TESTING FOR REGULATORY PENALTIES: INSURING THE HEALTH OF FEDERALISM IN THE AGE OF OBAMACARE

*Steven Z. Hodaszy**

* Assistant Professor of Taxation, Robert Morris University. A.B., Amherst College, 1988; J.D., New York University School of Law, 1991; LL.M. (taxation), New York University School of Law, 2010. The author wishes to extend his sincere thanks to the editors of the *West Virginia Law Review* for their many helpful suggestions and their valuable assistance with this Article. Any errors or omissions and all opinions are solely those of the author.

I. INTRODUCTION

Does Congress have the power to force us to eat broccoli by taxing those of us who do not? The question sounds absurd because the prospect of Congress ever enacting such a silly law seems so obviously far-fetched. Nevertheless, despite the query's seeming frivolousness, opponents of the Patient Protection and Affordable Care Act[1] (the "ACA") repeatedly raised the "issue" of whether Congress has the constitutional authority to compel us to purchase vegetables,[2] in the

---

[1] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

[2] For a description of the genesis and scope of the "broccoli" argument against the ACA, see *infra* notes 21, 433 and accompanying text. For a discussion as to why the broccoli hypothetical is

run-up to the most important Supreme Court decision in years concerning the scope of Congress's taxing power.[3] Yet, while the broccoli hypothetical itself is rather ridiculous, the constitutional question it implicates is actually quite serious: Can Congress use its broad power to tax[4] in order to regulate, indirectly, conduct that it is constitutionally prohibited from regulating directly?

The answer to that question, of course, must be "no." If Congress were able to use its taxing power to circumvent the limits of its other constitutional powers, Congress's legislative authority would become unlimited as a practical matter. Permitting such unfettered exercise of congressional power, in turn, would effectively nullify the Constitution's reservation to the states of legislative authority in all matters other than those with respect to which Congress's power is expressly enumerated. Such an arrangement, in other words, would be inimical to the federalist structure of American government. Thus, to prevent Congress from using the power to tax to regulate in areas beyond the scope of its authority, there must be a clearly recognized (and applied) constitutional distinction between congressional exactions that really are taxes and those that are instead penalties for failure to abide by an extraconstitutional regulation.

The Supreme Court has, without exception, recognized the need to confine Congress to its enumerated constitutional powers. And, in a number of cases, the Court has indeed dealt with the difference between taxes and penalties. However, as the Court came to adopt an increasingly expansive interpretation of Congress's power to regulate under the Commerce Clause,[5] the tax-vs.-penalty distinction seemed to lose at least some of its practical relevance.[6] In short, Congress was less likely to resort to pretextual assertions of its taxing power to regulate conduct indirectly, when it could simply regulate the conduct directly under its commerce power. Now, however, the legal landscape has changed once again: Through its analysis of the ACA's constitutionality, the Supreme Court has accorded renewed significance to the question of how to distinguish between taxes and penalties for constitutional purposes.[7]

---

an ineffective argument that trivializes the important constitutional issue it purports to address, see *infra* text accompanying notes 431–436.

3 That decision, of course, is NFIB v. Sebelius, 132 S. Ct. 2566 (2012), in which the Supreme Court upheld a key provision of the ACA as a federal tax. For a detailed discussion of the Court's *NFIB* opinion, see *infra* Part IV.

4 Congress's power to lay and collect taxes is enumerated in the General Welfare Clause of the United States Constitution. *See* U.S. CONST. art. I, § 8, cl. 1. For a discussion of the scope of Congress's taxing power, see *infra* Part III.B.2.i.

5 Congress's power to regulate interstate and international commerce is enumerated in the Commerce Clause of the Constitution. *See* U.S. CONST. art. I, § 8, cl. 3. For a discussion of the Commerce Clause and the Supreme Court's construction thereof, see *infra* text accompanying notes 107–152.

6 See *infra* note 412.

7 See *infra* text accompanying notes 412–13.

After the Court's decision to uphold a key component of the ACA as a tax—even though it found the provision at issue not to be sustainable under the Commerce Clause—the question of where to draw the boundary between a "legitimate" federal tax, on one hand, and an unconstitutional regulation of conduct masquerading as a "tax," on the other, has become both murkier and more important than ever. To make sure that some future Congress does not wrongly attempt to invoke the Court's ACA decision as permission to regulate indirectly through taxation in areas where direct congressional regulation would be unconstitutional, there needs to be a clear constitutional test for distinguishing between taxes and disguised penalties. This purpose of this Article is to propose just such a test.

Love it or hate it, the ACA—which expands Medicaid coverage and imposes sweeping reforms on the private health insurance industry—is among the most significant pieces of federal legislation to have been enacted within the last several decades. It is also among the most controversial. President Obama signed the ACA (which is also often referred to as "Obamacare") into law on March 23, 2010. Beginning on that very same day, opponents of the ACA—including a total of 27 states, as well as various private plaintiffs—filed multiple lawsuits in federal court challenging the ACA's constitutionality.[8] Among the law's private insurance reforms, one provision that drew particular ire from its critics was the so-called "individual mandate"—a requirement that individuals either obtain a statutorily specified level of health insurance coverage or pay a monetary exaction called a "shared responsibility payment."[9] Casting it as an unconstitutional

[8] On the date that President Obama signed the ACA into law, Florida and 12 other states (as well as several private plaintiffs) filed an action in the Northern District of Florida challenging the statute's constitutionality. Eventually 13 other states joined that suit as plaintiffs—bringing the total number of state plaintiffs to 26: Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. *See* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1263 (N.D. Fla. 2011), *aff'd in part, rev'd in part*, 648 F.3d 1235, *aff'd in part, rev'd in part sub nom.* NFIB v. Sebelius, 132 S. Ct. 2566 (2012). Separately, the Commonwealth of Virginia filed its own challenge to the ACA. *See* Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011). These suits were soon accompanied by a number of similar actions brought by various private plaintiffs. Altogether, by January 2011, there were approximately 20 federal court cases pending, involving constitutional challenges to the ACA. *See* Brad Joondeph, *Introduction of Speakers at the AALS Hot Topic Panel Discussion on January 7, 2011*, 62 MERCER L. REV. 605, 606 (2011).

[9] 26 U.S.C. § 5000A(b) (2010); *see* Brietta Clark, *Safeguarding Federalism by Saving Health Reform: Implications of* National Federation of Independent Business v. Sebelius, 46 LOY. L.A. L. REV. 541, 547 (2013) (individual mandate "proved to be a lightning rod for political and legal challenges to the ACA as a whole"); Matthew A. Melone, *The Pundits Doth Protest Too Much:* National Federation of Independent Business v. Sebelius *and the Future of the Taxing Power*, 2012 MICH. ST. L. REV. 1189, 1190 (noting that the individual mandate is "[p]erhaps the most contentious [ACA] provision"); *see also* Stewart Jay, *On Slippery Constitutional Slopes and the Affordable Care Act*, 44 CONN. L. REV. 1133, 1144 (2012) ("Aside from the Medicaid expansion," the

intrusion by the federal government into matters reserved to the states under the Tenth Amendment,[10] the plaintiffs in the ACA litigations argued, among other things, that the individual mandate was beyond the scope of Congress's power to regulate interstate commerce. The Obama Administration, of course, argued that the individual mandate was well within Congress's Commerce Clause power. But, almost as an afterthought, the administration included an additional, alternative defense of the mandate's constitutionality. Even if the mandate was not within Congress's commerce power, the government argued, it was nevertheless constitutional under Congress's broad power to tax.[11]

The issue inevitably made its way to the United States Supreme Court, which delivered its decision on the constitutionality of the ACA in *National Federation of Independent Business v. Sebelius*[12] ("*NFIB*") on June 28, 2012. Siding with the ACA's challengers, a majority of the Court held that the Commerce Clause did not give Congress authority to enact the individual mandate.[13] Yet, in a decision that surprised virtually everyone who followed the case, the Court ultimately upheld a key component of the mandate—the shared responsibility payment imposed on those who fail to obtain the requisite health insurance —on the ground that it is a constitutionally valid federal *tax*.[14]

To reach its conclusion that the shared responsibility payment is a tax, the Court needed first to determine that, for constitutional purposes, the exaction is not a penalty for noncompliance with a mandate to purchase insurance.[15] The distinction between taxes and penalties was critical to the outcome of *NFIB* because the Court had held the individual mandate not to be within the scope of Congress's commerce power. If the shared responsibility payment had been a penalty to enforce the mandate, then Congress would have lacked any constitutional power to impose that penalty, given that it had had no power to enact the mandate itself. On the other hand, because the shared responsibility payment is a tax, the Court held it to be sustainable under Congress's taxing power.

---

individual mandate is "the ACA provision that has generated the most opposition on constitutional grounds . . . .").

10 *See* Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975, 979 (2011) (discussing arguments made by the complaining states).

11 *See id.* (summarizing federal government's legal defense of the individual mandate).

12 132 S. Ct. 2566 (2012).

13 *See id.* at 2591 (opinion of Roberts, C.J.) (rejecting the argument that Commerce Clause authorized enactment of individual mandate); *see also id*. at 2648 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (same).

14 *See id.* at 2600 (majority opinion) (upholding the shared responsibility payment as a tax).

15 *See id.* at 2595–97 (finding that, for purposes of determining whether enacting the measure was within Congress's enumerated constitutional powers, the shared responsibility payment is not a penalty, but a tax). In contrast, in a threshold determination as to whether it could reach the merits of the issue, the Court found the shared responsibility payment to be a penalty for purposes of the Anti-Injunction Act. *See id.* at 2582–84.

Although the Court found the shared responsibility payment not to be a penalty, it recognized that some exactions styled as federal "taxes" could have "characteristics of regulation and punishment" that would render them penalties outside the scope of Congress's power to tax.[16] By acknowledging that "Congress's ability to use its taxing power to influence conduct is [thus] not without limits[,]"[17] the Court seemed to signal its willingness to strike down future penalties on conduct that may be disguised as taxes in cases where Congress lacks a separate constitutional power to regulate the conduct directly. However, in *NFIB*, the Court declined to identify "the precise point at which an exaction becomes so punitive that the taxing power does not authorize it."[18]

By virtue of the Supreme Court's decision in *NFIB*, Congress was not permitted under the Commerce Clause to mandate the purchase of health insurance directly, but it was nevertheless allowed to impel the same conduct indirectly by taxing those who do not purchase such insurance. Some commentators who opposed the ACA have now raised a concern that *NFIB* may pave the way for Congress to "impos[e] new economic mandates in the form of taxes" in the future.[19] They question whether the Court will actually keep its perceived promise to "strike down any congressional effort to exploit the taxing power to enact what are actually mandates."[20]

Prior to the Court's decision, some ACA opponents worried that, if the individual mandate were held to be within Congress's commerce power, then Congress would just as easily be able to compel citizens to purchase broccoli or cell phones or "whatever [other] products and services government officials believe[] people should buy."[21] In holding that the Commerce Clause does not authorize the individual mandate, the Court made clear in *NFIB* that Congress's power to regulate interstate commerce does not include a power to compel people to engage in commerce in the first place (e.g., a power to force people to make purchases). But, by sustaining the shared responsibility payment as a tax, does *NFIB* simultaneously permit Congress to tax individuals who do not purchase broccoli or cell phones in order to coerce them to buy those products?

---

16 *Id.* at 2599 (quoting Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 779 (1994)).

17 *Id.*

18 *Id.* at 2600.

19 Timothy Sandefur, *So It's a Tax, Now What?: Some of the Problems Remaining After* NFIB v. Sebelius, 17 TEX. REV. L. & POL'Y 203, 215 (2013).

20 *Id.*

21 *Id.* at 211–12. As noted above, in advancing slippery-slope arguments against the individual mandate, many opponents of the ACA seemed particularly drawn to the hypothetical example of a law requiring individuals to purchase, of all things, broccoli. *See infra* note 433 (citing a *New York Times* article outlining the history and political force of the broccoli hypothetical). For more about what Professor Andrew Koppelman calls the "Broccoli Objection," see *infra* notes 432–436 and accompanying text.

As a practical matter, the prospect of future congressional mandates to purchase other products or services probably should not be of great concern. The public policy reasons for the individual mandate were specific to the ACA's regulatory scheme for private health insurance. Simply put, many of the other private insurance reforms in the ACA depend on everyone obtaining insurance.[22] It seems rather unlikely that a similar public policy rationale in any other area could persuade a congressional majority to vote to force people to buy anything else.

This hardly means, though, that we need not be concerned about the prospect of Congress abusing its power to tax in order to circumvent the limits of its other constitutional powers. It stands to reason that, if Congress can use "taxes" to mandate economic conduct indirectly, then it can just as easily use "taxes" to mandate *non*economic conduct indirectly. Congress has not been shy about trying to regulate noneconomic behavior in the past, and different constituencies' strongly held views on various social issues could incent it to try to do so again in the future. At the same time, the Supreme Court has held that Congress's commerce power generally does not extend to the regulation of noneconomic activity. On that basis, for example, the Court ruled in 1995 that the Commerce Clause did not give Congress the power to enact a law against carrying guns in school zones.[23] As a result, any future congressional attempts at regulating noneconomic conduct might well take the form of a federal "tax" on disfavored behavior—particularly if Congress comes to view *NFIB* as having given a "green light" to such use of the taxing power.

This Article starts from the premise that the Court in *NFIB* was correct to find the shared responsibility payment to be a tax for constitutional purposes, rather than an unconstitutional penalty to enforce the individual mandate.[24] However, this Article takes seriously the concern that *NFIB* might nevertheless have a very negative, unintended consequence. Specifically, the decision may encourage future Congresses to enact "taxes" that really *are* unconstitutional penalties in order to engender compliance with rules of conduct that Congress would otherwise lack constitutional authority to enact. After all, Congress may ask, if the shared responsibility payment passes constitutional muster as a federal tax, what would prevent "taxing" those who carry guns in school zones or, for that matter, those who do not purchase broccoli?

---

[22] For a discussion of why the individual mandate was essential to the operation of the ACA's other private insurance reforms, see *infra* notes 42–46 and accompanying text.

[23] *See* United States v. Lopez, 514 U.S. 549, 561–63 (1995).

[24] While this Article agrees with the Supreme Court's conclusion that the shared responsibility payment is appropriately classified as a tax, rather than a penalty, for constitutional purposes, the question of whether the shared responsibility payment is a constitutionally *valid* tax is beyond the scope of this Article. For a discussion of certain constitutional questions affecting the validity of the shared responsibility payment as a tax—and arguments that the Court did not adequately address those questions in *NFIB*—see *infra* note 425. While those questions are obviously critical to the constitutionality of the shared responsibility payment itself, they do not impact the threshold tax-vs.-penalty analysis for federal exactions, which is the focus of this Article.

To permit Congress to overstep the bounds of its enumerated powers in such fashion would not merely be to sanction some abstract, technical violation of the Constitution: It would threaten to erode tangible—and valuable—political benefits that stem from the federalist structure of American government, which the Constitution establishes. Most notably, it would undercut the ability of sub-national communities within the country to be governed in accordance with their own values and preferences when it comes to matters of local, as opposed to national, importance.[25]

How can we erect a safeguard against any such misapplication of the taxing power? The key is to define precisely the distinction between federal taxes, on one hand, and penalties against conduct, on the other, for purposes of determining whether any of Congress's enumerated constitutional powers authorizes the exaction. Drawing not only on *NFIB*, but also on the Court's earlier taxing-power decisions as well as previous scholarship on the topic, this Article does just that: It offers a clear and concise rule for determining whether a congressional exaction is a penalty, rather than a tax, in any case where the exaction—even if styled as a revenue measure—is suspect as a means to enforce an unconstitutional regulation of conduct.

Part II of the Article provides an overview of the ACA and describes the relevant features of the individual mandate and the shared responsibility payment. Part III discusses both the constitutional challenges that opponents raised against the individual mandate in federal court and the federal government's defense of the mandate's constitutionality. Part III focuses, in particular, on (i) the plaintiffs' claims that the mandate exceeded Congress's power under the Commerce Clause, (ii) the federal government's defense of the mandate as within Congress's commerce power, and (iii) the government's alternative defense that, even if the mandate is not sustainable under the Commerce Clause, the shared responsibility payment is nevertheless a valid exercise of Congress's power to tax. To place those arguments in context, Part III also discusses the history and evolution of the Supreme Court's Commerce Clause jurisprudence, as well as the constitutional parameters of the taxing power and the Court's most significant taxing-power decisions prior to *NFIB*.

Part IV of the Article discusses the *NFIB* decision itself. In Part V, the Article addresses the need, after *NFIB*, to develop a clear test for determining whether a federal exaction styled as a "tax" is instead really a penalty, the constitutionality of which depends on Congress's power (or lack thereof) to enact the regulation that the penalty enforces. Part V begins by explaining why the tax-vs.-penalty issue is most likely to arise in the context of prospective disguised penalties enforcing indirect regulations of *non*economic conduct, and by noting the important benefits of federalism that are at stake. After discussing the extent to which *NFIB* and the Court's prior taxing-power decisions shed light on how best to construct a tax-vs.-penalties test, Part V examines an "effects" theory of

25 *See* Clark, *supra* note 9, at 571; Mason, *supra* note 10, at 979, 993.

the taxing power presented by Professors Robert Cooter and Neil Siegel. While acknowledging the significant value of Cooter and Siegel's contribution to the topic, Part V concludes that their tax-vs.-penalties test is ultimately neither workable nor wholly consistent with Supreme Court precedent.

Drawing on the foregoing considerations, Part VI of the Article presents a straightforward, workable rule for determining whether a professed federal "tax" is instead a penalty for failure to conform to some regulation of conduct embedded in the purported revenue measure. The rule establishes a definitive bright-line test both for penalties on economic conduct and, most importantly, for penalties on *non*economic conduct. Application of this rule would result in striking down any federal legislation that is disguised as an exercise of the taxing power but that, in substance, is actually a regulation outside the limits of Congress's other enumerated powers.

Part VII is the conclusion of the Article.

II. The ACA, the Individual Mandate, and the Shared Responsibility Payment

The stated intent of the ACA is to improve Americans' access to healthcare and to reduce the cost of that care.[26] In an effort to accomplish those ends, the ACA imposes a number of significant reforms on the nation's healthcare system.[27] Among many other things,[28] the ACA expands Medicaid coverage to those with incomes equal to or less than 133% of the federal poverty line,[29] provides tax credits to smaller employers to encourage them to provide

[26] NFIB v. Sebelius, 132 S. Ct. 2566, 2580 (2012) ("The [ACA] aims to increase the number of Americans covered by health insurance and decrease the cost of health care.").

[27] *See, e.g.*, Clark, *supra* note 9, at 545 (The ACA "relies on a host of reforms designed to reduce cost, improve the quality of healthcare and health outcomes, and expand access to care."); Melone, *supra* note 9, at 1190 (The ACA, "among its many provisions, imposed reforms on the health insurance industry, expanded Medicaid, enacted changes to Medicare, introduced illness prevention programs, and imposed a host of penalties, taxes, and other assessments on individuals and employers.").

[28] For example, some of the significant insurance market regulations included among the ACA reforms are a guaranteed-issue requirement and a prohibition on insurers' exclusions of coverage on the basis of pre-existing conditions, community rating requirements designed to spread risk more evenly among higher- and lower-risk individuals within a given community, new rate regulations on insurance premiums, and "a minimal set of 'essential benefits' that plans must cover." Clark, *supra* note 9, at 557. ACA regulations also prohibit insurers from imposing lifetime limits on insurance benefits or from canceling a policy for reasons other than fraud or misrepresentation, require insurers to include coverage of a child on a family policy until the "child" reaches the age of 26, and place certain limits on insurers' profits and administrative expenses relative to amounts spent on providing medical care. Jay, *supra* note 9, at 1144.

[29] Jay, *supra* note 9, at 1143 (citing 42 U.S.C.A. § 1396a(a)(10)(A)(i)(VIII) (West 2003 & Supp. 2011)).

health insurance to their employees,[30] imposes assessments on larger employers that do not offer their employees health insurance coverage deemed sufficient by Congress,[31] "creat[es] government-sponsored health insurance 'exchanges'" that pool purchasers of health insurance in the individual market (with the goal of reducing premiums for those purchasers),[32] and provides tax credits toward the purchase of insurance through such exchanges to persons whose household incomes are less than 400% of the federal poverty line.[33]

Among the ACA's numerous[34] provisions, one of the most important is the individual mandate, which is incorporated into the Internal Revenue Code of 1986, as amended (the "Code") at § 5000A.[35] Under § 5000A(a) of the Code, as enacted, non-exempt[36] individuals are required to arrange coverage for themselves and their dependents under health insurance providing at least a statutorily-prescribed minimum level of benefits.[37] This requirement to obtain such "minimum essential coverage" can be met in one of several ways[38]: It can be met by receiving coverage through a government-sponsored insurance program, such as Medicare, Medicaid or the Veterans program.[39] Or, it can be met by obtaining sufficient coverage through one's employer.[40] But for individuals who do not have government-sponsored or employer-provided insurance, the requirement

30 *Id.* at 1144 (citing 26 U.S.C.A. § 45R (West 2003 & Supp. 2011)). A "small employer" eligible for such tax credits is one that has no more than 25 full-time employees, the average annual wages of whom do not exceed a certain statutorily-prescribed amount, and which has in place an "arrangement" whereby the employer is required "to make a nonelective contribution" (in the amount of at least 50% of the premium costs) to each employee "who enrolls in a qualified health [insurance] plan offered . . . by the employer through [a health insurance] exchange" established under the ACA. 26 U.S.C. §§ 45R(d)(1), (4) (2010).

31 *Id*. (citing 26 U.S.C.A. § 4980H(a) (West 2003 & Supp. 2011)). A large employer potentially subject to such an assessment is, in general, one that has at least 50 full-time employees. 26 U.S.C. § 4980H(c)(2)(A) (2015).

32 Jay, *supra* note 9, at 1143–44 (citing 26 U.S.C.A. §§ 18031–44 (West 2003 & Supp. 2011)).

33 *Id.* at 1143–44 (citing 26 U.S.C.A. § 36B (West 2003 & Supp. 2011)).

34 *See* NFIB v. Sebelius, 132 S. Ct. 2566, 2580 (2012) ("The [ACA's] 10 titles stretch over 900 pages and contain hundreds of provisions.").

35 *See* 26 U.S.C. § 5000A (2010).

36 Undocumented aliens, incarcerated persons, and persons with certain religious-conscience-based objections are exempt from the requirements of § 5000A(a). *Id*. § 5000A(d).

