogative to make policy judgments." He continued that "It is not [the Supreme Court's] job to protect the people from the consequences of their political choices." He went on to find that the act was a proper exercise of authority under Congress' taxing power.

Roberts has never been shy about finding congressional laws unconstitutional; in fact, on the very same day, he voted to strike down the federal Stolen Valor Act. So where — in the most important case he has faced on the Supreme Court — did this judicial self-restraint come from?

In 2005, several months before he was nominated to the Supreme Court, Roberts was asked to name his favorite justices. He chose two for their analytical clarity: Felix Frankfurter and the second, John Marshall Harlan. What makes this so interesting is that Posner's article names Frankfurter as one of his prime examples of a justice who followed Thayerian self-restraint. As for Harlan, Posner said, "[there are] no apostles of restraint on the current Supreme Court. The last restrained justice ... was the second Justice Harlan who retired [in 1971]."

The connection between Harlan, Frankfurter and Roberts is a fascinating example of the legal power elite in America.

The story starts in the 1920s at the Wall Street firm of Root, Clark, Buckner & Howland. (The firm eventually morphed into Dewey, Ballantine, which several months ago suffered the largest



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law firm bankruptcy in U.S. history.) In the 1920s, name partner Emory Buckner became U.S. attorney for the Southern District of New York and brought along one of the brightest young lawyers in his firm: John Marshall Harlan. When they later returned to the firm, Harlan was clearly Buckner's protégé. Harlan also began to try cases with another favorite of Buckner's, a young lawyer named Henry Friendly.

When Harlan was appointed to the Supreme Court in 1955, he caught the attention of Felix Frankfurter, who wanted to mentor the new justice. To ingratiate himself with Harlan, Frankfurter emphasized his close friendship

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with his old Harvard Law School classmate, none other than Emory Buckner. And to educate Harlan, Frankfurter gave him a law review article, along with this advice: “[p]lease read it, and then read it again, and then think about it long.”

The law review article? “The Origin and Scope of the American Doctrine of Constitutional Law” written by James Bradley Thayer in 1893. The article would, of course, influence the work of both Frankfurter and Harlan.

Harlan's old law firm colleague Friendly went on to become a legendary judge on the 2nd U.S. Circuit Court of Appeals. In an article in 1971, Friendly praised Harlan by saying that there had never been a justice who had maintained such a high quality of performance and who enjoyed such nearly uniform respect than Harlan.

As an appellate court judge in 1979, one can imagine Friendly sharing memories of Harlan and Frankfurter with his new law clerk fresh out of Harvard Law School. The clerk's name? John Roberts.

Could this Thayer-Buckner-Harlan-Frankfurter-Friendly connection provide a clue as to why Roberts reached deep into the well of judicial self-restraint in deciding the most important case of his career?

Perhaps in his role as chief justice, Roberts wanted to emphasize the court's function — in his own terms from his confirmation hearings — as an “umpire” and not a “player.”

Or perhaps he was fashioning himself after the last chief justice, William H. Rehnquist. Rehnquist surprised a lot of experts in 2000 when he wrote the *Dickerson* opinion upholding *Miranda v. Arizona* over a vociferous dissent. *Dickerson v. U.S.*, 530 U.S. 428 (2000). To Rehnquist, stare decisis trumped ideology.

Who knows? Rehnquist may have shared his judicial philosophy with his law clerk back in 1980. The clerk's name, of course, was John Roberts.