37 *Id.* § 5000A(a). As discussed below, in upholding the shared responsibility payment as a tax, the Supreme Court interpreted § 5000A(a) in a way that technically writes the "requirement" to obtain insurance out of the statute. *See infra* notes 420–24424 and accompanying text.

38 *See* 26 U.S.C. § 5000A(f) (2010).

39 *Id.* § 5000A(f)(1)(A).

40 *Id.* § 5000A(f)(1)(B).

must be met through the purchase of a health insurance policy sold in the individual market.[41]

The requirement that all non-exempt individuals obtain health insurance is an essential part of the ACA's design. Without it, other ACA reforms—such as the prohibition on insurers from excluding from coverage persons with preexisting conditions—would provide increased incentives for healthier people to forgo the purchase of health insurance until they needed to use it.[42] If enough healthy people acted on those incentives and decided not to purchase health insurance until necessary, the private health insurance system (as adjusted by those other ACA reforms) would likely become insolvent and collapse.[43] The reason, of course, is that insurance pools rely on the premiums paid by healthy insureds to subsidize the coverage of sick insureds whose claims exceed their premium payments.[44] To prevent such a collapse of the system, the § 5000A(a) requirement was intended to ensure that the number of healthy people who join the insurance pool will be sufficient to spread risk and control insurance rates.[45] As the Supreme Court described it at one point, "the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals [that the ACA's] reforms require them to accept."[46]

If a non-exempt individual fails to maintain the "minimum essential coverage" required under § 5000A(a) during one or more months, then for each such month § 5000A(b) of the Code imposes on that individual "a penalty for such

---

41 *Id.* § 5000A(f)(1)(C). There is a provision in the law permitting the Secretary of Health and Human Services to recognize other sources of sufficient coverage. *See id.* § 5000A(f)(1)(E). However, that provision is likely to have very limited application, in practice.

42 NFIB v. Sebelius, 132 S. Ct. 2566, 2585 (2012); *see also* Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 2 (2011), http://www.yalelawjournal.org/pdf/981_s4wx1ct1.pdf.

43 Koppelman, *supra* note 42, at 2.

44 *Id.*

45 Clark, *supra* note 9, at 546.

46 *NFIB*, 132 S. Ct. at 2585. Crucially, though the Court referred to the individual mandate as forcing healthy persons to obtain health insurance in the above-quoted passage, it later found that many people might reasonably choose not to obtain insurance and to pay the shared responsibility payment instead. *See id.* at 2596.

failures."[47] The formal name of this exaction is the "shared responsibility payment,"[48] but it is notable that the statute consistently refers to the shared responsibility payment as a "penalty."[49] An individual owing a shared responsibility payment for any particular month is required to include the penalty amount with his or her income tax return for the taxable year in which such month falls.[50] Members of Native American tribes,[51] persons who are statutorily deemed not to be able to afford health insurance,[52] and taxpayers with gross incomes below the threshold for filing a federal income tax return[53] are exempt from the penalty.[54]

A rather complex formula for calculating the amount of the penalty is set forth in § 5000A(c) of the Code.[55] The penalty amount for a non-exempt individual for any taxable year in which he or she fails to maintain adequate coverage during one or more months is the *lesser* of (x) the national average premium charged on the new "exchanges" for a statutorily-specified level of health insurance coverage for such year for a family of the size of such individual's or (y) the sum of the so-called "monthly penalty amounts" for such individual for such year.[56] The "monthly penalty amount" for a non-exempt individual for any month during which he or she fails to maintain adequate coverage, is an amount equal to one-twelfth of the *greater* of: (i) a certain "flat dollar amount" or (ii) the applicable percentage of a certain portion of the individual's income.[57] However, regardless of the monthly penalty amount that would otherwise apply, an individual's penalty amount is always capped at the above-referenced average

47 26 U.S.C. § 5000A(b)(1) (2010).

48 *Id.* § 5000A(b).

49 The shared responsibility payment is repeatedly labeled a "penalty" in § 5000A. *See, e.g.*, *id.* § 5000A(b)(2) ("Any penalty imposed by this section . . ."); *id.* § 5000A(b)(3) ("Payment of penalty."); *id*. § 5000A(c) ("Amount of penalty.").

50 *Id.* § 5000A(b)(2).

51 *Id.* § 5000A(e)(3).

52 *Id.* § 5000A(e)(1).

53 *Id.* § 5000A(e)(2).

54 There is also an exemption for persons whom the Secretary of Health and Human Services deems to have suffered some unspecified "hardship with respect to the capability to obtain coverage under a qualified health plan." *Id*. § 5000A(e)(5). However, the statutory language provides no guidance as to when, or if, that provision may actually apply, in practice.

55 *See id.* § 5000A(c).

56 *Id.* § 5000A(c)(1); *see also* Melone, *supra* note 9, at 1193–95 (describing formula for calculating amount of penalty). The statutorily-required coverage, for purposes of this formula, is the so-called "bronze level of coverage." 26 U.S.C. § 5000A(c)(1)(B) (2010). The bronze level of coverage is "the lowest level of health insurance coverage identified by the ACA as sufficient to comply with the minimum coverage provision." Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Taxing Power*, 98 VA. L. REV. 1195, 1241 (2012).

57 26 U.S.C. § 5000A(c)(2) (2010).

amount of premiums payable for the specified insurance coverage that the individual decided to forgo.

The flat dollar amount for a non-exempt individual for a given taxable year is the sum of the "applicable dollar amounts" for such year for each person with respect to whom the individual failed to maintain required coverage (including the non-exempt individual himself or herself, and his or her dependents). The "applicable dollar amount" for a person is $695 for 2016[58] and at least $695 for each year after 2016[59]—subject, in each case, to a 50% reduction for persons younger than 18 years of age.[60] However, the flat dollar amount for any non-exempt individual is capped at 300% of the standard applicable dollar amount for the year in question.[61] Consider, for example, a hypothetical a family of six—two married adult parents and four children under 18. For those parents, the flat dollar amount for 2016, before applying the cap, would be $2,780. However, because of the cap, their actual flat dollar amount would be 300% of the $695 applicable dollar amount for 2016, or $2,085.[62]

In calculating the percentage-of-income prong of an individual's "monthly penalty amount," the portion of the individual's income to which the applicable percentage is applied is the excess of (i) the individual's so-called "household income" over (ii) the minimum amount of gross income that would require the individual to file a federal income tax return for the year.[63] (Let's refer to the amount of that excess as the "Excess Income Amount.") An individual's "household income" for this purpose is the aggregate modified adjusted gross income (as calculated specifically for this reason[64]) of the individual and his or her dependents for the taxable year in question.[65] The applicable percentage of such Excess Income Amount for any non-exempt individual is 2.5% for taxable years beginning in or after 2016.[66]

58 *Id.* § 5000A(c)(3)(A)–(B). For 2014, the first year in which the shared responsibility payment was in force, the applicable dollar amount for a person was $95. For 2015, the applicable dollar amount for a person was $325. *Id.* § 5000A(c)(3)(B).

59 For each year after 2016, the $695 per-person amount will be subject to increase by the amount of a statutorily-prescribed cost-of-living adjustment. *Id.* § 5000A(c)(3)(D).

60 *Id.* § 5000A(c)(3)(C).

61 *Id.* § 5000A(c)(2)(A)(ii). "Standard" refers to the applicable dollar amount for the year in question without giving effect to the 50% reduction for persons under the age of 18.

62 For a similar example using applicable dollar amounts for 2014, see Melone, *supra* note 9, at 1194.

63 26 U.S.C. § 5000A(c)(2)(B) (2010).

64 *See id.* § 5000A(c)(4)(C).

65 *Id.* § 5000A(c)(4)(B).

66 *Id.* § 5000A(c)(2)(B)(iii). The applicable percentage of such Excess Income Amount for a non-exempt individual was 1.0% for taxable years beginning in 2014 and 2.0% for taxable years beginning in 2015. *Id.* § 5000A(c)(2)(B)(i)–(ii).

Returning to our hypothetical family of six, imagine that the parents do not maintain the required healthcare coverage for themselves or their dependent children during any part of 2016. If, for 2016, the family's Excess Income Amount is $83,400 or less,[67] the sum of the parents'[68] monthly penalty amounts for 2016 will be the flat dollar amount of $2,085. Alternatively, if the family's Excess Income Amount for the year is greater than $83,400, the sum of the parents' monthly penalty amounts will equal 2.5% of that amount (which will be higher than $2,085). But, in either case, if the national average annual premium through the exchanges for "bronze level" coverage for the family for 2016 is less than the sum of the parents' monthly penalty amounts, then their shared responsibility payment for 2016 will be capped at that lower premium amount.[69]

As shown by the comparison of hypothetical families of six with Excess Income Amounts over and under $83,400 for taxable year 2016, the penalty will more likely "be determined by a percentage of income for families of moderate to moderately high income."[70] In contrast, "[l]ower income families will likely be subject to a flat dollar amount penalty."[71] Moreover, by virtue of the national-average-premium-for-basic-coverage cap, "[h]igh income families will likely find themselves subject to a penalty that is based on the cost of insurance coverage"[72] that they decided to forgo, rather than on either a percentage of income or a flat dollar amount.

III. ARGUMENTS FOR AND AGAINST THE ACA, AND CHALLENGES TO THE INDIVIDUAL MANDATE IN THE LOWER COURTS

As part of an effort to determine how best to distinguish between constitutionally-sanctioned taxes and extraconstitutional penalties, it is necessary to consider both (i) the constitutional objections that opponents raised against the individual mandate, in particular, and (ii) the reasons why the Supreme Court ultimately found the shared responsibility payment to be a tax, rather than a penalty for noncompliance with the mandate. Let us begin with some of the ACA opponents' primary objections.

---

67 2.5% of $83,400 equals $2,085. Thus, $83,400 is the Excess Income Amount at which the parents' flat dollar amount and their percentage-of-income amount will be the same for taxable years beginning in or after 2016.

68 If a non-exempt individual and his or her spouse file a joint federal income tax return, the individual's spouse is jointly liable for the individual's penalty. 26 U.S.C. § 5000A(b)(3)(B) (2010). For simplicity's sake, in our hypothetical family, let us assume that the parents file jointly.

69 *Id.* § 5000A(c)(1)(B).

70 Melone, *supra* note 9, at 1194–95.

71 *Id.* at 1195.

72 *Id.*

Supporters of the ACA hail it as "the most important progressive legislation in decades."[73] They laud it as an attempt to "address[] one of the most momentous social and economic problems ever to confront the country"[74]—namely, what many had viewed as the United States' "distressingly inadequate system for providing medical services to its people."[75] Given that a national "single-payer" health insurance system (or "Medicare for all") was not politically feasible,[76] proponents of healthcare reform have embraced the ACA's regulatory scheme for expanding private health insurance coverage.[77] In particular, they view the individual mandate as "necessary to ensure that enough healthy people . . . join the insurance pool to help spread the risk and keep insurance rates down."[78] They believe that individuals have a social responsibility to help to pay for a system of universal health insurance coverage, and they maintain that the individual mandate merely requires individuals to assume that responsibility by making them contribute to the funding of the ACA's system of private insurance coverage.[79]

Critics, however, view the ACA—and, especially, the individual mandate—very differently. Focusing more on individual autonomy than on collective social duty,[80] the ACA's detractors see the individual mandate as the "conscription of the healthy to subsidize the sick."[81] They argue that it places the economic burden of funding universal health insurance primarily on "healthy young adults" who would otherwise choose "not to buy insurance precisely because they do not expect to use medical care much—and usually they don't."[82] Some critics argue that, "[i]n an insurance pool in which young and healthy people are underrepresented . . . [t]he uninsured . . . do not impose any extra costs on the members of the pool. They simply refuse to subsidize the [older or sicker] pool members."[83] Considering that those subsidies might help to improve healthcare access for

[73] Koppelman, *supra* note 42, at 2, *quoted in* Jay, *supra* note 9, at 1135.

[74] Jay, *supra* note 9, at 1212.

[75] *Id.* at 1139.

[76] *Id.* at 1143.

[77] *See, e.g.*, Clark, *supra* note 9, at 545 (asserting that the ACA's attempts to expand private health insurance "should help improve health outcomes and reduce healthcare costs by ensuring that people can get access to the right kind of care at the right time").

[78] *Id.* at 546.

[79] *Id.* at 557–58.

[80] Professor Andrew Koppelman, a supporter of the ACA, has described the core of the critics' arguments as "an implicit libertarianism which focuses on the burden a law imposes on individuals and pays no attention at all to legitimate state interests." Koppelman, *supra* note 42, at 22.

[81] Gillian E. Metzger, *To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83, 83 (2012).

[82] David B. Rivkin, Jr. & Lee A. Casey, *Health Care Purchase Mandate: Unconstitutional and Likely to be Struck Down by the Courts*, 158 U. PA. L. REV. PENNUMBRA 94, 95 (2009).

[83] David B. Rivkin, Jr. & Lee A. Casey, *Health Insurance Purchase Tax: A Mandate by Any Other Name Is Still a Mandate*, 158 U. PA. L. REV. PENNUMBRA 109, 110 (2009).

people in need, such a refusal might seem "selfish, even churlish."[84] Nevertheless, critics regard a federal governmental mandate forcing individuals to enter into contracts[85] with private companies for health insurance that they do not need or want, as "a fundamental threat to individual liberty."[86]

A. *The Federalist Structure of American Government, and Federalism-Based Arguments Against the ACA*

Even if their concerns ultimately stemmed from a particular conception of individual liberty, opponents of the ACA framed many of their objections to the statute as arguments about protecting federalism.[87] The federalist structure of the American government is "one of dual sovereignty, in which the federal government's power is limited and arises from specific enumerated powers in Article I of the Constitution, and the states are granted plenary power to regulate."[88] As James Madison wrote in *The Federalist No. 45*, "the powers delegated by the proposed Constitution are few and defined. Those which are to remain in the State governments are numerous and indefinite."[89] Accordingly, the United States Congress does not have plenary police power to legislate on literally any subject that it so chooses. Instead, Congress may pass laws only in accordance with one (or more) of the specific grants of legislative authority accorded to it under the Constitution. Those express delegations of authority are set forth in

---

84 *Id.*

85 Josh Bolus, Note, *Legally Ill: Is the Federal Health Insurance Mandate Constitutional?*, 16 BARRY L. REV. 179, 195 (2011) ("On its face, the [individual] mandate is nothing more than a forced contract by the government.").

86 Metzger, *supra* note 81, at 83 (describing views of "the ACA's Republican and Tea Party opponents"); *see also* Clark, *supra* note 9, at 548 (discussing that the ACA's critics believe that the individual mandate "as a compelling example of how federal power threaten[s] individual liberties").

87 Some commentators who support the ACA have challenged the notion that objections to the ACA actually have anything to do with concerns about federalism—or, at least, federalism as (in their view) properly understood. Instead, they contend that the ACA critics' arguments are based on an anachronistic notion of economic liberty interests that fell out of fashion with the close of the *Lochner* era. *See, e.g.*, Erwin Chemerinsky, *A Defense of the Constitutionality of the Individual Mandate*, 62 MERCER L. REV. 618, 618 (2011) (positing that "the real objection to the individual mandate has nothing to do with the scope of Congress's power," but is instead "an objection to forcing people to buy insurance if they do not want to buy insurance" based on "an unarticulated sense that individuals should have a liberty interest to not have health insurance if they do not want to"); Koppelman, *supra* note 42, at 29 (arguing that, "[w]hat really drives the constitutional claims against" the ACA is not an argument concerning the limits of federal power under the Constitution, but rather libertarian ideology).

88 Clark, *supra* note 9, at 567.

89 THE FEDERALIST NO. 45, 292–93 (James Madison) (Clinton Rossiter ed., 1961), *quoted in* Bolus, *supra* note 85, at 182 (internal citations omitted).

Article I, Section 8.[90] They include, among other things, "the power to lay and collect taxes, coin, borrow and spend money, raise and support armies, declare war, punish counterfeiting, establish federal courts and post offices, and to regulate interstate commerce."[91] Under the Tenth Amendment, any powers that are not so delegated by the Constitution to the federal government (and that are not expressly denied to the states) "are reserved to the States respectively, or to the people."[92] Congress, therefore, "cannot regulate simply because it sees a problem to be fixed. Each and every federal law, whether reforming health care or building a new interstate highway, must be grounded in one of the specific grants of authority found in the Constitution."[93]

As the Supreme Court has recognized, the division of authority between the federal government and the states under America's federalist system "was adopted by the Framers to ensure protection of our fundamental liberties"[94]—the theory being that "a healthy balance of power between the States and the Federal Government will reduce the threat of tyranny and abuse from either front."[95] In expounding their objections to the new healthcare law, the ACA's critics have frequently invoked the nexus between individual liberty and limits on federal power. As discussed below, when bringing their challenges in court, the ACA's opponents maintained that Congress overstepped its constitutional authority in passing the law. They argued that none of the enumerated powers under Article I, Section 8 authorized Congress to enact the ACA. To these critics, the ACA—and the individual mandate, in particular—represented an unprecedented (and unconstitutional) expansion of federal power[96] that, if upheld, could "lead to a general federal police power"[97] under which Congress could theoretically intrude

---

90 U.S. CONST. art. I, § 8.

91 Rivkin & Casey, *supra* note 82, at 97 (summarizing many of the most significant enumerated powers of Congress under Article I, Section 8). For the complete list of Congress's enumerated powers under the Constitution, see U.S. CONST. art. I, § 8, cls. 1–18.

92 U.S. CONST. amend. X.

93 Rivkin & Casey, *supra* note 82, at 96.

94 United States v. Lopez, 514 U.S. 549, 552 (1995) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)) (internal quotation marks omitted); *see* Bolus, *supra* note 85, at 183 (discussing same).

95 *Id.* (quoting *Gregory*, 501 U.S. at 458 (internal quotation marks omitted), quoted in Bolus, *supra* note 85, at 183). In this way, the division of authority between the federal government and the states operates much the same as "the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch[.]" *Id.*

96 For example, Professor Randy Barnett (who has been a vocal critic of the ACA) explained that, "[i]n 2010[,] something happened in this country that has never happened before: Congress required that every person enter into a contractual relationship with a private company"—namely, a private health insurer. Randy E. Barnett, *Turning Citizens into Subjects: Why the Health Insurance Mandate Is Unconstitutional*, 62 MERCER L. REV. 608, 608 (2011).

97 *Id.* at 616.

into every aspect of one's life. If Congress has the power to make us purchase private health insurance, critics wondered with alarm what other individual actions the federal government might be able to compel: "Can the government force us to eat broccoli, buy American-made cars, join a health club?"[98]

B. *Legal Challenges to the ACA*

Whatever the merits of their objections, opponents of the ACA wasted no time in mounting challenges to the statute in the federal courts. Within minutes after President Obama signed the act into law,[99] Florida and 12 other states[100] filed a complaint in the District Court for the Northern District of Florida, claiming that the ACA was unconstitutional on multiple grounds.[101] The original plaintiffs in that case, *Florida* ex rel. *Bondi v. United States Department of Health and Human Services*,[102] were soon joined by 13 other states, several individuals and the National Federation of Independent Business.[103] Not long afterward, one additional state and various private parties filed other, similar lawsuits in other federal courts.[104]

---

[98] Clark, *supra* note 9, at 548. These concerns were articulated at length in a plaintiff's brief in one of the federal lawsuits challenging the ACA:

> The federal government will have the absolute and unfettered power to create complex regulatory schemes to fix every perceived problem imaginable and to do so by ordering private citizens to engage in affirmative acts, under penalty of law, such as taking vitamins, losing weight, joining health clubs, buying a GMC truck, or purchasing an AIG insurance policy, among others. The term "Nanny State" does not even begin to describe what we will have wrought if in fact the Health Care Reform Act falls within any imaginable governmental authority. To be sure, George Orwell's 1984 will be just the primer for our new civics.

Id. at 568–69 (quoting Plaintiff's Motion for a Preliminary Injunction & Brief in Support at 17–18, Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (2011) (No. 2:10-cv-11156)).

[99] Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1263 (N.D. Fla. 2011), *aff'd in part, rev'd in part,* Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part*, NFIB v. Sebelius, 132 S. Ct. 2566 (2012).

[100] *NFIB*, 132 S. Ct. at 2580; *see* Comment, National Federation of Independent Business v. Sebelius: *The Patient Protection and Affordable Care Act*, 126 HARV. L. REV. 72, 73 (2012).

[101] Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120 (N.D. Fla. 2010).

[102] *Bondi*, 780 F. Supp. 2d at 1256. Note that *Bondi* and *McCollum* are the same case. *See supra* note 101. The change in title reflects the fact that, during the course of the litigation, Pam Bondi succeeded Bill McCollum as Attorney General of the State of Florida.

[103] *NFIB*, 132 S. Ct. at 2580; *see* Comment, *supra* note 100, at 73. For a list of 26 states that were plaintiffs in *Bondi*, see *supra* note 8.

[104] The additional state was the Commonwealth of Virginia. Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 770 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011); *see* Joondeph, *supra* note 8, at 606 (noting that, as of January 7, 2011, there were "about twenty cases

Although the plaintiffs in those suits initially raised a number of arguments against the ACA, only two of their legal theories turned out to have legs: the claim that the individual mandate was beyond the scope of Congress's enumerated powers under Article I of the Constitution[105] and a claim that the Medicaid expansion was based on an unconstitutional coercion of the states by the federal government.[106]

being litigated in the lower federal courts that challenge—in some way, shape or form—the constitutionality of the [ACA]"); *see also* Bolus, *supra* note 85, at 1238–39 (discussing decisions in ACA litigations in federal district courts in Michigan and Virginia, as well as the district court decision in *Bondi*); Cooter & Siegel, *supra* note 56, at 1238–39 (outlining decisions in ACA litigations in various federal district courts and federal courts of appeals); Barry Cushman, NFIB v. Sebelius *and the Transformation of the Taxing Power*, 89 NOTRE DAME L. REV. 133, 153–58 (2013) (discussing decisions on taxing power claims, in particular, in ACA litigations in district courts in Pennsylvania, Ohio, the District of Columbia, Virginia, and Florida and in federal courts of appeals for the Fourth, Sixth, and Eleventh Circuits). Appeals from district court decisions in ACA cases were heard by U.S. Courts of Appeals for the Fourth Circuit, Sixth Circuit, Eleventh Circuit, and D.C. Circuit, respectively. *See NFIB*, 132 S. Ct. at 2580–81, 2613 n.1 (discussing challenges to the ACA heard by those federal appeals courts).

105 *See* Clark, *supra* note 9, at 570 (noting that "lower courts rejected [the plaintiffs'] individual rights-based claims" and that "the only viable challenge to reform [concerning private health insurance coverage] was to the individual mandate and whether Congress exceeded the Article I powers it used to justify the mandate: the power to regulate interstate commerce and the power to tax and spend").

106 Medicaid is a joint federal-state program, the states' participation in which is voluntary. States receive federal matching funds for healthcare services to Medicaid beneficiaries as long as they comply with certain federal program requirements. *Id.* at 552. As originally enacted, the ACA required states that wished to continue to participate in Medicaid to provide coverage to the additional persons included under the ACA's expanded Medicaid eligibility criteria. *Id.* at 555. This would require the states, as "partners" in the Medicaid program, to spend billions of additional dollars to cover that additional group of beneficiaries. Jay, *supra* note 9, at 1143. The prospect of such additional expense made some states "reticent" to participate in the expansion of Medicaid coverage. Clark, *supra* note 9, at 561. However, under the ACA as originally enacted, any state refusing to participate in the expansion would lose all federal Medicaid funding. *Id.* at 603. As part of their court challenge to the ACA, the 26 states in *Bondi* (the original Florida litigation) sought to invalidate the Medicaid expansion on the ground that it "exceed[ed] Congress's authority under the Spending Clause" of the Constitution. *NFIB*, 132 S. Ct. at 2601 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.). In essence, their argument was that Congress was "coercing the States to adopt [the Medicaid expansion] by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and accepts the conditions that come with it." *Id.* Such coercion, they argued, "violates the basic principle that the 'Federal Government may not compel the States to enact or administer a federal regulatory program.'" *Id.* (quoting New York v. United States, 505 U.S. 144, 188 (1992)). In *NFIB*, the Supreme Court invalidated the ACA's Medicaid expansion "insofar as it would allow the Secretary of the Department of Health and Human Services 'to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion.'" Comment, *supra* note 100, at 78 (quoting *NFIB*, 132 S. Ct. at 2607 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.)). The Court essentially determined that, by conditioning a state's receipt of "traditional" Medicaid funds upon the state's participation in the ACA's expansion of the program, Congress would coerce the states into taking action (i.e., spending state funds on expanded Medicaid coverage) that Congress has no constitutional authority to require

1. The Claim that the Individual Mandate Exceeded Congress's Commerce Power

The primary legal argument asserted against the individual mandate was that it exceeded the ambit of Congress's Commerce Clause power. Among Congress's enumerated powers in Article I, Section 8 of the Constitution is the power "[t]o regulate Commerce . . . among the several States."[107] In modern times, Congress's authority to regulate interstate commerce has repeatedly been invoked, "in one way or another[,] to support most features of the elaborate federal regulatory system."[108] As discussed below, the Supreme Court has "consistently approved expanding uses of the Commerce Clause to support congressional action"[109] since 1937—albeit, "unjustifiably"[110] in the eyes of some ACA critics. Thus, the ACA's challengers initially pressed the Commerce Clause argument because they surmised that the commerce power was the only potential ground on which the individual mandate might even arguably be defended.[111] And, indeed, Congress expressly relied on its Commerce Clause power when enacting the individual mandate.[112]

The Commerce Clause is key to an understanding of how the Supreme Court reached its decision in *NFIB*, why the *NFIB* decision has lent renewed

---

them to take, and that such coercion through provision or withholding of federal funds cannot be justified under the Spending Clause of the Constitution. *Id.* (discussing *NFIB*, 132 S. Ct. at 2601–08). However, over vigorous objections by the dissenters, the Court did not invalidate the Medicaid expansion in its entirety. *Id.* at 78–79. As a result, states may now elect, but are not required, to participate in the expansion.

107 The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

108 Rivkin & Casey, *supra* note 82, at 97.

109 Jay, *supra* note 9, at 1137.

110 Sandefur, *supra* note 19, at 206 ("Since 1937, the Supreme Court has unjustifiably expanded [the commerce] power to allow federal authority over matters the Constitution was not meant to permit . . . .") (footnote omitted).

111 For example, a couple of prominent ACA critics concluded as follows:

> If the federal government has any right to reform, revise, or remake the American healthcare system (without simply paying for it out of the federal treasury), it must be found in this all important [Commerce Clause] provision, and this is especially true of any mandate that every American obtain health care insurance or face a penalty.

Rivkin & Casey, *supra* note 82, at 97.

112 Barnett, *supra* note 96, at 611 & n.34 (citing Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 1501, 124 Stat. 119, 243 (2010)); *see also* Rebecca L. McCullough, Note, *What is All the Fuss About?: The United States Congress May Impose a Tax (It's Called the "Individual Mandate")*, 22 S. CAL. INTERDISC. L.J. 729, 742 (2013) (same); Sandefur, *supra* note 19, at 205–06 (discussing Congress's express reliance on its supposed Commerce Clause power in enacting the individual mandate).

urgency to the constitutional distinction between taxes and penalties, and the extent to which future Congresses may be tempted to resort to penalties disguised as taxes in order to escape the confines of their enumerated powers. To grasp the primary practical significance of the tax-vs.-penalty distinction (and the legal context in which the issue now exists), it is imperative to comprehend the scope of Congress's regulatory authority under the Commerce Clause and how the Supreme Court has interpreted that authority at different points in the nation's history. Accordingly, a brief explication of the Court's Commerce Clause jurisprudence follows.

i. Commerce Clause Jurisprudence Prior to the New Deal

In the nineteenth and early twentieth centuries, the Supreme Court read the Commerce Clause rather narrowly, in a way that encompassed only "economic activities that entailed crossing state lines or involved the 'instrumentalities' of interstate commerce, such as railroads."[113] During that period, the Court distinguished between commerce, on one hand, and manufacturing or production, on the other, and held that regulation of the latter was solely the province of the states. As a result, the Court at the time took the view that Congress could not invoke its Commerce Clause power to regulate intrastate manufacturing or production activity, even when the resulting product was ultimately sold across state lines or when local manufacturing or production otherwise had some indirect effect on interstate trade.[114] Up until the New Deal era, this "restrictive distinction between production, which Congress could not regulate, and commerce, which it could[,]" created a formidable "barrier to many national regulatory efforts."[115]

Just as one example, in its 1918 decision in *Hammer v. Dagenhart*,[116] the Court invalidated a federal law prohibiting the interstate shipping of goods manufactured through the use of child labor on the ground that it was beyond the scope of Congress's Commerce Clause power. Invoking the reasoning of the time, the Court stated in *Dagenhart* that, "[o]ver interstate transportation, or its

113 Rivkin & Casey, *supra* note 82, at 97 (citing the Shreveport Rate Cases, 234 U.S. 342 (1914); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

114 *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 303–05 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495, 546–47 (1935); United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 407–08 (1922); Kidd v. Pearson, 128 U.S. 1, 20–21 (1888); *see also* Jay, *supra* note 9, at 1148 n.98 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937)) (noting that "[a] long line of cases had held that manufacturing was not commerce, which was confined to 'trade, traffic, commerce, transportation, or communication' across either state or international borders").

115 Metzger, *supra* note 81, at 90.

116 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation."[117] On that basis, the Court held that the authority to regulate child labor (even when used to produce goods for sale in interstate commerce) was reserved solely to the states.[118]

ii. *The Modern, Broad Interpretation of the Commerce Clause*

The Court's earlier, narrower reading of the Commerce Clause changed in the late 1930s with the demise of the now-discredited *Lochner* era. In *Lochner v. New York*[119] and a string of cases that followed, the Court had invalidated both federal and state laws regulating economic activity on the ground that they violated a right to freedom of contract or other economic rights then thought to be guaranteed under the Due Process Clause[120] of the Fourteenth Amendment.[121] Yet, the *Lochner* era came to an abrupt end during the constitutional crisis of 1937, when President Franklin Delano Roosevelt threatened his "court-packing" plan following a string of Supreme Court decisions striking down early New Deal legislation.[122] Beginning in 1937, the Court suddenly rejected the idea that

---

[117] *Dagenhart*, 247 U.S. at 272.

[118] *Id.* at 275–76.

[119] Lochner v. New York, 198 U.S. 45 (1905) (invalidating a New York State labor law prohibiting employers from requiring or permitting employees to work more than 60 hours per week, on the ground that the law unreasonably infringed on the parties' freedom of contract in violation of the Due Process Clause of the Fourteenth Amendment).

[120] The Due Process Clause of the Fourteenth Amendment provides: "nor shall any State deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[121] In *Lochner* and its progeny, the Court essentially found a substantive due process right to freedom of contract, freedom of labor and other economic liberties, and invalidated federal and state laws that it deemed to have violated those supposed "substantive" due process rights. *See* Florida *ex rel*. McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120, 1161 (N.D. Fla. 2010) (discussing *Lochner*, 198 U.S. at 45, and the line of cases that followed, such as Coppage v. Kansas, 236 U.S. 1 (1915), *overruled in part by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Adkins v. Children's Hosp., 261 U.S. 525 (1923), *overruled in part* by W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (in which "the Due Process Clause was interpreted to reach economic rights and liberties")). For a good and distinct description of the substantive due process doctrine, see Ryan McCarl, *Incoherent and Indefensible: An Interdisciplinary Critique of the Supreme Court's "Void-for-Vagueness" Doctrine*, 42 HASTINGS CONST. L.Q. 73, 73 n.1 (2014). "Substantive due process refers to the 'due process limitation on conduct-regulating policy.'" *Id.* (quoting Leonard G. Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1050 n.8 (1968)). "Its counterpart, procedural due process, protects values such as the opportunity to be heard in a forum in which one's substantive rights are to be adjudicated, and notice that such adjudication is scheduled to occur." *Id.*

[122] *See* Cooter & Siegel, *supra* note 56, at 1215 n.111 (referencing that crisis and the court-packing plan, and citing sources providing further discussion of the same).

there was any due process protection of freedom of contract or similar economic liberties.[123] Following that repudiation of "substantive due process in the arena of economic regulation, [the Supreme Court recognized] legislatures [to] have 'broad scope to experiment with economic problems.'"[124]

The same "switch in time that saved nine" also ushered in a far more expansive interpretation of the Commerce Clause.[125] In its 1937 watershed decision in *NLRB v. Jones & Laughlin Steel Corp.*,[126] the Supreme Court discarded its former distinction between production and commerce in order to uphold the National Labor Relations Act as a permissible exercise of Congress's Commerce Clause power. The Court therein held for the first time that the Commerce Clause authorized federal regulation of local economic activity (in this case, labor) when that activity affects interstate commerce.[127] A few years later, in its 1941 *United*

123 *See W. Coast Hotel Co.*, 300 U.S. at 392 (upholding the state of Washington's minimum wage law and noting that freedom of contract is a qualified right and that due process does not prevent the government from enacting protective safeguards with respect to the making of contracts). In reaching its *West Coast Hotel* decision, the Court rhetorically asked: "What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law." *Id.* at 391, *quoted in part in* Cooter & Siegel, *supra* note 56, at 1215 n.112.

124 *McCollum*, 716 F. Supp. 2d at 1161 (quoting New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106–07 (1978)). Although the Court has not actually overruled *Lochner*, the case is universally considered no longer to be good law. Cooter & Siegel, *supra* note 56, at 1215 n.112. "*Lochner* is never cited for its legal authority. Although it has never been formally overruled, it is well understood among constitutional lawyers that relying on *Lochner* would be a pointless, if not a self-destructive, endeavor." Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244 (1998), *quoted in* Cooter & Siegel, *supra* note 56, at 1215 n.112. Since the rejection of the *Lochner*-era notion of freedom of contract as a fundamental constitutional right, substantive due process claims involving laws regulating economic activity are now subjected to the far more lenient or deferential rational basis test. As a result, "[e]ven if the court is convinced that the political branch has made an improvident, ill-advised or unnecessary decision, it must uphold the act if it bears a rational relation to a legitimate governmental purpose." TRM, Inc. v. United States, 52 F.3d 941, 946 (11th Cir. 1995), *quoted in McCollum*, 716 F. Supp. 2d. at 1161.

125 *See* Melone, *supra* note 9, at 1190 n.83 (describing United States v. Darby, 312 U.S. 100 (1941), as "one of a series of cases that expanded the scope of the commerce power after the so-called 'switch in time that saved nine' in the New Deal era").

126 301 U.S. 1 (1937).

127 Ryan C. Patterson, Note, *"Are You Serious?": Examining the Constitutionality of an Individual Mandate for Health Insurance*, 85 NOTRE DAME L. REV. 2003, 2019 n.131 (2010) (citing *Jones & Laughlin*, 301 U.S. at 36–38). In *Jones & Laughlin*, the Court upheld the National Labor Relations Act (protecting workers' rights to form unions and engage in collective bargaining with employers) as applied to a steel manufacturer that used materials shipped in interstate commerce in order to produce steel intended for sale out of state. Jay, *supra* note 9, at 1148 (citing *Jones & Laughlin*, 301 U.S. at 15–16). Labor, of course, relates directly to production or manufacture of goods. And, the Court noted in *Jones & Laughlin* that, if viewed in isolation, the manufacture of steel may be seen as purely local activity. *Id.* (citing *Jones & Laughlin*, 301 U.S. at 38). However, the Court found that fact not to be dispositive because of the "close and intimate relation" between

States v. Darby[128] decision, the Court overruled *Hammer v. Dagenhart* and upheld the Fair Labor Standards Act of 1938 (which "regulat[ed] . . . wages and hours of employees of businesses selling products across state lines"[129]) as valid under the Commerce Clause. In so doing, the Court found that Congress's Commerce Clause power extends to intrastate activities that "so affect interstate commerce . . . as to make regulation of [those local activities] appropriate means to the . . . legitimate end" of regulating interstate commerce.[130] Building on these precedents, the Court cemented its modern, expansive interpretation of the Commerce Clause with its 1942 decision in *Wickard v. Filburn*.[131] In *Wickard*, the Court upheld the application of the Agricultural Adjustment Act of 1938 to impose quotas on the amount of wheat that a farmer could grow for personal consumption. Growing wheat for personal use is obviously a strictly local activity. Nevertheless, the Court found that Congress could regulate that activity through its commerce power because growing more wheat for consumption reduces market demand for the commodity and therefore has a substantial effect on interstate commerce.[132] *Wickard* thus stands for the proposition that Congress may regulate even entirely local economic activity that "has a cumulative and substantial effect on interstate commerce."[133]

The *Jones & Laughlin*, *Darby*, and *Wickard* decisions "effectively eviscerated the Commerce Clause as a barrier to federal action" in the area of economic regulation.[134] In the five decades following the *Wickard* decision, Congress used the Commerce Clause (together with the power to tax and spend) "to vastly expand its regulatory reach into almost every area affecting one's daily life, including labor, education, the environment, public safety, and, of course,

---

steel manufacturing and interstate commerce. *Id.* (quoting *Jones & Laughlin*, 301 U.S. at 37 (internal quotation marks omitted)). Labor unrest in the steel industry could disrupt the commercial chain with respect to steel production, ultimately affecting sales of product across the country and abroad. *Id.* (citing *Jones & Laughlin*, 301 U.S. at 41, 42). Because the "ramifying activities" of the steel manufacturing industry "affect[] interstate commerce at every point[,]" the Court found the Commerce Clause to permit regulation of labor in that industry. *Jones & Laughlin*, 301 U.S. at 43.

128 312 U.S. 100 (1941).

129 Jay, *supra* note 9, at 1146 (citing *Darby*, 312 U.S. at 111).

130 *Darby*, 312 U.S. at 118. In *Darby*, the Court approved the power to regulate wages and hours of "of workmen in the production of goods 'for interstate commerce'" on the theory that Congress "could stop the initial step toward transportation" of such goods in interstate commerce, which was "production with the intention of so transporting" those goods. *Id.* at 108, 117.

131 317 U.S. 111 (1942).

132 Clark, *supra* note 9, at 586 (citing *Wickard*, 317 U.S. at 118–19, 125).

133 Jack M. Balkin, *The Constitutionality of an Individual Mandate for Health Insurance*, 158 U. PA. L. REV. PENNUMBRA 102, 106 (2009) (citing *Wickard*, 317 U.S. at 117; United States v. Wrightwood Dairy Co., 315 U.S. 110, 121–22 (1942); *Darby*, 312 U.S. at 118–24).

134 Melone, *supra* note 9, at 1227 n.208 (noting the turning point in Commerce Clause jurisprudence reflected in *Darby* and *Wickard*).

healthcare financing and delivery."[135] During that time, Congress's "commerce power was commonly thought to be virtually plenary."[136] Indeed, between 1936 and 1995, the Supreme Court did not invalidate a single federal law on the ground that it exceeded Congress's Commerce Clause authority.[137]

iii. Commerce Power Limits Concerning Regulation of Noneconomic Activity

Prior to *NFIB*, the only limit on the commerce power that the Supreme Court had enforced in the modern era was to reject congressional efforts at regulating intrastate noneconomic activity. In its 1995 *United States v. Lopez*[138] decision, the Court invalidated the Gun-Free School Zones Act of 1990, which "made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'"[139] Possession of a gun near a school is, of course, a purely local activity that is not commercial in nature. Noting that it had previously "upheld a wide variety of congressional Acts regulating intrastate *economic* activity where . . . the activity substantially affected interstate commerce[,]"[140] the Court thus distinguished the Gun-Free School Zones Act on the ground that it was "a criminal statute that by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[141] The federal government had argued that the statute was sustainable under the Commerce Clause because having guns near schools substantially affects interstate commerce in several ways: by facilitating violent crime, which in turn would impose substantial costs to be spread among the population through the mechanism of insurance; by causing people not to travel to areas that are perceived to be unsafe;

---

135 Clark, *supra* note 9, at 570; *see also* Patterson, *supra* note 127, at 2019 ("After *Wickard*, Congress, taking advantage of the Court's extraordinarily broad interpretation, used the commerce power to pass regulatory, criminal, and civil rights laws.").

136 Cushman, *supra* note 104, at 134.

137 Patterson, *supra* note 127, at 2019.

138 514 U.S. 549 (1995).

139 *Id.* at 551 (quoting 18 U.S.C. § 922(q)(1)(A) (1988 ed. Supp. V)).

140 *Id.* at 559 (emphasis added).

141 *Id.* at 561. The Court observed that "[e]ven *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not." *Id.* at 560. To be sure, "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567. Nor was such regulation of gun possession "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561.

and by adversely affecting education, thereby reducing citizens' ability to contribute to the national economy.[142] The Court, however, found the relationship of these "costs of crime" to interstate commerce to be far too tenuous to satisfy the "substantial effects"[143] test for upholding regulation of intrastate activity on Commerce Clause grounds.[144]

Five years later, in its 2000 decision in *United States v. Morrison*,[145] the Court similarly struck down a statute that "provide[d] a federal civil remedy for the victims of gender-motivated violence."[146] Arguing that the law was sustainable under the Commerce Clause, the federal government and an individual petitioner (who sought to sue her alleged rapist under the statute) essentially asked the Court to recognize a "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce."[147] As in *Lopez*, however, the Court refused to recognize indirect consequences of local, noneconomic activities as grounds for federal regulation of such activities under the guise of the commerce power. To do so, the Court adduced, would threaten

---

142 *Id.* at 563–64.

143 After outlining the prior history of its Commerce Clause jurisprudence, and focusing particularly on the modern-era precedents that expanded its interpretation of the clause, the Court listed the "three broad categories of activity that Congress may [now] regulate under its commerce power[:]"

> *First*, Congress may regulate the use of the channels of interstate commerce. . . . *Second*, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . *Finally*, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that *substantially* affect interstate commerce . . . .

Id. at 558 (emphasis added) (internal citations omitted). In articulating the third of category, the Court acknowledged that, "admittedly, our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause." *Id.* at 559. However, the Court "conclude[d], consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* Given that prohibiting the possession of guns near schools is obviously not a regulation of either a channel or an instrumentality of interstate commerce, the Court reasoned that the only potential basis for sustaining the law under the Commerce Clause would be if it came within the third category—i.e., if gun possession near a school somehow substantially affected interstate commerce. *Id.*

144 *Id.* at 564. If such attenuated causal connections were considered to satisfy the "substantial effects" test established in *Wickard* and other modern-era precedents, then Congress could conceivably use its commerce power to regulate literally "any activity that it found was related to the economic productivity of individual citizens[.]" *Id.* Under such an approach, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." *Id.*

145 529 U.S. 598 (2000).

146 *Id.* at 601–02 (discussing the federal statute in question, 42 U.S.C. § 13891).

147 *Id.* at 615.

"to completely obliterate the Constitution's distinction between national and local authority."[148] While it stopped short of "adopt[ing] a categorical rule against aggregating the effects of any noneconomic activity[,]" the Court in *Morrison* once again stressed that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is *economic* in nature."[149]

Although federalism enthusiasts may have taken some comfort from *Lopez* and *Morrison*, those decisions did not call into question the federal authority recognized in *Darby* and *Wickard* to regulate local economic activity when that activity has a substantial effect on interstate commerce. The Court thus left Congress's broad authority to legislate on economic matters completely intact.[150] Indeed, in its 2005 *Gonzales v. Raich*[151] decision, "the Court further clarified that Congress can regulate [even] some noneconomic activity" under the Commerce Clause "if it is a part of a general class of activity that the Court deems economic."[152]

---

148 *Id.* The Court determined that the logical conclusion of "petitioners' reasoning [would be] to allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." *Id.* Moreover, petitioners' reasoning could be extended not only to federal regulation of crime, but also "to family law and other areas of traditional state regulation, since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Id.* at 615–16.

149 *Id.* at 613 (emphasis added).

150 *Id.* at 610 (quoting United States v. Lopez, 514 U.S. 549, 560 (1995)) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."), *quoted in* Koppelman, *supra* note 42, at 11 n.58; *see also Morrison*, 529 U.S. at 611 (quoting *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring)) ("Congress may 'regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy[.]'"), *quoted in* Koppelman, *supra* note 42, at 11 n.58.

151 545 U.S. 1 (2005).

152 Koppelman, *supra* note 42, at 11 n.58 (citing *Raich*, 545 U.S. at 17–19). In *Raich*, the Court upheld the federal Controlled Substances Act, 21 U.S.C. § 801 ("CSA"), as applied to prohibit "the intrastate manufacture and possession of marijuana for medical purposes" (notwithstanding that said manufacture and possession for such purposes was allowed under California law). *Raich*, 545 U.S. at 15. The Court found the prohibition of local cultivation and possession of marijuana for personal medical use to be a valid exercise of Congress's Commerce Clause power, even though those activities were themselves not economic in nature. Citing *Wickard* and other precedents, the Court noted that "[o]ur case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17. Analogizing the prohibition of marijuana possession for personal use to the quotas on cultivation of wheat for personal use that were at issue in *Wickard*, the Court found that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale," if it has a rational basis for concluding "that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18; *see also id.* at 19 (discussing the rational basis for such a belief on the facts in *Wickard*). The Court distinguished applying the CSA to prohibit personal marijuana possession from the Gun Free School Zones Act of 1990 that it struck down in *Lopez*. The Gun Free School Zones Act was a "discrete prohibition" of a local noneconomic activity. *Id.* at 24. In contrast, the application of the

iv. Arguments as to Whether the Individual Mandate Was Within the Scope of Congress's Commerce Power

Given this legal landscape, supporters of the ACA thought there was ample basis for defending the individual mandate on Commerce Clause grounds. For example, noted constitutional law professor Erwin Chemerinsky maintained that an individual's decision whether to purchase health insurance constitutes economic activity (even when there is no economic transaction, per se)[153] and that the consequences of those individual decisions have substantial effects on interstate commerce.[154] Therefore, he surmised that regulating those decisions through the individual mandate was a legitimate use of the commerce power.[155] Another prominent legal scholar, Professor Jack Balkin, thought that even if a decision not to purchase health insurance was "noneconomic" activity, regulation of that activity was still permissible (presumably under *Raich*) as a necessary part of a broader regulation of interstate commerce in healthcare.[156]

On the other hand, in arguing that the Commerce Clause did not support the measure, the plaintiffs in the ACA litigation "maintain[ed] that the individual

---

CSA to noneconomic activity "was merely one of many essential part[s] of a larger regulation of economic activity," i.e., the interstate sale of illicit drugs, "in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 24–25 (quoting *Lopez*, 514 U.S. at 561) (internal quotation marks omitted). Though that distinction had been foreshadowed in *Lopez* itself, some commentators saw *Raich* as a "clear departure from the Court's prior efforts" in *Lopez* and *Morrison* "to establish judicially enforceable limits on the commerce power." Patterson, *supra* note 127, at 2028; *see* Sandefur, *supra* note 19, at 206 (observing that, prior to *NFIB*, "what limits [on the Commerce Clause power that] the Court did offer in recent years appeared to have been once again demolished in the 2005 *Raich* decision").

153 Chemerinsky, *supra* note 87, at 620 (arguing that "[t]he act of purchasing health care is, by definition, economic activity[,]" but that "economic activity does not require an economic transaction[,]" and that "[e]ven the choice to not purchase health care is economic activity because if a person makes a choice not to purchase health care, the person is making the economic decision to purchase something else or save the money").

154 *Id.* at 621 (arguing that "[t]he health care industry is about $800 billion in the United States economy, and that says that what Congress is doing here [by mandating individuals' purchase of health insurance] clearly does have a substantial effect on interstate commerce").

155 Professor Chemerinsky argued that, under *Raich* and its modern-era precedents, the mandate was a valid exercise of the commerce power so long an individual's decision whether to purchase health insurance constituted economic activity and Congress had a rational basis for concluding that such activity substantially affected interstate commerce. *See id.* at 619–21. He seems to have focused particularly on the *Raich* decision because *Raich* highlighted the rational basis standard for determinations as to whether intrastate activity substantially affects interstate commerce. *Id.* at 619 ("This tremendously lessens the burden on the government because the rational basis test is so deferential.") Interestingly, he interprets *Raich* as having "changed the law because it broadened what counts as economic activity." *See id.* at 620. This differs technically from the more pervasive interpretation of *Raich*, which is that the Court there found the Commerce Clause to permit congressional regulation of even noneconomic intrastate activity when necessary as part of a broader scheme to regulate interstate commerce. *See supra* note 152 and accompanying text.

156 *See* Balkin, *supra* note 133, at 107.

mandate [did] not regulate [any] activity affecting interstate commerce"[157] whatsoever. Instead, they argued, the mandate sought "to impermissibly regulate economic *inactivity*. The decision not to buy insurance, according to the plaintiffs, [was] the exact opposite of economic activity."[158] Some legal commentators agreed,[159] contending that to allow Congress to reach such inactivity would enable it to "exercis[e] powers that are even more remote to the regulation of interstate commerce than is the regulation of noneconomic activity."[160]

The federal government, of course, "responded that the individual mandate represents a valid use of the commerce power,"[161] and proponents of the ACA sought to dismiss any distinction between activity and inactivity as irrelevant.[162] Nonetheless, to be on the safe side, the government did not base its defense of the individual mandate solely on Commerce Clause grounds.

---

157 Florida *ex rel.* McCollum v. U.S. Dept. of Health & Human Servs., 716 F. Supp. 2d 1120, 1162 (N.D. Fla. 2010).

158 *Id.*

159 *See, e.g.*, Barnett, *supra* note 96, at 612 ("The individual health insurance mandate, however, is not regulating any economic activity. The mandate is quite literally regulating *inactivity*. Rather than regulating or prohibiting economic activity in which a citizen voluntarily *chooses* to engage . . . the mandate is commanding that a citizen *must* engage in economic activity."); Rivkin & Casey, *supra* note 82, at 99 ("[W]hat Congress is contemplating with regard to a health care mandate is even less defensible under a Commerce Clause analysis than what it sought to do" under the statutes that the Court struck down in *Lopez* and *Morrison*, "both of which, after all, purported to regulate noneconomic activities that were nevertheless freely engaged in by individuals." In contrast, "the health care mandate would not regulate any 'activity' at all. Rather, it features an affirmative federal command that parties engage in a particular commercial activity—i.e., a purchase of insurance.").

160 Barnett, *supra* note 96, at 614. Professor Barnett argued that such an expansion of the commerce power "would convert all decisions not to sell one's house or car into economic activity that could be regulated or mandated if Congress deemed the expansion convenient to its regulation of interstate commerce." *Id.* at 613.

161 Mason, *supra* note 10, at 979.

162 Professor Andrew Koppelman, for example, considered it to be "an interesting semantic question" and conceded that forgoing the purchase of health insurance "may not be economic *activity*," even though "[i]t is an economic decision with economic consequences." Koppelman, *supra* note 42, at 6–7. Yet, to Professor Koppelman, the answer to that question "[did] not matter" because "[u]nder the Necessary and Proper Clause, it is enough that there is a national problem that only Congress can solve, and that the means chosen are reasonably adapted to the attainment of a legitimate end." *Id.* at 7 (internal citations and internal quotation marks omitted). The Necessary and Proper Clause grants to Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" all of Congress's other Article I, Section 8 powers, as well as "all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18. While there was no precedent for invoking that power to regulate *inactivity*, the Supreme Court had relied on the Necessary and Proper Clause when expanding its interpretation of the commerce power to reach wholly intrastate *activity* that substantially affects interstate commerce. Barnett, *supra* note 96, at 612 & n.39 (citing United States v. Darby, 312 U.S. 100, 118–19 (1941)).

2. The Argument that the Shared Responsibility Payment Was a Valid Exercise of Congress's Taxing Power

Arguing in the alternative, the government contended that, even if not authorized by the Commerce Clause, there was nevertheless an independent source of congressional power to enact the individual mandate: The mandate (or, at least, the shared responsibility payment owed by individuals not in compliance with the mandate) was valid as a tax that was within Congress's power to lay and collect under the General Welfare Clause.[163]

Understanding why the government ultimately prevailed on that argument is essential to crafting a post-*NFIB* constitutional test to distinguish between actual taxes, on one hand, and penalties masquerading as taxes, on the other. The Supreme Court's analysis of the constitutional power to tax in *NFIB*, of course, drew heavily on the Court's many prior taxing-power decisions. By illustrating how the Court has historically construed the scope of the taxing power and how it has approached the constitutional distinction between taxes and penalties in the past, those earlier tax-power cases not only place *NFIB* in context; they also provide useful insights into how best to construct a forward-looking tax-vs.-penalties test that the Court would actually accept and apply. To make sense of those previous cases, in turn, it is necessary to understand the constitutional underpinnings of the taxing power itself. Among other things, it is important to be mindful of the breadth of that power—and the reasons why it is so broad—in order to ensure that any proposed tax-vs.-penalties test does not impinge upon Congress's constitutional authority to lay and collect those exactions that really are taxes. Accordingly, let us turn next to a consideration of the taxing power, followed by examinations of the foundational cases comprising three distinct eras of the Court's taxing-power jurisprudence.

[163] *See* Clark, *supra* note 9, at 565 & n.93 (citing Reply Brief for Petitioner (Minimum Coverage Provision) at 21–25, Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 604 (2011) (No. 11-398), 2012 WL 748426, at *21–25) ("Alternatively, the federal government argued that the mandate could also be upheld as an exercise of Congress's taxing power."); Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Constitutional Compromise*, 120 Yale L.J. Online 407, 407 (2011) (citing Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 19–25, Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) (No. 3:10-cv-188-HEH)) (noting that the taxing power is one of the "grounds on which the federal government defend[ed] the constitutionality of the" ACA)); Jay, *supra* note 9, at 1169 ("The government claim[ed] that there is an independent basis for congressional power: the mandate's assessment is authorized as [a] tax justified under the General Welfare Clause."); Mason, *supra* note 10, at 979 (noting the federal government's argument that, even if not valid under the Commerce Clause, "the individual mandate . . . is nevertheless constitutional as an exercise of the taxing power").

i. The Scope of the Taxing Power

The General Welfare Clause (also referred to as the Taxing and Spending Clause[164]) provides that "Congress shall have Power [t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States[.]"[165] As the Supreme Court has recognized from the early days of the republic, "the power of Congress to tax is a very extensive power."[166] Indeed, the taxing power is among the broadest and most absolute of any of Congress's Article I powers. Though the Constitution places some express limits on congressional taxing authority, those limits are modest and few. In the words of the Supreme Court,[167] the taxing power is

[164] *See* Mason, *supra* note 10, at 994 ("The congressional powers to tax and spend derive from the same clause of the Constitution, alternatively called the General Welfare Clause or the Taxing and Spending Clause.").

[165] U.S. CONST. art. I, § 8, cl. 1.

[166] License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867).

[167] *Id*.

given "with only one exception and two qualifications. Congress cannot tax exports,[168] and it must impose direct taxes by the rule of apportionment,[169] and indirect taxes by the rule of uniformity."[170] The only other express constitutional requirement for tax legislation is that the legislation must have originated in the House of Representatives.[171] Subject to those modest constraints, the Supreme Court has long construed the federal taxing power to "reach[] every subject"

[168] The Export Clause provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, § 9, cl. 5.

[169] The apportionment rule for direct taxes appears in two clauses of the Constitution. *See* U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .") and U.S. CONST. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.") For any direct tax subject to the apportionment requirement, the federal government must collect from the citizens of each particular state a percentage of the total amount of the tax collected, equal to the percentage of the total population of all states comprised of population of that particular state. So, if State A has 1,000,000 people, and State B has 2,000,000 people, then the federal government must collect $2 from citizens of State B for every dollar collected from citizens in State A under the tax in question. The Constitution provides little guidance as to what constitutes a "direct" tax for this purpose. In an early case, the Supreme Court construed the Direct Tax Clauses very narrowly, indicating that the only direct taxes were capitation or head taxes and taxes on real property. *See* Hylton v. United States, 3 U.S. (3 Dall.) 171, 179 (1796) (Chase, J.). This narrow construction persisted for nearly a century, until the Court's 1895 decisions in Pollock v. Farmers' Loan & Trust Co. (*Pollock I*), 157 U.S. 429 (1895), and Pollock v. Farmers' Loan & Trust Co. (*Pollock II*), 158 U.S. 601 (1895) *superseded by constitutional amendment*, U.S. CONST. amend. XVI. In *Pollock II*, the Court invalidated a tax on individual incomes derived from real or personal property, as a direct tax that was not apportioned among the states. In so doing, the Court expanded the recognized categories of direct taxes to include taxes on personal property, as well as taxes on income derived from either real or personal property. *Pollock II*, 158 U.S. at 637. *Pollock II's* application of the apportionment rule to income taxes was ultimately overturned by the 1913 ratification of the Sixteenth Amendment, which provides that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI. However, the apportionment requirement continues to apply to other direct taxes (whatever they may be). The requirement does not apply to "indirect" taxes—i.e., duties, imposts and excises.

[170] The Uniformity Clause (which is included within the General Welfare Clause) provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1. It "requires that an excise tax apply, at the same rate, in all portions of the United States where the subject of the tax is found." United States v. Ptasynski, 462 U.S. 74, 84 (1983) (citing Knowlton v. Moore, 178 U.S. 41, 106 (1900)). The uniformity requirement "is one of geographic uniformity only; so long as the tax structure does not discriminate among the states, it does not matter that a tax may not be 'uniform' as it applies to particular individuals." 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 842 (3d ed. 2000), *quoted in* McCullough, *supra* note 112, at 750 n.104. The uniformity requirement does not apply to direct taxes.

[171] The Origination Clause provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills." U.S. CONST. art. I, § 7, cl. 1.

upon which a tax might be levied, and to be exercisable "at [Congress's] discretion."[172]

The strength and breadth of the taxing power are by design. The national government's need for adequate means by which to raise revenue was a primary impetus behind the creation of the current constitutional order.[173] During America's "initial national experiment with the Articles of Confederation . . . [, t]he original Congress had the power to request taxes from the . . . states, but it had no way to enforce collection."[174] The only way that the national government could finance itself under the Articles was to requisition the states for funds. The national government could "apportion taxes among the states," but only the states had the actual power to levy and collect taxes from individual citizens.[175] While some of the states complied with congressional requisitions, most of them did not.[176] For example, under the Requisition of 1786 (the last requisition pursuant to the Articles), the national government required the states to pay a total of $3,800,000, but it collected only $663.[177] Because the states "had failed to meet congressional requisitions on a massive scale" under the Articles of Confederation, the national government essentially became insolvent and the very survival of the Union became at stake.[178] Thus, among the foremost reasons for calling the Constitutional Convention of 1787 was to develop a strong taxing authority for the national government.[179] Among the Articles of Confederation's several

---

172 License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867).

173 *See* Joel Alicea & Donald L. Drakeman, *The Limits of New Originalism*, 15 U. PA. J. CONST. L. 1161, 1173–74 n.55 (2013) (citing GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 15 (2009)) ("One of the principal reasons for adopting a new Constitution was to enable the United States government to raise the funds it needed in light of the manifest failure of the Articles of Confederation to provide an adequate mechanism for doing so."); McCullough, *supra* note 112, at 745 ("The power to tax is so fundamental to the United States Constitution that it was one of the central impetuses for calling the Constitutional Convention."); Metzger, *supra* note 81, at 89 ("[P]roviding a mechanism by which the federal government could raise revenue and pay its debts was a principal motivation behind the creation of a new constitutional order.").

174 Steven J. Willis & Nakku Chung, *Constitutional Decapitation and Healthcare*, 128 TAX NOTES 169, 178–79 (July 12, 2010).

175 Cooter & Siegel, *supra* note 56, at 1201–02.

176 Willis & Chung, *supra* note 174, at 179.

177 Cooter & Siegel, *supra* note 56, at 1202.

178 Metzger, *supra* note 81, at 89.

179 Willis & Chung, *supra* note 174, at 179. After all, one might argue that nominal authority over such things as "[r]ights, armies, and commerce do not matter if the government has no money to operate." *Id.*

deficiencies, the absence of a meaningful ability to tax was first on James Madison's list.[180] And Washington, Jefferson, and Hamilton also each mentioned an adequate revenue-raising mechanism either as lacking in the Articles or as a central requirement of the new Constitution.[181]Accordingly, attendees of the Constitutional Convention pressed for the federal Congress to have a potent taxing authority, and the breadth of the resulting power is reflected in the General Welfare Clause.[182]

Under the terms of the General Welfare Clause, Congress may exercise its power to tax only to pay the nation's debts, to provide for the common defense, or otherwise to further the "general welfare." As Justice Joseph Story reasoned in his revered *Commentaries on the Constitution of the United States*, exercise of the taxing power must be seen as permissible only for those purposes; otherwise, "the federal government would be one of 'general and unlimited powers.'"[183] In practice, however, the general welfare requirement has not produced any significant judicially enforced limits on the taxing power. Rather, in analyzing a congressional taxing or spending measure, the Supreme Court generally defers to Congress's judgment as to what may promote the general welfare of the nation.[184]

At the time of the Constitution's ratification, at least one of the Framers—James Madison—believed that the taxing power was limited by more than

---

180 *Id.* (quoting JAMES A. MADISON, *Vices of the Political System of the United States*, *in* THE PAPERS OF JAMES MADISON (1787) (eds. William T. Hutchinson, et al., University of Chicago Press, 1977)).

181 *Id.* at 179 & nn.117–19 (citing Letter from George Washington to John Jay (Aug. 1, 1786), Letter from Thomas Jefferson to Edward Carrington (Aug. 4, 1787), and Letter from Alexander Hamilton to James Duane (Sept. 13, 1780)).

182 McCullough, *supra* note 112, at 745 n.87; *see also* W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA 16 (2d ed. 2004) ("The Constitution reflected the desire of James Madison, Alexander Hamilton, and its other leading supporters to provide the new central government with far greater capacity to tax than the old national government had enjoyed under the Articles of Confederation."), *quoted in* Cooter & Siegel, *supra* note 56, at 1203 n.36.

183 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 907 (Melville M. Bigelow ed., Boston, Little, Brown, & Co. 5th ed. 1891), *quoted in* Jonathan S. Sidhu, Comment, *For the General Welfare: Finding a Limit on the Taxing Power after* NFIB v. Sebelius, 103 CALIF. L. REV. 103, 112 (2015).

184 While recognizing that the Constitution distinguishes between the general welfare of the nation, on one hand, and some sort of "particular" welfare, on the other, the Court has said that discretion as to whether a particular tax or expenditure serves the general welfare belongs not to the courts but "to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." Helvering v. Davis, 301 U.S. 619, 640 (1937), *quoted in* Jay, *supra* note 9, at 1163 n.203; *see* Mason, *supra* note 10, at 997 (citing *Helvering*, 301 U.S. at 640) ("The Supreme Court defers to Congress and voters on whether taxing and spending provisions advance general welfare."); *see also* McCullough, *supra* note 112, at 748 n.100 (citing *Helvering*, 301 U.S. at 640) (noting how "the 'general welfare' understanding has been dramatically expanded to include taxing and spending toward ends not wholly illegitimate").

just the general welfare requirement. Madison thought that Congress could exercise its power to tax (and its power to spend) only to facilitate the exercise of one of its other enumerated powers under Article I, Section 8.[185] On the other hand, another of the most influential Framers—Alexander Hamilton, the nation's first Treasury Secretary—saw the taxing power as essentially plenary.[186] To Hamilton, the Taxing and Spending Clause was separate and distinct from Congress's other enumerated powers, and the power to tax thus was unconstrained by the limits of those other powers. He believed that, subject to the few express requisites mentioned earlier,[187] Congress's ability to lay and collect taxes was restricted only by the requirement that the power be exercised to advance the country's general welfare.[188] For more than 140 years after the Constitution was ratified, the Supreme Court remained officially silent on the Hamilton-Madison debate—though, from its earliest cases, the Court's construction of the taxing power plainly comported with Hamilton's. Finally, in its 1936 decision in *United States v. Butler*, the Court formally endorsed the Hamiltonian view.[189]

---

185 In *The Federalist No. 41*, Madison expressly rejected the notion that Congress had been granted power to tax and spend for any purpose allegedly connected to the general welfare, arguing that so broad a taxing power would threaten to obliterate protections of individual rights and other constraints on federal power embedded in the Constitution. *See* Sidhu, *supra* note 183, at 114 & n.59 (quoting THE FEDERALIST NO. 41, at 258–59 (James Madison) (Clinton Rossiter ed., 2003)) (discussing Madison's views); *see also* McCullough, *supra* note 112, at 748 n.100 (discussing Madison's "strict constructionist view, in which the government could only tax and spend for purposes specifically enumerated in the Constitution").

186 Sidhu, *supra* note 183, at 114 (citing THE FEDERALIST NO. 33, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 2003)) (noting Hamilton's description of the taxing power as plenary in *The Federalist No. 33*).

187 For a discussion of the prohibition against taxing exports, the apportionment requirement for direct taxes, and the uniformity requirement for excises, duties and imposts, see *supra* notes 168–70 and accompanying text.

188 As the Supreme Court would later describe his position on the matter:

> Hamilton . . . maintained the [Taxing and Spending Clause] confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.

United States v. Butler, 297 U.S. 1, 65–66 (1936); *see also* McCullough, *supra* note 112, at 748 n.100 ("On the other side [of Madison's more restrictive view of the taxing power], Alexander Hamilton expounded a doctrine of implied powers, in which 'general welfare' was understood broadly.").

189 *Butler*, 297 U.S. at 66 (maintaining that "Mr. Justice Story, in his *Commentaries*, espouse[d] the Hamiltonian position[,]" and concluding that "the reading [of the Taxing and Spending Clause] advocated by Mr. Justice Story is the correct one"); *see* Jay, *supra* note 9, at 1162 n.201 (describing how, in *Butler*, "the Court agreed with Alexander Hamilton's interpretation of the Taxing and Spending Clause"); *see also* McCullough, *supra* note 112, at 748 n.100 (noting that "this dispute has been long-settled in favor of the Hamiltonian view"). *Butler* dealt with the constitutionality of taxing and spending provisions in the Agricultural Adjustment Act, 1933. Although the Court in

ii. Early Cases Upholding Congress's Broad Power to Tax

The fact that Congress may lay a tax in furtherance of the general welfare, even when the revenue is not used in connection with an exercise of another enumerated power (such as the commerce power), commended the General Welfare Clause as an independent basis upon which to defend the constitutionality of the individual mandate. In at least one important respect, the mandate—or, more precisely, the shared responsibility payment—certainly looks like a tax: It promises to raise significant revenue for the federal government.[190] That revenue, in turn, may "help[] to pay some of the costs of comprehensive public health reform that includes an expansion of Medicaid, reform of insurance practices, and an employer mandate"[191]—certainly uses that can be said to advance the general welfare.

Nevertheless, the shared responsibility payment is not intended primarily to raise revenue. Rather, its indisputably primary purpose is to cause individuals to obtain adequate health insurance.[192] However, ACA supporters argued that, "[e]ven if the primary purpose of a measure is regulatory, it is still potentially a valid tax."[193] Given the breadth of the taxing power, ACA supporters maintained that the shared responsibility payment could be upheld as a tax, even if compelling people to buy health insurance were beyond the scope of Congress's commerce power.[194]

Indeed, there was much Supreme Court precedent to support this argument. In early cases examining the scope of the federal taxing power, the Court confirmed that Congress could tax objects or activities that it could not otherwise regulate under its other enumerated powers.[195] Moreover, it held in those cases

---

Butler endorsed Hamilton's broad interpretation of the taxing power in that case, the Court nevertheless struck down the act on the ground that the tax was part of a plan to "regulate and control agricultural production," which the Court determined to be "beyond the powers delegated to the federal government." *Butler*, 297 U.S. at 68. Thus, the Court's actual holding in that case was essentially that "Congress could tax and spend for anything that served the general welfare, *so long as it did not violate another part of the Constitution*." Sidhu, *supra* note 183, at 112 (citing *Butler*, 297 U.S. at 65–66) (emphasis added). For further discussion of the *Butler* decision, see *infra* text accompanying notes 295–311.

190 *See infra* text accompanying notes 397–99.

191 Balkin, *supra* note 133, at 103–04.

192 Gillian Metzger, *Defense of the Constitutionality of Health Care Reform*, 62 Mercer L. Rev. 633, 633–34 (2011) (noting how "[n]o one disputes that the primary purpose of the minimum coverage provision is to encourage people to purchase insurance").

193 *Id.* at 634.

194 Balkin, *supra* note 133, at 103–06 (advancing that argument in support of upholding the "tax on uninsured persons").

195 *See, e.g.*, McCray v. United States, 195 U.S. 27, 51, 61 (1904) (upholding federal excise tax on manufacture and sale of artificially colored oleomargarine, even though the power to regulate

that a revenue-producing measure was a valid tax even if it had regulatory effects that Congress could not achieve through its other enumerated powers,[196] and that when a revenue-producing measure is a valid tax on its face, the judicial branch may not invalidate it on the basis of Congress's possible regulatory motives for enacting it.[197]

For example, in its 1867 decision in the *License Tax Cases,*[198] the Supreme Court upheld the constitutionality of provisions in an 1864 internal revenue act requiring (upon penalty of imprisonment) merchants of lottery tickets or liquor to pay for a federal "license" to sell such items. The sale of lottery tickets was then prohibited in New York State and New Jersey, and the retail sale of liquor was then prohibited in Massachusetts. Merchants in those states who were indicted under federal law for selling the items in question without having obtained the requisite licenses challenged the validity of the law on the ground that only the states had the power to regulate intrastate trade and that, therefore, "penalties for carrying on such trade without [a federal] license could not be constitutionally imposed."[199] In rejecting that argument, the Court first found that, although labeled a "license," the provision at issue did not confer or purport to confer any authority to sell lottery tickets or liquor in any state.[200] In other words, it was not a regulation of intrastate trade that exceeded congressional authority or infringed on any power reserved to the states. Instead, despite the label, the "license" was merely a tax.[201] As such, it was authorized by the extensive "power of Congress to tax[,]" which (subject only to the restriction on taxation of exports; the apportionment rule for direct taxes; and the uniformity requirement for

such manufacture and sale was reserved exclusively to the states); License Tax Cases, 72 U.S. (5 Wall.) 462, 470–75 (1867) (upholding federal excise taxes on sales of lottery tickets and liquor, even though regulation of those activities was solely the province of the states).

196 *See, e.g.*, United States v. Doremus, 249 U.S. 86, 93–95 (1919) (holding that a nominal tax on narcotics was valid, despite that related requisites for sales of taxed items had a moral end in view and that regulation of such sales was a police power reserved to the states); *McCray*, 195 U.S. at 59 (finding that, whereas tax on artificially colored oleomargarine was a facially valid excise tax, Congress's power to enact the tax could not be restrained on the basis that the tax would have an effect of discouraging or restricting the manufacture of such product).

197 *See, e.g.*, *Doremus*, 249 U.S. at 93 (determining that an otherwise valid federal tax "cannot be invalidated because of the supposed motives which induced it"); *McCray*, 195 U.S. at 53–56 (reasoning that the judicial branch may not restrain Congress's valid exercise of the taxing power on the basis that Congress's objective was to achieve an end beyond the scope of its other powers); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 548 (1869) (finding that a tax on state-bank notes could not be invalidated on the ground that the purpose of the tax was to impair the franchise granted by the state to the bank to issue such notes).

198 72 U.S. (5 Wall.) 462 (1867).

199 *Id*. at 470.

200 *Id*. at 471.

201 *Id.* In support of its finding that the measure was a tax, the Court took note of the fact that Congress renamed the "license" in question as a "special tax" in an 1866 internal revenue act. *Id*. at 473–74.

excises, duties and imposts) "reaches every subject and may be exercised at discretion."[202] Thus, even if Congress did not have the power to regulate intrastate sales of lottery tickets or liquor, it nevertheless had the power to tax those who engaged in that trade.

In *Veazie Bank v. Fenno*,[203] decided in 1869, the Court ruled on the constitutionality of a federal excise tax upon notes issued for circulation as currency by state-chartered banks.[204] By 1866, when the tax went into effect, "the country had been sufficiently furnished with a National currency[,]"[205] and the objective of the measure was plainly to remove state-bank notes from circulation.[206] A state bank against which the tax was levied challenged the measure on several grounds. Among them was that the rate of the tax—10% of the amount of the notes in question—was "so excessive as to indicate a purpose on the part of Congress to destroy" the franchises that the states had granted to state banks to issue such notes for circulation, and thus was "beyond the constitutional power of Congress."[207] To this, the Court's first response was that "the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers."[208] Thus, the Court determined that, when a measure is facially valid under the taxing power (as was the measure at issue in *Veazie*[209]), the judicial branch cannot restrict Congress's exercise of that power on the basis of the tax's effects. In particular, the Court concluded that it may not substitute its judgment for Congress's and strike down a federal tax because the rate is too high. Instead, the people's proper recourse against a Congress that taxes oppressively is to vote the bums out.[210] For these reasons, the Court rejected the argument that the measure in question could be invalidated on the ground

---

202 *Id.* at 471. For further quotation of the Court's description in the *License Tax Cases* of the breadth of the taxing power and the few constraints to which that power is subject, see *supra* text accompanying notes 167–70, 172.

203 75 U.S. (8 Wall.) 533 (1869).

204 The tax was levied on state banks that paid out any state-bank-issued notes used for circulation after August 1, 1866. *Id.* at 539.

205 *Id.*

206 Cushman, *supra* note 104, at 138.

207 *Veazie*, 75 U.S. (8 Wall.) at 548.

208 *Id.*

209 The Court had previously rejected the argument that the tax in question was an unapportioned direct tax. *See id.* at 541–47.

210 The Court recognized, of course, that "[t]he power to tax may be exercised oppressively upon persons," but it reasoned that "the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So, if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution." *Id.*

that the tax would effectively eliminate state-bank-issued notes from circulation.[211]

Because the Court went on to find that Congress had separate authority for restraining state banks from issuing currency, the statements in *Veazie* regarding the tax power were arguably mere dicta.[212] However, the notion of judicial deference to Congress's exercise of its taxing authority—whatever the effects of, or motives for, the particular tax—was central to the Court's 1904 decision in *McCray v. United States*.[213] In *McCray*, the Court upheld the constitutionality of a federal excise tax on oleomargarine, a butter substitute made from vegetable oil. Under the act in question, the product was taxed at the rate of ten cents per pound, except that the rate was reduced to one-quarter cent per pound in the case of oleomargarine that was "free from artificial coloration that cause[d] it to look like butter of any shade of yellow."[214] The intent of the measure was clearly to curb the manufacture and sale of oleomargarine that competed with butter.[215] Thus, the tax on artificially colored oleomargarine, in particular, was challenged on the ground that it was "of such an onerous character as to make it manifest that the purpose of Congress in levying it was not to raise revenue but to suppress the manufacture of the taxed article[,]" even though, under the Commerce Clause jurisprudence of the day, "the power to regulate the manufacture and sale of oleomargarine [was] solely reserved to the several States."[216]

The Court began its analysis in *McCray* by noting that, on its face, the act in question was an excise tax and that Congress plainly has the power to lay and collect excises.[217] That being the case, the Court felt constrained to assume that the primary motive of the act was to raise revenue, even if it might also serve to regulate against possible "deception in the sale of oleomargarine as and for butter."[218] The threshold question for the Court was "how far, if at all, the motives or purposes of Congress are open to judicial inquiry in considering the

---

211 *Id.*

212 Among Congress's enumerated Article I, Section 8 powers is the power "[t]o coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures." U.S. CONST. art. I, § 8, cl. 5. The Court found that, pursuant to the power to establish a national currency, Congress was authorized to restrain the issuance and circulation of state-bank-issued currency. *Veazie*, 75 U.S. (8 Wall.) at 548–49. Consequently, Congress could have achieved the regulatory effect of the tax in question (essentially eliminating state-bank-issued notes) through one of its enumerated powers other than the tax power. Accordingly, in reaching its decision to uphold the measure, the Court arguably did not have to reach the question of whether a facially valid tax could be invalidated on the basis of that tax's regulatory effects.

213 195 U.S. 27 (1904).

214 *Id.* at 45.

215 Cushman, *supra* note 104, at 138.

216 *McCray*, 195 U.S. at 51.

217 *Id.* at 50.

218 *Id.* at 51 (quoting *In re* Kollock, 165 U.S. 526, 536 (1897)) (internal quotation marks omitted).

power of that body to enact the laws in question."[219] The answer, in essence, was that Congress's motives were irrelevant: As long as Congress had the power to enact the tax, it was of no consequence whether Congress's intention in doing so was to pursue a regulatory objective that was beyond the scope of its other powers.[220] Respect for the separation of powers dictated that, even if Congress "exert[ed] its lawful powers with the object or motive of reaching an end not justified," the judiciary could not "restrain the exercise of [that] lawful power."[221]

Just as Congress's motives for implementing the tax did not matter to the Court in *McCray*, neither did the onerous effects of the tax. The Court reasoned that, because "the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise."[222] Congress had the power to choose artificially colored oleomargarine as an "object[] upon which an excise should be laid."[223] And when Congress enacts a facially valid tax, the courts cannot "hold the tax to be void because it is deemed the tax is too high."[224] Therefore, the Court concluded that the excise on oleomargarine had to be sustained, even if the consequence was to "destroy or restrict the manufacture of" that product.[225]

The subsequent case of *United States v. Doremus*,[226] decided in 1919, underscored the lengths to which the Court would go to uphold the constitutionality of a purported taxing measure, regardless of the regulatory intent or effects of the measure—even when the exaction raised only a nominal amount of revenue. *Doremus* dealt with a constitutional challenge to certain provisions of the Harrison Drug Act of 1914. Section 1 of the act imposed a "special" federal tax in the amount of $1.00 per annum on producers or sellers of drugs derived from

---

219 *Id.* at 53.

220 *See id.* at 56 (rejecting any doctrine "that the judiciary may restrain the exercise of a lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted").

221 *Id.* at 54. To say otherwise, according to the Court, would be to "destroy all distinction between the powers of the respective departments of the [federal] government" and to "put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold." *Id.* at 54–55. The contention that the judiciary could restrain the exercise of a valid congressional power under such circumstances amounted, in the Court's view, to an argument that "the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department." *Id.* at 54. In other words, two constitutional wrongs don't make a right. *See also* Cushman, *supra* note 104, at 139 (noting how the Court in *McCray* "quoted at length from judicial paeans to separation of powers").

222 *McCray*, 195 U.S. at 59.

223 *Id.* at 61.

224 *Id.* at 60.

225 *Id.* at 59.

226 249 U.S. 86 (1919).

opium or coca leaves. Section 2 of the act prohibited anyone—other than a doctor dispensing to patients or a druggist filling a doctor's prescription—from distributing such drugs unless the transaction was memorialized on a particular form issued in blank by the Commissioner of Internal Revenue.[227] A doctor who had paid the special tax was indicted for violating section 2 of the act by distributing heroin to a habitual drug addict (rather than a patient in treatment) without using the requisite internal-revenue form.[228] He challenged the constitutionality of section 2 on the ground that it was not a revenue-raising measure but was instead a regulation of intrastate drug sales, which (under the Commerce Clause jurisprudence of the time) was "an invasion of the police power reserved to the States."[229]

The Court recognized that section 2 of the act "aim[ed] to confine sales [of opiates] to registered dealers and those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians."[230] Plainly, the primary goal of the provision was to impede illicit drug use, and the Court noted that "the statute ha[d] a moral end . . . in view."[231] However, citing *Veazie* and *McCray*, the Court asserted that "the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject."[232] As long as the measure "has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it."[233]

In a stretch that would make any yoga instructor proud, the Court found that Congress had inserted the regulatory scheme of section 2 into a tax measure specifically to facilitate the collection of the revenue. (Keep in mind that the tax in question was only $1.00 per year.) According to the Court, the regulations in section 2 of the act "tend[ed] to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law."[234] This tenuous connection to revenue-raising was enough to make the provision pass constitutional muster, notwithstanding the "moral" ends that Congress intended the act to achieve. Because Congress pursued those ends "through a revenue measure and within the limits of a revenue measure,"[235]

227 *Id.* at 90–91.

228 *Id.* at 90.

229 *Id.* at 89.

230 *Id.* at 94.

231 *Id.* (quoting United States v. Jin Fuey Moy, 241 U.S. 394, 402 (1916)) (internal quotation marks omitted).

232 *Id.* at 93.

233 *Id.* (citing McCray v. United States, 195 U.S. 27 (1904); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 541 (1869)).

234 *Id.* at 94.

235 *Id.* (quoting *Jin Fuey Moy*, 241 U.S. at 402) (internal quotation marks omitted).

the Court in *Doremus* upheld section 2 of the Harrison Drug Act as a valid exercise of the taxing power.

iii. 1920s and 1930s Decisions Invalidating Unconstitutional Regulatory Penalties Disguised as Taxes

Applying precedents such as *Veazie*, *McCray*, and *Doremus* to an analysis of the individual mandate requires a threshold finding that the shared-responsibility payment is, on its face, a tax. The plaintiffs in the ACA litigations, however, argued that the shared-responsibility payment was actually a "penalty" for noncompliance with the individual mandate and not a tax at all.[236] Instead of taxing everyone to finance a government subsidy of private health insurance reform, "Congress decided to compel the people to pay insurance companies directly."[237] The plaintiffs maintained that the exaction for noncompliance with that mandate was a penalty that could be sustained only if the mandate were authorized by the Commerce Clause. Since the individual mandate was beyond the scope of Congress's commerce power, they argued that the penalty for violating it was necessarily also "untethered to an enumerated power."[238] They contended that, in mischaracterizing the shared responsibility payment, "the federal government [sought] to smuggle an unconstitutional exercise of the Commerce Clause past judicial review in the guise of a tax."[239]

The plaintiffs found support for their tax-vs.-penalty argument in a line of Supreme Court decisions from the 1920s through the mid-1930s[240] finding that "Congress could not use its taxing power in [an] indirect way to regulate

---

236 *See, e.g.*, Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 772 (E.D. Va. 2010) (discussing plaintiff Commonwealth of Virginia's contention that the shared responsibility payment is a penalty unauthorized under the Commerce Clause, rather than a tax authorized under the General Welfare Clause), *vacated*, 656 F.3d 253 (4th Cir. 2011); Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120, 1131–32 (N.D. Fla. 2010) (discussing contention of State of Florida and other plaintiffs that "the individual mandate penalty is not a 'true tax' because, among other things, it will (at most) 'generate only "some revenue" and then only as an incident to some persons' failure to obey the law'").

237 Barnett, *supra* note 96, at 611.

238 *Cuccinelli*, 728 F. Supp. 2d at 772 (discussing plaintiff's argument that the shared responsibility payment could not "be sustained as a legitimate exercise of the congressional power of taxation under the General Welfare Clause").

239 *Id.* at 784.

240 *See, e.g.*, United States v. Butler, 297 U.S. 1 (1936) (invalidating a federal tax intended to regulate agricultural commodity prices); United States v. Constantine, 296 U.S. 287 (1935) (invalidating a federal tax intended to regulate liquor sales); Hill v. Wallace, 259 U.S. 44 (1922) (striking down a federal tax intended to regulate sales of commodities futures); Child Labor Tax Case, 259 U.S. 20 (1922) (striking down a federal tax intended to regulate child labor).

business not within federal control."[241] Specifically, in this line of cases—decided during the *Lochner* era[242]—the Supreme Court held that "Congress could not impose a 'tax' in order to penalize conduct . . . that it could not regulate under the Commerce Clause."[243] In so doing, the Court emphasized a significant "constitutional difference between taxes properly laid under the General Welfare Clause and penalties for" engaging in certain proscribed conduct.[244] Even though the conduct at issue therein could today be regulated under the modern, more expansive reading of the Commerce Clause, those decisions still support the proposition that "Congress cannot use a tax"—or, more precisely, a penalty masquerading as a tax—"to regulate conduct that is otherwise indisputably beyond its regulatory power."[245] The individual mandate's opponents invoked these precedents to argue that, if the mandate exceeded Congress's commerce power, the limits of that power should not be circumvented by treating the shared responsibility payment as a tax. Alluding to concerns about respect for federalism, they maintained that Congress should not be permitted to "evade all of the constitutional limits on its authority by simply imposing 'taxes' whenever any individual or entity fails to follow a prescribed course of action."[246]

The best-known decision within this tax-vs.-penalty line of cases is the *Child Labor Tax Case*,[247] decided in 1922. As discussed above, in its 1918 *Hammer v. Dagenhart* decision, the Court struck down a federal statute regulating the employment of minors on the ground that the Commerce Clause did not authorize congressional regulation of child labor.[248] Congress responded by enacting the Child Labor Tax Law of 1919, which imposed on any business that knowingly employed children for any part of a taxable year a 10% tax on that business's net profits for that taxable year.[249] That measure—which has been aptly described as "one of the most flagrant examples of congressional chutzpah in American history"[250]—was plainly intended to achieve the same regulatory result as the statute that the Court had just invalidated. One affected business paid the purported tax under protest and then filed a refund claim. After that claim was denied, the business brought suit,[251] challenging the Child Labor Tax Law's constitutionality on the ground that the exaction was really "a regulation of the

[241] Bd. of Trade of Chi. v. Olsen, 262 U.S. 1, 32 (1923), *quoted in* Jay, *supra* note 9, at 1179.

[242] For a discussion of the *Lochner* era, see *supra* notes 119–21 and accompanying text.

[243] Rivkin & Casey, *supra* note 82, at 100 (citing *Child Labor Tax Case*, 259 U.S. 20).

[244] Jay, *supra* note 9, at 1175.

[245] Rivkin & Casey, *supra* note 82, at 100.

[246] *Id.*

[247] 259 U.S. 20 (1922).

[248] For further discussion of *Dagenhart*, see *supra* text accompanying notes 116–18.

[249] *Child Labor Tax Case*, 259 U.S. at 34–35.

[250] Jay, *supra* note 9, at 1177.

[251] *Child Labor Tax Case*, 259 U.S. at 34.

employment of child labor in the States[,]" which the Court had previously determined to be "an exclusively state function under the Federal Constitution."[252] In response, the federal government defended the measure as "a mere excise tax levied by the Congress of the United States under its broad power of taxation."[253]

The Court began its analysis of the *Child Labor Tax Case* by recognizing that virtually all taxes have an incidental regulatory effect of discouraging the thing taxed.[254] It also acknowledged that, when Congress imposes a tax on a "proper subject" with a primary motive of collecting revenue but "an incidental motive of discouraging" the thing taxed, the incidental motive does not automatically cause the exaction to lose its character as a tax.[255] In addition, the Court reflected on its previous decisions in which, out of a respect for separation of powers, it had "gone far to sustain taxing acts as such, even though there ha[d] been ground for suspecting from the weight of the tax [that] it was intended to destroy its subject."[256] Based on those considerations, the Court hypothesized that, if the measure in question had been "an excise on a commodity or other thing of value," precedent may have prevented the Court from inferring "solely from [the excise's] heavy burden" that the act had "intend[ed] a prohibition" on child labor "instead of a tax."[257] But the Court found that the Child Labor Tax Law was more than merely an excise on a thing: Instead, the measure "provide[d] a heavy exaction for a *departure from a* detailed and *specified course of conduct* in business."[258] And, although Congress did not declare a departure from that course of conduct to be illegal (as *Dagenhart* said it could not), it nevertheless "exhibit[ed] its intent practically to achieve the [same] result by adopting . . . criteria of wrongdoing and imposing" an onerous monetary exaction "on those who transgress[ed] its standard."[259] Thus, the Court found that, in enacting the

---

252 *Id.* at 36.

253 *Id.*

254 *Id*. (considering whether the Child Labor Tax Law "impose[d] a tax with only that incidental restraint and regulation which a tax must inevitably involve").

255 *Id.* at 38.

256 *Id.* at 37.

257 *Id.* at 36.

258 *Id*. (emphasis added). The specified course of conduct was

> that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years, and shall prevent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week.

Id. The heavy exaction was that, "[i]f an employer depart[ed] from this prescribed course of business, he [was] to pay to the Government one-tenth of his entire net income in the business for a full year." *Id*.

259 *Id.* at 38.

Child Labor Tax Law, Congress attempted to regulate the employment of children "by the use of the so-called tax as a penalty."[260]

Three features of the act, in particular, impelled the Court to reach that conclusion. First, the heavy amount of the exaction suggested a prohibitory or regulatory purpose[261]: An employer who knowingly utilized child labor was required to pay 10% of his net business income for the year in question, whether he knowingly "employe[d] five hundred children for a year, or employe[d] only one for a day."[262] Second, an employer could avoid the exaction if he did not know that his employees were underage, and "[s]cienter is associated with penalties[,] not with taxes."[263] Third, for the purpose of determining whether underage laborers were being utilized, an employer's business was subject to inspection not only by the Internal Revenue Service ("IRS"), which normally enforces and collects taxes, but also by the Department of Labor[264]—an agency charged with regulating employment matters. Given those features, the Court determined that, on its face, "the so-called tax [was] a penalty to coerce people of a State to act as Congress wishe[d] them to act in respect of a matter completely the business of the [states] under the Federal Constitution."[265] While a proper tax may have regulatory effects, or even intents, ancillary to its primary revenue-raising purpose, the Court reasoned that "there comes a time in the extension of the penalizing features of [a] so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment."[266] The Court found that "[s]uch [was] the case" with the Child Labor Tax Law.[267]

---

260 *Id.* at 36.

261 Chief Justice Taft's opinion actually referred to the Child Labor Tax Law as having had a "prohibitory *and* regulatory effect and purpose." *Id.* at 37 (emphasis added). However, in his contemporary analysis of the *Child Labor Tax Case*, Professor Thomas Reed Powell (then of Columbia University Law School) described those characteristics (and their role in the Court's analysis) disjunctively. Thomas Reed Powell, *The Supreme Court's Adjudication of Constitutional Issues in 1921–1922* (pt. 3), 21 MICH. L. REV. 290, 290 (1922), *cited in* Cushman, *supra* note 104, at 181. Powell interpreted the Court's analysis as requiring a penalty to be either prohibitive *or* regulatory because, while unquestionably onerous, the child labor tax was not "completely prohibitive." Thomas Reed Powell, *Child Labor, Congress, and the Constitution*, 1 N.C. L. REV. 61, 69 (1922) [hereinafter Powell, *Child Labor*], *quoted in* Cushman, *supra* note 104, at 182. For more on why Professor Powell concluded that the child labor tax did not completely prevent employment of child labor, see *infra* note 510. For further discussion of Professor Powell's analysis of the *Child Labor Tax Case*, see Cushman, *supra* note 104, at 181–88.

262 *Child Labor Tax Case*, 259 U.S. at 36.

263 *Id.* at 36–37.

264 *Id.* at 37.

265 *Id.* at 39.

266 *Id.* at 38.

267 *Id.*

Congress had intended the penalty to reach precisely the same result (i.e., elimination of child labor) as the regulation that the Court struck down in *Dagenhart* on Commerce Clause grounds,[268] and the Court asserted that an effort to misuse the taxing power to accomplish what could not be done under the commerce power "must be equally futile."[269] Despite the undeniably laudable intentions of the Child Labor Tax Law, the Court posited that giving effect to a statute designed as an end-run around the limits of Congress's Commerce Clause power could threaten the federalist system:

> Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control [any] one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.[270]

Accordingly, the Court invalidated the Child Labor Tax Law on the ground that it exceeded Congress's enumerated powers—including the power to tax.[271]

The Court handed down its decision in *Hill v. Wallace*[272] on the same day that it decided the *Child Labor Tax Case* and issued in *Hill* an identical holding on an identical basis. In *Hill*, members of the Board of Trade of the City of Chicago challenged the constitutionality of the Future Trading Act of 1921—which imposed federal regulation of grain futures trading—on the ground that it was beyond the scope of Congress's commerce power. Embedded in section 4 of the act was a tax, in the amount of 20 cents per bushel, on futures contracts for grain delivery, but the tax did not apply in the case of contracts that were "made by or through a member of the Board of Trade designated by the Secretary of Agriculture as a contract market."[273] Section 5 of the act, in turn, authorized the Secretary of Agriculture to designate boards of trade as contract markets—

---

268 *Id.* at 39 (noting the similarity between the regulation at issue in *Dagenhart* and the obvious intent and effect of the Child Labor Tax Law).

269 *Id.*

270 *Id.* at 38.

271 *Id*. at 38–39, 44.

272 259 U.S. 44 (1922).

273 *Id.* at 63. In addition, the tax did not apply "where the seller holds and owns the grain at the time of sale, or is the owner or renter of land on which the grain is to be grown, or is an association made of such owners or renters." *Id.*

but only if the boards complied with a detailed set of conditions and requirements, all aimed at the regulation of grain futures sales.[274]

The Court held that the act's regulation of boards of trade could not be sustained under the Commerce Clause. Under the narrower Commerce Clause interpretation of the time, the Court found that, because the act regulated grain futures trading that occurred solely within the City of Chicago, the regulated activity did not constitute interstate commerce within Congress's regulatory reach.[275] Instead, "[s]uch regulations [were] held to be within the police powers of the State."[276]

Next, the Court considered whether the tax in section 4 could be severed from the remainder of the act and be sustained under the General Welfare Clause. It concluded that section 4 of the act could not be upheld on that basis because the exaction it imposed was really a "penalty to secure compliance with the regulations" that the Court had just invalidated.[277] The Court found that the amount of the "tax" levied under section 4 was extremely burdensome[278] and determined that the "manifest purpose of the tax [was] to compel boards of trade to comply with regulations, many of which can have no relevancy to the collection of the tax at all."[279] Put another way, "[t]he act [was] in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance."[280] For this reason, the Court concluded that there was "no ground upon which" section 4 of the Future Trading Act could "be sustained as a valid exercise of the taxing power."[281]

The 1935 decision in *United States v. Constantine*[282] reached a similar conclusion—although, unlike the *Child Labor Tax Case* and *Hill*, the exaction at issue in *Constantine* penalized expressly criminal conduct. A provision originally introduced in the federal Revenue Act of 1918 and readopted in the Revenue Act of 1926 imposed a "special excise tax" in the amount of $1,000 on retailers who sold malt liquor in violation of state law.[283] The amount of that special

---

274 *Id.* at 64 (listing such conditions and requirements under section 5 of the act).

275 *Id.* at 68.

276 *Id.*

277 *Id.* at 70.

278 *See id.* at 66 (noting that "[t]he tax upon contracts for sales for future delivery under" a separate revenue measure then in effect was "only 2 cents upon $100 of value, whereas [the section 4] tax varies according to the price and character of the grain from 15 per cent. of its value to 50 per cent.").

279 *Id.*

280 *Id.*

281 *Id.* at 66–67.

282 296 U.S. 287 (1935).

283 *Id.* at 295.

excise was somewhere between ten and fifty times as great as the federal excises then imposed on liquor dealers more generally.[284] A Birmingham retailer who sold malt liquor in violation of Alabama law was indicted under federal law in 1934 for not having paid the special excise in 1926.[285] In *Constantine*, the retailer challenged the constitutionality of the tax.

In 1926 (the year in which the retailer was alleged not to have paid the special excise), the Eighteenth Amendment gave the federal government the "power to enforce nation-wide prohibition."[286] However, because the Eighteenth Amendment was "[t]he only color for the assertion of congressional power to [penalize a] violation of state liquor laws[,]" the repeal of that Amendment by the Twentieth Amendment in 1933 made it necessary to consider whether the special excise was in fact a tax or instead a penalty.[287] If the excise had been laid in order to raise revenue, it plainly would have been sustainable as an exercise of the taxing power—regardless that the activity being taxed was illegal under state law—under precedent going back to the *License Tax Cases*.[288] On the other hand, if its purpose was "to punish rather than to tax[,]" then the special excise would have become unenforceable following the Eighteenth Amendment's repeal.[289]

The "highly exorbitant" amount of the exaction (relative to federal excises on liquor dealers in general), coupled with the fact that its imposition was conditioned on "the commission of a crime[,]" led the Court to conclude that the "special excise" was not a tax, but was instead a penalty for a violation of state law.[290] As such, it was "beyond the limits of federal power"[291]—including the taxing power conferred by the General Welfare Clause.

But how does that decision comport with precedents such as *McCray* and *Doremus*, in which the Supreme Court had held that, "where the power to tax is conceded[,] the motive for the exaction may not be questioned[?]"[292] The Court asserted that those precedents were irrelevant because the "special excise" at issue in *Constantine* simply was not a tax. As the Court explained, "[t]he point here is that the exaction is in no proper sense a tax" but is instead "a penalty" imposed in order to punish conduct that may be proscribed only under state law.[293] Precedents establishing judicial deference to congressional exercises of

---

284 *Id.*

285 *Id.* at 288.

286 *Id.* at 294.

287 *Id.*

288 *Id.* at 293 (citing License Tax Cases, 72 U.S. (5 Wall.) 462 (1867)).

289 *Id.* at 294.

290 *Id.* at 294–95.

291 *Id.* at 294.

292 *Id.* at 296.

293 *Id.*

the taxing power are thus inapplicable to a case such as *Constantine* where, "under the guise of a taxing act[,] the purpose is to usurp the police powers of the State."[294]

The last in this tax-vs.-penalty line of cases was *United States v. Butler*,[295] decided in 1936. In *Butler*, the Court considered the constitutionality of the Agricultural Adjustment Act of 1933. During the Great Depression, prices of agricultural goods became significantly lower than prices of other goods, thereby severely diminishing farmers' purchasing power and real incomes.[296] To address this "economic emergency," the avowed purpose of the Agricultural Adjustment Act was to "establish and maintain such balance between the production and consumption of agricultural commodities . . . as [would] reestablish prices to farmers at a level" restoring their purchasing power to what it was during a "base period" between August 1909 and July 1914.[297] To accomplish that purpose, the act empowered the Secretary of Agriculture to enter into agreements with farmers, pursuant to which the farmers would reduce the acreage of their fields or otherwise reduce their production of agricultural goods for market. In return, the Secretary would make "rental or benefit payments" to the farmers to compensate for their reduced production.[298] In order to finance those payments, the act provided for certain taxes on processors of agricultural products. The taxes were to be imposed on processors of a particular product whenever the Secretary determined that such rental or benefit payments were to be made to farmers of that product.[299] Receivers of a cotton processing firm against which such a tax had been assessed, challenged the assessment on the ground that Congress lacked constitutional power to make such an exaction.

The federal government argued that the tax was "merely a revenue measure levying an excise upon the activity of processing cotton[.]"[300] The Court, however, determined that it could not sustain the tax as a revenue-raising measure for support of the government because it could neither sever the tax from the

[294] *Id.* (citing, *inter alia*, Child Labor Tax Case, 259 U.S. 20 (1922); Hill v. Wallace, 259 U.S. 44 (1922)).

[295] 297 U.S. 1 (1936).

[296] *Id.* at 53 (outlining recitation, in section 1 of the Agricultural Adjustment Act, of a national economic emergency with respect to agricultural prices).

[297] *Id.* at 54 (quoting the declaration, in section 2 of the Agricultural Adjustment Act, of the policy of Congress in enacting the statute). The August 1909–July 1914 base period applied in the case of all agricultural commodities except cotton and tobacco. *Id*.

[298] *Id.* at 54–55 (outlining provisions of section 8(1) of the Agricultural Adjustment Act).

[299] *Id.* at 55 (describing provisions of section 9(a) of the Agricultural Adjustment Act). The amount of the tax was fixed "at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value" therefor, as determined by the Secretary. *Id.* at 56 (quoting section 9(b) of the Agricultural Adjustment Act) (internal quotation marks omitted).

[300] *Id.* at 57.

rest of the Agricultural Adjustment Act nor ignore the stated purpose of the act.[301] The sole intent of the act was to regulate agricultural production, and the tax "play[ed] an indispensable part in the plan of regulation."[302] In fact, the tax was "a mere incident of such regulation."[303] Accordingly, whether the tax was sustainable depended upon whether the act as a whole was within the scope of Congress's enumerated powers.

The Court found that the Agricultural Adjustment Act was not authorized by the Commerce Clause because it did "not purport to regulate transactions in interstate or foreign commerce" but instead sought to control "purely local activity."[304] No other clause in Article I, Section 8 gave Congress the power to control agricultural production either. Thus, that power was reserved to the states.[305] In turn, because the act as a whole invaded the police power of the states, the tax which facilitated the act's plan of regulation was "but [a] means to an unconstitutional end."[306] Citing the landmark case of *McCulloch v. Maryland*,[307] the Court again rejected (as it had in *Constantine*) the notion that separation of powers requires judicial deference when Congress invokes its taxing power as a pretext to act beyond the limits of its other enumerated powers.[308] Nor did the Court accept that Congress could use its power to tax and spend to purchase compliance with regulations that it could not impose through force.[309] The

---

301 *Id.* at 58.

302 *Id.* at 59.

303 *Id.* at 61.

304 *Id.* at 63–64. Like the *Child Labor Tax Case* and *Hill*, *Butler* was decided prior to the Court's recognition that regulation of intrastate economic activity having "substantial effects" on interstate commerce was within Congress's commerce power.

305 *Id.* at 68.

306 *Id.*

307 17 U.S. (4 Wheat.) 316 (1819).

308 To underscore the point, the Court reiterated a crucial statement from *McCulloch*:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

Id. at 423, *quoted in Butler*, 297 U.S. at 68–69.

309 As a threshold matter, the Court rejected the contention that the act's regulations were somehow voluntary. While, in theory, a farmer could choose not to enter into an agreement with the Secretary of Labor to restrict crop production, "the price of such refusal [would be] the loss of benefits" under the agreement. *Butler*, 297 U.S. at 70. The amount of the benefits offered by the Secretary was great enough to put pressure on farmers to enter into such agreements, and the ability of farmers who accepted the benefits to undersell those who did not, could have resulted in financial ruin for the latter. *Id.* at 70–71. Under the circumstances, the "asserted power of choice [was] illusory" and the Secretary's offers of benefits amounted to coercion of farmers to comply with the act's regulations. *Id.* at 71. Nor was the coercion inherent in those offers abated by the fact that a

Court even wondered whether the Agricultural Adjustment Act's tax was in service of the nation's general welfare, but it ultimately declined to reach that question.[310] That the tax was an inherent part of a statutory plan of regulation "beyond the powers delegated to the federal government"[311] was a sufficient reason for the Court to hold it to be unconstitutional.

iv. Modern Taxing Power Decisions Upholding Revenue Measures Regardless of Regulatory Purpose or Effect

Some legal commentators who supported the ACA hoped to dismiss the *Child Labor Tax Case* and its progeny as products of the bygone *Lochner* era.[312] They advocated limiting those precedents "to their particular historical context"[313] and focusing instead on a series of cases beginning in 1937, in which the Court "repeatedly refused to invalidate taxes on the ground[] that Congress ha[d] used the taxing power to regulate conduct."[314]

The first of those more modern cases was the 1937 decision in *Sonzinsky v. United States*.[315] In *Sonzinsky*, the Court considered the constitutionality of the National Firearms Act, which imposed a $500 annual tax on manufacturers or importers of certain firearms, a $500 annual special excise tax on dealers of those firearms and a $200 tax on each transfer of such a firearm (payable by the transferor).[316] The act also required firearms dealers to register with the Collector of Internal Revenue and prescribed certain identification requirements for firearms

minority of farmers chose not to enter into agreements with the Secretary: "The coercive purpose and intent of the statute is not obscured by the fact that it has not been perfectly successful." *Id.* Thus, since "Congress has no power to enforce its commands on the farmer . . . [i]t must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance." *Id.* at 74.

310 *See id.* at 63–68. The Court affirmed Alexander Hamilton's position that Congress can lay taxes to provide for the general welfare of the nation and that the taxing power is not restricted to raising revenue for use in the exercise of Congress's other enumerated powers. *Id.* at 65–66. Yet the Court raised the question whether a tax that ultimately aided agricultural producers was in service of the general welfare, or merely the "local" welfare of those producers. *Id.* at 64, 67. In the end, however, the Court did not need to decide that question because, regardless of the answer, the act at issue "invad[ed] the reserved power of the states." *Id.* at 68. For more on Hamilton's view of the taxing power, and the Court's embrace of that view in *Butler*, see *supra* notes 186–88 and accompanying text.

311 *Id.* at 68.

312 Metzger, *supra* note 192, at 634 (noting that, "to the extent there are cases that have emphasized regulatory purposes to disqualify measures as taxes, those decisions go back to the *Lochner* era"); Balkin, *supra* note 133, at 104 (deriding citation of the *Child Labor Tax Case* as reliance on "a decision from the *Lochner* [e]ra").

313 Mason, *supra* note 10, at 1006.

314 Balkin, *supra* note 133, at 104.

315 300 U.S. 506 (1937).

316 *Id.* at 511.

purchasers.[317] An Illinois gun dealer was convicted of having dealt in the covered firearms without having paid the special excise tax. He argued that the tax was really a "penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which [was] reserved to the states[.]"[318] To establish the "penal and prohibitive character" of the exaction,[319] he pointed to the "limited class of firearms, of relatively small value," covered by the tax[320] and the prohibitive effect of the cumulative taxes on those firearms.[321]

The Court was unpersuaded by the argument that the act covered only a small class of weapons. In exercising its taxing power, "Congress may select the subjects of taxation, choosing some and omitting others."[322] Moreover, the Court found that this was not a case—such as the *Child Labor Tax Case* or *Hill*—in which the statute "contain[ed] regulatory provisions related to a purported tax" indicating that the "tax" was actually a penalty enacted to enforce the regulations.[323] Instead, the National Firearms Act contained no regulations other than certain registration provisions that the Court thought would aid in collection of the revenue to be raised under the act. Thus, the Court determined that, on its face, the act was "only a taxing measure."[324]

Interestingly, the Court found the act to be a revenue measure even though, due to its "prohibitive" effect, it raised only a nominal amount of revenue.[325] Nevertheless, because it was facially a tax, the Court declined to find that the measure operated "as a regulation which is beyond the congressional power" on the basis of the tax's deterrent consequences.[326] The Court noted that "[e]very tax is in some measure regulatory. To some extent it interposes an economic

---

317 *Id.*

318 *Id.* at 512.

319 *Id.*

320 *Id.* at 511–12. For purposes of the act, a "firearm" consisted of:

> a shotgun or a rifle having a barrel less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive, if capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm.

Id.

321 *Id*. at 512–13 (The dealer argued that the "successive imposition" of taxes upon the manufacturer or importer, the dealer, and the transfer of the same firearm had a prohibitive effect that "disclose[d] unmistakably the legislative purpose to regulate rather than to tax").

322 *Id.* at 512.

323 *Id.* at 513.

324 *Id.*

325 *Id.* at 514 n.1 (explaining that "[t]he $200 annual tax on dealers was paid by only 27 dealers in 1934 and only 22 dealers in 1935"). Yet those *de minimis* receipts were enough for the Court to conclude that the $200 tax was "productive of some revenue." *Id.* at 514.

326 *Id.* at 513.

impediment to the activity taxed as compared with others not taxed."[327] Thus, a revenue measure does not exceed Congress's taxing power just because it has a regulatory effect.[328] In turn, the Court determined it had no power to strike down a valid exercise of the taxing power simply "because the tax is burdensome or tends to restrict or suppress the thing taxed."[329] Nor did the Court think that it had the power to inquire into any hidden regulatory motives for enacting a facially valid tax.[330] To the Court in *Sonzinsky*, the question turned on whether a professed tax enforces or furthers non-revenue-related regulations beyond Congress's constitutional authority. Since the National Firearms Act did not, "and since it operate[d] as a tax," the Court held that it was "within the national taxing power."[331]

In *United States v. Sanchez*,[332] decided in 1950, the Court made its most sweeping statements ever about the degree to which taxes could also regulate and still remain valid. *Sanchez* concerned the Marihuana Tax Act of 1937, which seems clearly to have been modeled on the Harrison Drug Act of 1914 that the Court upheld in *Doremus*.[333] The Marihuana Tax Act imposed a "special tax" of between $1 and $24 on importers, producers, and distributors of marihuana.[334] The act also required such importers, producers and distributors to register with the Collector of Internal Revenue and made transfers of marijuana unlawful unless the transactions were memorialized on a specific form issued by the Secretary of the Treasury.[335] In the case of transfers made pursuant to the authorized form by registered persons who had paid the special tax, the act imposed a tax on transferees of $1 per ounce; however, in the case of transfers by unregistered persons or without use of the proper form, the transfer tax rose to $100 per ounce.[336]

Congress had expressly stated two objectives in enacting the Marihuana Tax Act:

---

327 *Id.*

328 *Id.* (citing, *inter alia*, United States v. Doremus, 249 U.S. 86, 93, 94 (1919); Child Labor Tax Case, 259 U.S. 20, 38 (1922); License Tax Cases, 72 U.S. (5 Wall.) 462 (1867)).

329 *Id.* (citing, *inter alia*, Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 548 (1869); McCray v. United States, 195 U.S. 27, 56–59 (1904)).

330 *Id.* at 513–14 (citing, *inter alia*, *Veazie*, 75 U.S. (8 Wall.) at 533; *McCray*, 195 U.S. at 60–61; *Doremus*, 249 U.S. at 93–94).

331 *Id.* at 514.

332 340 U.S. 42 (1950).

333 Cushman, *supra* note 104, at 149.

334 *Sanchez*, 340 U.S. at 43.

335 *Id.* at 43–44.

336 *Id.* at 44.

> First, the development of a plan of taxation which will raise revenue and at the same time render extremely difficult the acquisition of marihuana by persons who desire it for illicit uses and, second, the development of an adequate means of publicizing dealings in marihuana in order to tax and control the traffic effectively.[337]

There thus could be no question but that the primary purpose of the act was to restrict illicit marihuana use and trafficking. Accordingly, the constitutionality of the act was challenged on the basis of its "regulatory character and prohibitive burden" as well as "the penal nature of" the tax on unauthorized transfers.[338] Yet, the Court upheld the act "despite [its] regulatory effect and [its] close resemblance to a penalty[.]"[339]

Citing *Sonzinsky*, the Court asserted that "a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed"—even when the revenue obtained from the purported tax "is obviously negligible" and even when "the revenue purpose of the tax [is] secondary."[340] Nor did it matter that the tax may "touch[] on activities which Congress might not otherwise regulate."[341]Ignoring distinctions drawn in earlier cases (including *Sonzinsky*) between taxes with regulatory effects and penalties to enforce non-revenue-related regulations,[342] the Court proclaimed in *Sanchez* that, "[f]rom the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment."[343] Applying those principles, the Court held that the Marihuana Tax Act was a "legitimate exercise of the taxing power despite its collateral regulatory purpose and effect."[344]

---

337 S. REP. NO. 75-900, at 3 (1937), quoted in *Sanchez*, 340 U.S. at 43.

338 *Sanchez*, 340 U.S. at 44.

339 *Id.*

340 *Id.*

341 *Id.*

342 Just as it had done with similar Harrison Drug Act regulations at issue in *Doremus*, the Court took the dubious view in *Sanchez* that the Marihuana Tax Act's registration requirements and increased tax rate on transfers without the proper forms were primarily to prevent avoidance of the tax. *See id.* at 45–46.

343 *Id.* at 45 (quoting Magnano Co. v. Hamilton, 292 U.S. 40, 47 (1934)) (internal quotation marks omitted).

344 *Id.* That it could characterize that regulatory purpose and effect as "collateral," despite Congress's stated intent to curb illicit marihuana use and despite the meager revenue generated by the measure, reveals how far the Supreme Court was willing to bend to uphold anti-drug legislation. The Court demonstrated similar litheness in sustaining anti-drug measures in *Doremus* and, arguably, in *Gonzales*.

Three years later, in its 1953 decision in *United States v. Kahriger*,[345] the Court again upheld a tax that had a clear regulatory purpose. But this time, in so doing, the Court also reaffirmed the critical constitutional distinction between valid revenue measures with regulatory effects, on one hand, and invalid penalties for engaging in conduct that Congress could not otherwise regulate, on the other. The issue in *Kahriger* was the constitutionality of a federal occupation tax on "persons engaged in the business of accepting wagers" and an accompanying requirement that such persons register with the Collector of Internal Revenue.[346] The tax was challenged on the ground that it was a pretext for penalizing intrastate gambling and was thus an infringement of the police powers reserved to the states.[347]

As the Court explained, Congress plainly had the authority to choose the business of accepting wagers as a subject of taxation, even though that business was not within Congress's power to regulate.[348] Therefore, while the legislative history of the tax may have indicated "a congressional motive to suppress wagering,"[349] that fact alone was not enough to render the measure constitutionally infirm.[350] Whatever Congress's other intentions may have been, the wagering tax actually produced revenue—more, for example, than taxes on narcotics, marihuana, colored margarine or firearms that the Court had previously upheld.[351] Thus, it was indisputably a facially valid tax, and it did not become invalid simply by virtue of its deterrent effects. After all, as the Court observed, "[i]t is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect on businesses deemed unessential or inimical to the public welfare[.]"[352]

Importantly, the Court found that the registration provisions associated with the wagering tax were not "offensive" regulations of conduct beyond federal control. Instead, the registration requirements merely made "the tax simpler to collect."[353] The only such requirements were the filing of the registrants'

---

345 345 U.S. 22 (1953), *overruled on other grounds by* Marchetti v. United States, 390 U.S. 39 (1968).

346 *Id.* at 23.

347 *Id.* at 23–24

348 *Id.* at 26 (citing *License Tax Cases*, 72 U.S. (5 Wall.) 462 (1867)).

349 *Id.* at 27 n.3 (outlining pertinent legislative history of the act).

350 *See id.* at 27 (citing, *inter alia*, Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 533 (1869); McCray v. United States, 195 U.S. 27, 59 (1904); United States v. Doremus, 249 U.S. 86 (1919); Sonzinsky v. United States, 300 U.S. 506 (1937); United States v. Sanchez, 340 U.S. 42 (1950)). Indeed, the Court had previously upheld a number of facially valid revenue measures where the legislative intent was not only to tax, but also to discourage, curtail or hinder the product or activity that was taxed. *Id.*

351 *Id.* at 28 n.4 (comparing amounts of revenue generated by the aforementioned taxes).

352 *Id.* at 28.

353 *Id.* at 31–32.

names, addresses and places of business. Those data, which are also required on tax returns, were "directly and intimately related to the collection of the tax."[354] The Court noted that it had previously invalidated "[p]enalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation."[355] In citing such prior decisions, the Court confirmed the continued vitality of those precedents. At the same time, however, the Court granted that it cannot limit Congress's exercise of the taxing power when the enactment in question plainly relates to a "tax need."[356] Because the wagering tax was a facially valid excise, and because the tax's modest registration provisions were "obviously supportable as in aid of a revenue purpose[,]"[357] the Court in *Kahriger* upheld the measure.

v. Rejection of the Taxing Power Defense by the Lower Courts in the ACA Litigations

Despite the contrary result that might have been commended by the Court's modern taxing-power decisions, none of the lower federal courts hearing challenges to the ACA upheld the shared responsibility payment as a tax.[358] Some of the lower courts never reached the merits of the taxing power argument,[359] but those that did unanimously rejected it.[360] Some held that the shared responsibility payment was a regulatory penalty of the kind that had been inval-

354 *Id.*

355 *Id.* at 31 (citing Child Labor Tax Case, 259 U.S. 20, 34, 38 (1922); Hill v. Wallace, 259 U.S. 44, 63, 70 (1922); United States v. Constantine, 296 U.S. 287 (1935)).

356 *Id.*

357 *Id.* at 32 (quoting Sonzinsky v. United States, 300 U.S. 506, 513 (1937)) (internal quotation marks omitted).

358 Cooter & Siegel, *supra* note 56, at 1239; McCullough, *supra* note 112, at 741 & n.65 (citing cases).

359 For example, the D.C. Circuit upheld the individual mandate as constitutional under Congress's Commerce Clause power, but did not even address whether the shared responsibility payment was also constitutional under Congress's taxing power (despite having requested the parties to brief the issue). McCullough, *supra* note 112, at 741 (citing Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011)). The Fourth Circuit found the shared responsibility payment to be a tax, not for constitutional purposes, but for purposes of the Anti-Injunction Act, thus concluding that it lacked subject matter jurisdiction to reach the merits of the constitutional claims and enjoin enforcement of the exaction. *Id.* at 741 n.60 (citing Liberty Univ. v. Geithner, 671 F.3d 391 (4th Cir. 2011)).

360 Cushman, *supra* note 104, at 153–54; Clark, *supra* note 9, at 547.

idated in the *Child Labor Tax Case*; others found that the payment was a "penalty" simply because Congress had labeled it as such in the statute.[361] In the district courts and circuit courts of appeals, "[t]he only support for the government's taxing-power arguments came in concurrences or dissents."[362]

There was, however, disagreement among the lower courts on the question of whether the individual mandate was within Congress's commerce power. The Sixth Circuit and the D.C. Circuit each upheld the mandate on the basis that individual decisions whether to purchase health insurance had substantial effects on interstate commerce and were thus within Congress's power to regulate under the Commerce Clause (either alone or in conjunction with the Necessary and Proper Clause).[363] In contrast, the Eleventh Circuit found the mandate outside the scope of the commerce power because the Commerce Clause does not authorize regulation of economic *in*activity.[364] This circuit split guaranteed that the Supreme Court would take up the issue.[365]

The Supreme Court accepted certiorari in the original Florida ACA lawsuit to review the Eleventh Circuit's judgment denying the constitutionality of the individual mandate, as well as its upholding of the Medicaid expansion.[366] Most observers expected the decision on the mandate to turn on the commerce power rather than the taxing power.[367] Perhaps because none of the lower courts had accepted the government's tax-power hypothesis, the parties devoted little

---

361 *See* Cushman, *supra* note 104, at 153–57. The label of the payment as a "penalty" seemed a peculiarly weak basis on which to invalidate the measure, given that the Supreme Court had held in the *License Tax Cases* that labels were not dispositive of whether an exaction was a tax for constitutional purposes. *See supra* text accompanying notes 200–01.

362 McCullough, *supra* note 112, at 741 n.65.

363 *See* Cooter & Siegel, *supra* note 56, at 1238 (citing Thomas More Law Ctr. v. Obama, 651 F.3d 529, 544 (6th Cir. 2011); *Seven-Sky*, 661 F.3d at 20).

364 *See id.* (citing Florida *ex rel.* Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1311–13 (11th Cir. 2011)). At the same time, the Eleventh Circuit held that the individual mandate could be severed from the rest of the ACA and that, even if the individual mandate was unconstitutional, the entire ACA need not be invalidated. Comment, *supra* note 100, at 75 (citing *Florida* ex rel. *Att'y Gen.*, 648 F.3d at 1328).

365 Clark, *supra* note 9, at 547.

366 Comment, *supra* note 100, at 75 (citing NFIB v. Sebelius, 132 S. Ct. 603 (2011)). The Court also granted certiorari on the issue of whether the individual mandate was severable from the rest of the ACA. *Id.* The Court combined the original Florida case with *Department of Health & Human Services v. Florida* and *Florida v. Department of Health & Human Services*, two other Eleventh Circuit decisions "for which certiorari on the same issues had been granted." *Id.* (citing *NFIB*, 132 S. Ct. at 2566).

367 Clark, *supra* note 9, at 584; Melone, *supra* note 9, at 1191.

attention to that theory during arguments before the Supreme Court.[368] The government addressed the theory that the individual mandate is a tax in only a few pages within its extensive briefing of the case, and the parties spent practically no time debating the taxing-power issue during the three days of oral argument in the case.[369] It thus came as a great surprise to most observers when the Supreme Court ultimately upheld the shared responsibility payment as constitutional under Congress's power to tax.[370]

Nevertheless, that is exactly what a majority of the Court did.

IV. THE SUPREME COURT'S DECISION IN *NFIB*

The Supreme Court issued its decision in *NFIB* on June 28, 2012.[371] The majority's opinion was penned by Chief Justice John G. Roberts. After describing the procedural history of the case and confirming the Court's authority to reach the merits,[372] Chief Justice Roberts began by considering whether the individual mandate is within Congress's power under the Commerce Clause. Writ-

368 Erik M. Jensen, *The Individual Mandate, Taxation, and the Constitution*, J. TAX'N INV., Fall 2012, at 31, 34 (noting that none of the lower courts hearing cases relating to the individual mandate grounded their decisions in the taxing power, and that the parties' briefing and argument before the Supreme Court on taxing-power issues were "minimal").

369 Sandefur, *supra* note 19, at 204; *see also* Metzger, *supra* note 81, at 88 (noting that, of the 156 briefs filed with the Supreme Court in *NFIB*, only 10 contained more than a passing reference to the taxing-power argument, and that the government itself devoted only 15 pages to the argument, and also noting that the taxing-power issue received less than 14 minutes of discussion at oral argument); Cushman, *supra* note 104, at 159 (noting that the parties' briefs contained almost no discussion of the main taxing-power precedents and that the government's brief, in particular, did not even mention the *Child Labor Tax Case*).

370 *See, e.g.*, Jensen, *supra* note 368, at 34 ("Almost everyone outside the confines of the Supreme Court was flabbergasted that the taxing power was dispositive in *NFIB*."); Metzger, *supra* note 81, at 88 (noting that, to some, the Court's upholding of the shared responsibility payment as a tax "seemed to come out of nowhere"); Melone, *supra* note 9, at 1191 ("The fact that the taxing power ultimately was held to support the mandate came as quite a surprise to many . . . .").

371 *See* NFIB v. Sebelius, 132 S. Ct. 2566 (2012).

372 Before turning to the merits, the Court determined that the Anti-Injunction Act did not bar it from hearing a challenge to the individual mandate. *See id.* at 2582–84. For a discussion of the Court's reasoning on this point, see *infra* note 408.

ing on behalf of himself only (but reaching the same conclusion as the four dissenters in the case),[373] he determined that it is not.[374] He began his analysis by noting that the Commerce Clause grants Congress "the power to '*regulate* Commerce'" and that "[t]he power to *regulate* commerce presupposes the existence of commercial activity to be regulated."[375] As expansive as the Court's construction of Congress's commerce power has become, the Court's prior decisions "uniformly describe the power as reaching 'activity.'"[376] Chief Justice Roberts found that "[t]he individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product."[377]

Because forgoing health insurance constitutes *in*activity, Chief Justice Roberts found that the mandate could not be justified as a regulation of local activity that substantially affects interstate commerce.[378] He conceded that, "[t]o an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But," he continued, "the distinction between doing something and doing nothing would not have been lost on the Framers, who were 'practical statesmen,' not metaphysical philosophers."[379] Chief Justice Roberts concluded that "[t]he individual mandate forces

---

[373] Chief Justice Roberts's opinion on the Commerce Clause issue is contained in Part III-A of his opinion, in which none of the other Justices joined. Of course, the four Justices who dissented in the case—Justices Scalia, Kennedy, Thomas and Alito—also concluded that the individual mandate was outside Congress's Commerce Clause power. *See NFIB*, 132 S. Ct. at 2644–47 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). However, because that conclusion is contained in their dissent, rather than in a concurrence with the relevant portion of Chief Justice Roberts's opinion, it is unclear whether the five Justices' determination on the Commerce Clause issue is binding precedent. Moreover, "Justice Ginsburg, joined by Justices Breyer, Sotomayor and Kagan, argued that upholding the mandate under the Taxing Clause renders Chief Justice Roberts's Commerce Clause discussion 'not outcome determinative', and therefore not part of the *ratio decidendi*." Sandefur, *supra* note 19, at 212–13 (citing *NFIB*, 132 S. Ct. at 2629 n.12 (Ginsburg, J., concurring)). Accordingly, it is unclear whether Chief Justice Roberts's Commerce Clause opinion is mere dicta, and there is already a split amongst lower courts and legal scholars as to "how much of the Commerce Clause element of *NFIB* is binding." *Id.* at 212 & nn. 38–39 (citing cases and legal scholars' writings reaching divergent conclusions on the issue).

[374] *See NFIB*, 132 S. Ct. at 2585–93 (opinion of Roberts, C.J.). For an additional discussion of Chief Justice Roberts's Commerce Clause opinion, see Comment, *supra* note 100, at 76–77.

[375] *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.) (emphasis in original).

[376] *Id*. at 2587.

[377] *Id.* (emphasis in original). Chief Justice Roberts observed that "most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care" and that "[t]he mandate primarily affects healthy, often young adults who are less likely to need significant health care and have other priorities for spending their money." *Id.* at 2590.

[378] *See id.* at 2587–89.

[379] *Id.* at 2589 (quoting Indus. Union Dep't. v. Am. Petroleum Inst., 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring)).

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.'"[380]

Having concluded that the individual mandate is outside Congress's Commerce Clause power, Chief Justice Roberts turned next to the question of whether the mandate is valid under Congress's power to lay and collect taxes. Writing for a five-member majority of the Court, he determined that it is.[381]

The federal government's taxing-power defense rested on a different interpretation of the individual mandate than did its commerce-power defense. In making its commerce-power argument, the government "defended the mandate as a regulation requiring individuals to purchase health insurance."[382] In contrast, when making its taxing-power argument, the government asked the Court "to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product."[383] The only consequence to an individual for failing to comply with the mandate and forgoing adequate health insurance is "that he must make an additional payment to the IRS when he pays his taxes."[384] Therefore, the government contended that "the mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS."[385] On this reading, the mandate does not impose "a legal command to buy insurance," but instead "makes going without insurance just another thing the [g]overnment taxes."[386]

Writing for himself, Chief Justice Roberts considered this alternative reading of the individual mandate in light of the well-established "savings" principle, perhaps most famously articulated by Justice Oliver Wendell Holmes: "[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."[387] Chief Justice Roberts found that

---

380 *Id.* at 2591–92. Chief Justice Roberts also concluded that, by extension, the individual mandate also cannot be sustained under the Necessary and Proper Clause because each of the Court's "prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power." *Id.* at 2592.

381 Chief Justice Roberts delivered the opinion of the Court that the individual mandate is valid as a tax, in Part III-C of his opinion. *See id.* at 2593–2600 (majority opinion). The other four Justices joining in that part of opinion were Justices Ginsburg, Sotomayor, Breyer, and Kagan.

382 *Id.* at 2593.

383 *Id.*

384 *Id.* at 2593–94.

385 *Id.* at 2594.

386 *Id.*

387 *Id.* at 2593 (opinion of Roberts, C.J.) (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) (internal quotation marks omitted)). Justices Ginsburg, Sotomayor, Breyer, and Kagan (who did not join Part III-B of Chief Justice Roberts's opinion) did not find any need to adopt a "saving" construction of the mandate because they concluded it was sustainable

"[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance."[388] However, because both he and the four dissenting Justices found such a command not to be within Congress's Commerce Clause power, Chief Justice Roberts sought to determine whether an alternative view of the individual mandate—as a tax—could bring the mandate within constitutional muster.[389] The government had asked the Court "to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution."[390] Given the Court's duty to resort to "every reasonable construction . . . in order to save a statute from unconstitutionality[,]"[391] the question was not whether this alternative was "the most natural interpretation of the mandate, but only whether it [was] a 'fairly possible' one."[392]

Writing at this point for a five-member majority of the Court, Chief Justice Roberts found that the shared responsibility payment due from individuals without health insurance "looks like a tax in many respects."[393] The relevant statutory provision is contained in the Code and requires the exaction to be "paid into the Treasury by 'taxpayer[s]' when they file their tax returns."[394] The amount of the exaction to be paid depends on such tax-like factors as the taxpayer's taxable income, filing status and number of dependents,[395] and the statute requires the IRS to assess and collect the payment "in the same manner as taxes."[396] Moreover, as the majority observed, the Congressional Budget Office ("CBO") has estimated that approximately four million individuals annually will choose to pay the shared responsibility payment rather than to obtain the health insurance required under the individual mandate.[397] As a result, the CBO predicts that the shared responsibility payment will raise at least $4 billion per year by 2017.[398]

under the Commerce Clause. However, they joined in Part III-C of the opinion, in which the Court upheld the shared responsibility payment as a tax.

388 *Id.*

389 *Id.*

390 *Id.* at 2594.

391 *Id.* (quoting Hooper v. California, 155 U.S. 648, 657 (1895) (internal quotation marks omitted)).

392 *Id.* (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

393 *Id.* (majority opinion).

394 *Id.* (citing 26 U.S.C. § 5000A(b) (2010)).

395 *Id.* (citing 26 U.S.C. § 5000A(b)(3), (c)(2), (c)(4) (2010)).

396 *Id.* (quoting 26 U.S.C. § 5000A(g)(1) (2010) (internal quotation marks omitted)).

397 *Id.* at 2597 (citing Congressional Budget Office, *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act* (Apr. 30, 2010), *in* SELECTED CBO PUBLICATIONS RELATED TO HEALTH CARE LEGISLATION, 2009–2010, at 71 (rev. 2010) [hereinafter CBO, *Payments of Penalties*]).

398 *Id.* at 2594 (citing CBO, *Payments of Penalties*, *supra* note 397, at 71).

Thus, the shared responsibility payment presents the most "essential feature of any tax: it produces at least some revenue for the [g]overnment."[399]

Of course, as the Court stated, the mere fact that the shared responsibility payment produces revenue is by no means "to say that the payment is not intended to affect individual conduct."[400] Indeed, the Court acknowledged that, "even though the [shared responsibility] payment will raise considerable revenue, it is plainly designed to expand health insurance coverage."[401] Yet, pointing to the tax on sawed-off shotguns that it sustained in *Sonzinsky* and the marihuana tax it sustained in *Sanchez*, the Court noted that it had previously upheld "obviously" regulatory measures under the taxing power and that "taxes [intended] to influence conduct are nothing new."[402] "Indeed," as the Court had previously observed in *Sonzinsky*, "every tax is in some measure regulatory."[403] Moreover, the breadth of Congress's power to tax and spend "gives the Federal Government considerable influence even in areas where it cannot directly regulate."[404] As the *License Tax Cases* established, Congress "may enact a tax on an activity that it cannot authorize, forbid, or otherwise control."[405] Thus, the fact that the individual mandate "seeks to shape decisions about whether to buy health insurance[,]" did not prevent the shared responsibility payment from being "a valid exercise of the taxing power."[406]

The majority noted that the ACA statute refers to the shared responsibility payment as a "penalty"[407] and, based on that label, found that the Anti-Injunction Act did not bar the Court from reaching the merits of the case.[408] However,

---

399 *Id.* (citing *Kahriger*, 345 U.S. at 28 n.4).

400 *Id*. at 2596.

401 *Id*.

402 *Id*. (citing United States v. Sanchez, 340 U.S. 42, 44–45 (1950); Sonzinsky v. United States, 300 U.S. 506, 513 (1937)). In addition to those examples, the Court observed that "some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry" and that, today, federal cigarette taxes are intended not only to raise money, "but [also] to encourage people to quit smoking." *Id*.

403 *Id*. (quoting *Sonzinsky*, 300 U.S. at 513) (internal quotation marks omitted).

404 *Id*. at 2579.

405 *Id.* (citing License Tax Cases, 72 U.S. (5 Wall) 462, 471 (1867)).

406 *Id*. at 2596.

407 *Id*. at 2594. *See also supra* note 49 and accompanying text (citing various subsections of 26 U.S.C. § 5000A in which the shared responsibility payment is referred to as a "penalty").

408 *Id.* at 2582–84. The Anti-Injunction Act prohibits any lawsuit for the purposes of restraining the assessment or collection of any tax. *See* 26 U.S.C. § 7421(a). Thus, if the shared responsibility payment were a tax for purposes of the Anti-Injunction Act, the Court would not have had the authority to consider the merits of the challenge to the individual mandate. The Court, however, determined that, because Congress labeled the shared responsibility payment as a "penalty" in the ACA, the payment was indeed a penalty, rather than a tax, for purposes of the Anti-Injunction Act. *NFIB*, 132 S. Ct. at 2583. The Court reasoned that, because both the ACA and the Anti-Injunction Act are "creatures of Congress's own creation[,]" it is for Congress to decide how the two statutes

the label did not mean that the shared responsibility was automatically a penalty for constitutional purposes.[409] As the *License Tax Cases* also established, an exaction's label is not dispositive for purposes of determining whether it is a tax authorized by the General Welfare Clause.[410] Instead, the Court sought to determine whether the shared responsibility payment was a tax or a penalty based solely on the "substance and application" of the measure.[411]

For the first time since the *Butler* case in 1936, the constitutional distinction between taxes and penalties thus became the cornerstone of a taxing-power decision[412]: If it were a penalty for failure to comply with the individual mandate to obtain health insurance, the shared responsibility payment could not have passed constitutional muster, because five Justices had just determined the mandate itself to be beyond the scope of Congress's commerce power. As a tax, however, the shared responsibility payment could nevertheless be upheld under the taxing power. *NFIB* marked the reemergence of the tax-vs.-penalty distinction as a significant constitutional issue because, for the first time in decades, the Court had recognized a limit on economic legislation sustainable under the Commerce Clause.[413]

To determine whether the shared responsibility payment was an unconstitutional regulatory penalty, the Court used a "functional" analysis that it adopted from the *Child Labor Tax Case*.[414] The Court identified three characteristics that caused it to find the Child Labor Tax Law to be a regulatory penalty,

---

relate to one another, and the best evidence of Congress's intent is its explicit labeling of the shared responsibility payment as a "penalty" in the statutory text. *Id.* As a result, the Court concluded that it had the authority to decide the merits of the case. *Id.* at 2584.

409 *Id.* at 2594. The Court found that, while the ACA's description of the shared responsibility payment as a "penalty" is "fatal" to the applicability of the Anti-Injunction Act, "it does not determine whether the payment may be viewed as an exercise of Congress's taxing power." *Id.* In short, the Court determined, "Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other." *Id.* at 2583 (emphasis in original).

410 *Id*. 2594–95 (citing *License Tax Cases*, 72 U.S. (5 Wall) at 471). In the *License Tax Cases*, as described above, an exaction called a "license" was found to be a tax rather than a regulation conferring authority to conduct activity. *See supra* text accompanying notes 200–01.

411 *Id*. at 2595 (quoting United States v. Constantine, 296 U.S. 287, 294 (1935)).

412 *See* Cushman, *supra* note 104, at 185 (noting that, after the Court expanded its Commerce Clause interpretation, the tax-vs.-penalty question did not arise again until the Court found the individual mandate to be beyond the scope of the commerce power); *see also* Cooter & Siegel, *supra* note 56, at 1196–97 (noting that, following its "post-1937 decisions essentially abandon[ing] judicially enforceable limits on the Commerce Clause," the Court "had no need to rethink distinctions between taxes and penalties" until *NFIB*).

413 As the Court itself had previously observed, "[w]here the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another." *Child Labor Tax Case*, 259 U.S. at 38.

414 *NFIB*, 132 S. Ct. at 2595 (citing *Child Labor Tax Case*, 259 U.S. at 36–37).

but concluded that those same considerations indicate that the shared responsibility payment is instead a tax. First, the Court found that the shared responsibility payment imposes significantly less of a burden on taxpayers than the Child Labor Tax Law had imposed. The child labor tax had "imposed an *exceedingly heavy burden*—10 percent of a company's net income—on those who employed children, no matter how small their infraction."[415] In contrast, the Court observed that the amount of an individual's shared responsibility payment will, in most cases, "be far less than the price of insurance" that the individual would otherwise have to buy, and, pursuant to the statute, the payment "can never be more" than the cost of such insurance.[416] Second, the Court found that, whereas the child labor tax contained a scienter requirement (which indicates a penalty), the shared responsibility payment is not conditioned on scienter.[417] Third, the Court found that the shared responsibility payment is collected only by the IRS, whereas the child labor tax was also enforced by the Department of Labor.[418] Thus, the same reasons why what had been called a "tax" was instead a penalty in the *Child Labor Tax Case*, supported a conclusion in *NFIB* that "what is called a 'penalty' . . . may be viewed as a tax."[419]

The Court further posited that, "if the concept of penalty means anything, it means punishment for an unlawful act or omission."[420] It maintained, however, that "[w]hile the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful."[421] The Court found that wording within § 5000A(a) of the Code—stating that an indi-

---

415 *Id.* (emphasis added). The exaction under the Child Labor Tax Law was in all cases one-tenth of the employer's annual net profits—regardless of "whether he employ[ed] five hundred children for a year, or employ[ed] only one for a day." *Child Labor Tax Case*, 259 U.S. at 36. To comprehend the potential effects of that exaction, imagine an employer whose net profits are attributable entirely to the work of his or her employees, and imagine further that each employee contributes equally to the profit: If all of that employer's workers during the year were children, the "tax" on the employer would have been 10% of the gain derived from the employment of those children. However, if only 5% of the employer's workers during the year were children, the "tax" on the employer would have been 2,000% of the gain derived from the employment of the children.

416 *NFIB*, 132 S. Ct. at 2595–96. The Court noted that, in 2016, the shared responsibility payment for an individual with $35,000 of annual income would be approximately $60 per month, and the payment for an individual with $100,000 of annual income would be approximately $200 per month. In contrast, for each person, the cost of premiums for "a qualifying insurance policy" would be approximately $400 per month. *Id.* at 2596 n.8 (citing D. Newman, *CRS Report for Congress, Individual Mandate and Related Information Requirements Under PPACA* 7 & n.25 (2011)). For those individuals, the exaction would amount to 15% or 50%, respectively, of the cost saved by forgoing the purchase of health insurance.

417 *Id*. at 2595, 2596.

418 *Id*.

419 *Id*. at 2596.

420 *Id.* (internal quotation marks and internal citations omitted).

421 *Id.* at 2596–97.

vidual "shall" obtain insurance or otherwise pay a "penalty"—need not be interpreted as punishing unlawful conduct.[422] Rather, the Court concluded that § 5000A(a) could instead be read as "impos[ing] only 'a series of incentives'" to obtain health insurance, thus leaving the shared responsibility payment as "an exercise of the taxing power."[423] In adopting that construction, the Court technically wrote the "requirement" to obtain insurance out of the law, but left the teeth of the individual mandate—the shared responsibility payment—intact.[424]

The Court thus held that the shared responsibility payment is a tax for constitutional purposes. Having done so, and after finding no other constitutional impediment to the enactment of such a tax,[425] the Court upheld the payment as within the scope of Congress's authority under the General Welfare Clause.[426]

---

[422] *Id.* at 2597.

[423] *Id.* (analogizing the individual mandate to a federal statute upheld under a similar approach in *New York v. United States*, 505 U.S. 144 (1992)).

[424] *See* Sandefur, *supra* note 19, at 213 (discussing the Court's "refashioning of the statute" that "eliminates the mandatory nature of the individual mandate, and upholds not the command itself, but only the tax triggered by a person not purchasing insurance").

[425] The Court recognized that, "[e]ven if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution." *NFIB*, 132 S. Ct. at 2598. Thus, the Court next considered whether the shared responsibility payment was a direct tax subject to the apportionment requirement, and concluded in rather summary fashion that it is not. *Id.* at 2598–99. This facet of the Court's opinion has been widely criticized as inadequately reasoned. *See id.* at 2655 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (pointing out insufficiency of briefing of direct-tax issue before the Court and arguing that the majority should have demanded more thoughtful consideration than the "lick-and-a-promise accorded by the [g]overnment" before deciding the question); *see also* Melone, *supra* note 9, at 1191 (characterizing the Court's attention to the direct-tax issue as "laconic"); Jensen, *supra* note 368, at 44 (describing Chief Justice Roberts' direct-tax analysis as "excessively simplistic"); Sandefur, *supra* note 19, at 216 (arguing that the Court's direct-tax analysis "makes little logical sense"). After declaring the shared responsibility payment not to be a direct tax, the Court failed even to mention whether it satisfies the Uniformity Clause's requirements for indirect taxes. For an interesting argument that it may not, see Sandefur, *supra* note 19, at 220–27. For an argument that the shared responsibility payment may also have run afoul of the Origination Clause (another constitutional requirement left unaddressed by the Court in *NFIB*), see *id.* at 227–36; *see also* Tessa L. Dysart, *The Origination Clause, the Affordable Care Act, and Indirect Constitutional Violations*, 24 CORNELL J.L. & PUB. POL'Y 451, 490–91 (2015) (arguing that Senate's amendment of original ACA bill was effectively "new" Senate-originated legislation and thus constituted an "indirect" violation of the Origination Clause). Whether the shared responsibility payment is an unapportioned direct tax, whether it is instead an indirect tax that may violate the Uniformity Clause, and whether it was developed in a legislative process that violated the Origination Clause are all matters beyond the scope of this Article. Accordingly, while this Article starts from the proposition that the Supreme Court was correct in finding the shared responsibility payment to be a tax (rather than a penalty) for constitutional purposes, this Article takes no position as to whether the shared responsibility payment is ultimately a constitutionally *valid* tax.

[426] *NFIB*, 132 S. Ct. at 2600.

"Because the Constitution permits such a tax," the Court concluded, "it is not our role to forbid it, or to pass upon its wisdom or fairness."[427]

V. THE NEED TO DEVELOP A CLEAR TEST FOR REGULATORY PENALTIES IN THE WAKE OF *NFIB*

To those concerned with protecting the constitutional division between federal and state authority, the Court's refusal to uphold the individual mandate under the Commerce Clause was a welcome affirmation that Congress's commerce power has not mutated into a de facto plenary police power. Even in the realm of economic regulation, the commerce power still has some boundaries. At the same time, some devotees of federalism fear that, as a result of the Court's decision to uphold the shared responsibility payment as a tax, "the taxing power will now serve as cover for virtually limitless federal intrusion into the lives of Americans."[428]

Congress has surely taken note that what started out as a purported exercise of its Commerce Clause power was ultimately validated in *NFIB* as an exercise of its taxing power instead. Will this precedent embolden future Congresses to side-step the limits of its commerce power by imposing monetary penalties styled as "taxes" in order to punish activity (or inactivity) that it could not regulate under the Commerce Clause? Some have predicted that the *NFIB* decision "will serve as a catalyst for challenges to exactions that Congress may choose to enact in similar form" to the shared responsibility payment.[429] That prediction presupposes that Congress will actually enact other measures similar to the shared responsibility payment. In other words, it rests on a premise that Congress will make future attempts to compel taxpayers to engage in various sorts of commerce.[430] But should that possibility really be a focus of our concern?

A. The Unlikeliness of Future Monetary Penalties on Economic Conduct Beyond the Reach of Congress's Commerce Power

Opponents of the individual mandate had worried about the mandate's wider implications for the limits of congressional power since the ACA was signed into law. But they did their cause no favors by the way they framed the issue. Typical of their approach, for example, was the argument posed by former Justice Department attorneys David B. Rivkin, Jr. and Lee A. Casey: "If Congress can mandate the purchase of health care insurance, it can similarly impose,

---

427 *Id.*

428 Melone, *supra* note 9, at 1191.

429 *Id.* at 1230.

430 *See id.* at 1210 (speculating that "the taxing power issues raised in [*NFIB*] will surface with more regularity now that the Court has held that individuals cannot be compelled to enter into commerce through Congress's power to regulate interstate commerce").

under the Commerce Clause guise, an infinite array of other mandates, ranging from health club memberships to a requirement to consume a given quantity of fruits and vegetables annually."[431] Unfortunately for the cause, this argument verges on silliness. Even the most cynical among us can concede how unlikely it is that Congress would ever try to make us purchase, say, turnips. Could upholding the shared responsibility payment really portend such ridiculous legislation in the future?

By concentrating on such seemingly trivial examples of prospective congressional overreach, critics of the ACA subjected a crucial concern—about preserving the constitutional limits of Congress's power—to ridicule. Professor Andrew M. Koppelman, for example, has mockingly referred to arguments that the individual mandate could lead to laws compelling vegetable purchases, as the "Broccoli Objection."[432] He refers to broccoli (rather than the more odious turnip) because of a peculiar hypothetical developed by ACA opponents and popularized by at least one federal judge: In the district court's opinion in the original Florida ACA litigation, Judge C. Roger Vinson of the Northern District of Florida famously mused that, if the individual mandate were permitted to stand, then "Congress could require that people buy and consume broccoli at regular intervals."[433] According to Professor Koppelman, a primary fallacy of the Broccoli Objection is that it "treat[s] a slippery slope argument as a logical one, when in fact it is an empirical one."[434] Citing the work of Professor Frederick Schauer, Koppelman asserts that "any slippery slope argument depends on a prediction that doing the right thing in the instant case will, in fact, increase the likelihood of doing the wrong thing in the danger case. If there is no danger, then the fact

431 Rivkin & Casey, *supra* note 82, at 101. Though they were then focused on hypothetical mandates sustained under the Commerce Clause, Rivkin and Casey—as well as other ACA opponents—would presumably have been equally alarmed if such mandates were recast as taxes that provide "a series of incentives" in order to achieve the same regulatory ends.

432 *See* Koppelman, *supra* note 42, at 18–21.

433 Florida *ex rel.* Bondi v. U.S. Dep't of Health and Human Servs., 780 F. Supp. 2d 1256, 1289 (2011), *quoted in* Koppelman, *supra* note 42, at 18. Critics of the ACA seized on Judge Vinson's hypothetical of the dreaded broccoli mandate and repeated it often. *See* James B. Stewart, *How Broccoli Landed on Supreme Court Menu*, N.Y. TIMES, June 13, 2012, at A1 (noting how the broccoli mandate became a powerful, if simplistic, metaphor for the sort of unrestrained, intrusive federal power that ACA opponents feared, and describing how the broccoli hypothetical originated on a conservative website, was embraced by libertarian attorneys arguing against the individual mandate, was highlighted in Judge Vinson's *Bondi* opinion, and was repeated by various conservative commentators), *cited in* Clark, *supra* note 9, at 548 n.22. During oral argument in *NFIB*, even Justice Antonin Scalia raised the hypothetical, asking a government attorney whether, if the federal government could mandate the purchase of health insurance, it could also require people to purchase broccoli. *See id.*

434 Koppelman, *supra* note 42, at 20.

that there logically could be has no weight."[435] On this view, because there is little chance that Congress will try to make us eat our vegetables, the theoretical possibility that the individual mandate could serve as a precedent for such an absurd law is not a valid objection to the mandate itself.[436] In other words, if a law compelling the purchase of broccoli is the worst that can happen, then the individual mandate (or, more specifically, the shared responsibility payment) does not set a precedent that should worry us in the least.

Professor Koppelman's argument suggests that there is probably little cause for concern about future congressional attempts to impose unconstitutional regulatory penalties on *economic* conduct. As significant as it is, the *NFIB* decision does not fundamentally alter the "substantial effects" doctrine or any other facet of the Court's modern, broad interpretation of the Commerce Clause. In the aftermath of *NFIB*, the Commerce Clause continues to authorize congressional regulation of virtually all economic activity. *NFIB* merely states that the commerce power does not extend to regulation of economic *in*activity by compelling persons to engage in commerce. That being the case, when seeking to regulate economic activity in the future, Congress will likely have little incentive to enact a penalty disguised as a tax. After all, why would Congress employ such subterfuge in order to regulate indirectly that which it could instead regulate directly under its commerce power? Under the Court's current reading of the Commerce Clause, virtually the only future economic regulations (besides the individual mandate itself) that Congress might not be able to enact directly under its commerce power would be regulations to compel the purchase of other products or services.[437] For that reason, barring some unexpected narrowing of the Court's construction of the Commerce Clause somewhere down the road, virtually the only unconstitutional penalty against economic conduct that a future Congress might theoretically impose in the guise of a tax would be some sort of far-fetched, eat-your-broccoli-type mandate.

That is not the end of the matter, however.

B. The Greater Likelihood of Future Monetary Penalties on Noneconomic Conduct Beyond the Reach of Congress's Commerce Power

Despite the low probability that the issue might ever arise in the context of an attempt to regulate economic conduct, there nonetheless remains cause for concern that *NFIB* may embolden a future Congress to circumvent the limits of

---

435 *Id.* (citing Frederick Schauer, *Slippery Slopes,* 99 HARV. L. REV. 361, 369 (1985)). As an example, Koppelman postulates that, in theory, the federal taxing power "empowers the government to tax incomes at 100 percent, thereby wrecking the economy." *Id.* But, he advises, "Relax! It will not happen." *Id.*

436 *See id.* at 20–21.

437 *See* Melone, *supra* note 9, at 1216 ("We now know that Congress cannot compel persons to engage in commercial activities under the Commerce Clause.").

its commerce power by fashioning a regulatory penalty disguised as a tax. The reason for that concern, quite simply, is that Congress likes to regulate *non*economic conduct, too. Moreover, as the *Lopez* and *Morrison* cases amply demonstrate, Congress sometimes likes to try to regulate noneconomic conduct even when it has no constitutional authority to do so. Recall that, prior to *NFIB*, the only limit on Congress's commerce power to have been recognized during the post-New Deal era was when the Court struck down certain noneconomic regulations in *Lopez* and *Morrison*.[438] *Lopez* concerned congressional regulation of gun possession near schools, and *Morrison* concerned congressional regulation of gender-based violent crime. Even though the Supreme Court held in those cases that Congress generally cannot use its commerce power to regulate noneconomic behavior,[439] we cannot assume that Congress has been dissuaded from ever trying to regulate noneconomic conduct again.

Indeed, one can imagine myriad ways in which Congress might wish to regulate personal, noneconomic behavior in the future—especially in light of the persistent divisions within the country over various social issues. A liberal congressional majority might again seek to ban gun possession not only in schools, but also in other noncommercial spaces such as libraries or houses of worship. A conservative congressional majority might opt to ban transgender persons from using certain bathrooms in those same places.[440] In today's political climate, the prospect of such regulatory efforts is hardly fantastical. At the same time, in the wake of the *Lopez* and *Morrison* decisions, it is likely that any such efforts would not be sustainable under the Commerce Clause. As a result, Congress may be incented to shape any future attempts at regulating noneconomic behavior as "taxes" that penalize the behavior in question.[441] Thus, we should not ignore the

---

438 For a discussion of the *Lopez* and *Morrison* decisions, see *supra* text accompanying notes 138–49.

439 The one narrow exception, recognized in *Raich*, is that the Commerce Clause permits congressional regulation of noneconomic activity *if* that regulation is an essential part of a larger scheme of regulation of interstate economic activity. For a discussion of the *Raich* opinion, see *supra* text accompanying note 152.

440 This is by no means far-fetched. After all, such bans—like North Carolina's highly publicized "HB2" law—have already been either enacted or proposed in a number of states. *See* Michael Gordon et al., *Understanding HB2: North Carolina's Newest Law Solidifies State's Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 26, 2016, 11:00 AM), http://www.charlotteobserver.com/news/politics-government/article68401147.html (describing North Carolina law that, *inter alia*, "requires students to use public school restrooms and locker rooms based on the gender on their birth certificates" and mentioning similar measures proposed in Georgia, Indiana, Kentucky, and West Virginia); *see also* Sam Brodey & Julia Lurie, *Get Ready for the Conservative Assault on Where Transgender Americans Pee*, MOTHER JONES (Mar. 9, 2015, 6:00 AM), http://www.motherjones.com/politics/2015/03/transgender-bathroom-discrimination-bills (describing transgender bathroom bills introduced by state legislators in Texas, Florida, and Kentucky in early 2015, and mentioning prior attempts at similar legislation in Colorado and Arizona).

441 Because the distinction between taxes and regulatory penalties is of constitutional moment only when a congressional exaction cannot be supported by any enumerated power other than the

plausible risk that Congress might resort to penalties styled as "taxes" in order to regulate *non*economic activity that it cannot reach directly through its commerce power.

If *Lopez* and *Morrison* gave Congress a motive to use monetary penalties to regulate noneconomic behavior, the question now is whether *NFIB* has given Congress the means to do so. Did the Court's holding that the shared responsibility payment is a tax (rather than a penalty) make it easier for Congress to levy purported "taxes" to regulate conduct that it could not regulate directly under the Commerce Clause? In an effort to uphold the constitutionality of the individual mandate, did the Court inadvertently grant Congress a license to circumvent the limits of its other enumerated powers in the future simply by invoking (as a pretext) its power to tax?

As an example of how unclear the issue presently is, legal scholars are currently divided as to whether Congress could refashion as a tax the regulation banning gun possession near a school that the Court struck down in *Lopez*. Professor Jack Balkin asserts that Congress could provide "tax advantages" to schools that ban gun possession.[442] If so, Congress might just as easily levy an additional "tax" on persons who carry guns near schools. Professors Robert Cooter and Neil Siegel have suggested that a $25,000 federal exaction on a person carrying a gun in a school zone would not pass muster as a "tax" after *Lopez*.[443] But what if the exaction were only $2,000, or $1,000? Would it then still constitute the kind of "exceedingly heavy burden" that the Court referred to in *NFIB* as a hallmark of a regulatory penalty? Professor Erik Jensen essentially thinks the question could go either way: "A straightforward punitive levy" against those who possess guns near schools "probably . . . would not be considered a tax, but imaginative drafters might be able to come up with legislation that would work."[444]

This doctrinal uncertainty should not be allowed to persist. If a future Congress purports to invoke the taxing power to penalize conduct—particularly noneconomic, personal conduct—beyond the regulatory reach of its other enumerated powers, the safeguards in place to repel such an attempt have to amount to more than a constitutional crapshoot. In the event that *NFIB* spurs Congress ever to enact anything akin to a "tax" on the possession of a gun in a school zone, there must be a concrete rule for invalidating such legislation as the end-run

taxing power, *Lopez* and *Morrison* were arguably the first modern decisions to make the tax-vs.-penalty issue potentially salient once again. *See* Cushman, *supra* note 104, at 134–35*; see also* Cooter & Siegel, *supra* note 56, at 1219 (arguing that the Court's "impos[ition]" of limits on the Commerce Clause in *Lopez* and *Morrison* "renewed the significance of this constitutional distinction" between taxes and regulatory penalties).

442 Balkin, *supra* note 133, at 106 (Professor Balkin suggested that "[d]espite *Lopez*, Congress could withhold federal subsidies or offer tax advantages to schools—and businesses within 1000 feet of schools—that agree to ban possession of guns . . . .").

443 Cooter & Siegel, *supra* note 56, at 1234.

444 Jensen, *supra* note 368, at 47.

around the Commerce Clause that it plainly would be. To establish beyond question that the Constitution prohibits such congressional overreach, there needs to be a clear and concise test—consistent with relevant Supreme Court precedent—for distinguishing disguised regulatory penalties from valid exercises of the taxing power.

C. What Is at Stake: Preserving the Benefits of Federalism

Before proceeding to consider what the constitutional test for regulatory penalties should look like, it is worth pausing briefly to reflect on why confining congressional action to the limits of the Article I, Section 8 powers matters in the first place. If a particular congressional regulation of noneconomic behavior is "beneficial," why should we be concerned whether it is within the scope of Congress's enumerated powers? Assuming the legislation serves a valid public policy purpose, why focus on such constitutional niceties rather than the legislation's advancement of the social good?

The answer, in short, is that federalism is more than a legal technicality or a quaint anachronism. The federalist structure of American government, in which limited congressional powers are enumerated in the Constitution and all other powers are reserved to the states, continues to yield substantive and important political benefits. For one thing, federalism fosters regulatory competition among the states.[445] When regulations are made at the state (rather than federal) level, states compete with each other for residents and businesses by trying to develop comparatively better solutions to various public policy problems.[446] This, in turn, gives rise to propitious policy experimentation within the states.[447] As the states pursue different paths to given public policy goals, they become, as Justice Louis D. Brandeis once famously stated, "'laborator[ies]' for 'social and economic experiments.'"[448] In addition, when regulations are enacted at a state or local level, the process involves more direct political participation and thus greater political accountability than if the same issue were being decided at the federal level. The smaller size of a state or a locality means that each voter has a comparatively larger voice in the process and that the representatives making the decision are more directly answerable to each person they represent.[449]

---

445 Mason, *supra* note 10, at 979, 992.

446 *Id.* at 992.

447 Clark, *supra* note 9, at 571.

448 Mason, *supra* note 10, at 993 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

449 *See* Clark, *supra* note 9, at 571 ("[S]tate sovereignty ensures that decisions impacting people's lives will be made at the state level, ensuring better local participation and clear political accountability."); *see also* Mason, *supra* note 10, at 979, 992–93 ("[S]tates' smaller size compared to that of the nation also may facilitate political participation, at least when a single voter's voice carries more weight in state than federal elections.").

Closely related to that last point is perhaps the most valuable purpose that federalism serves: allowing subnational communities to make certain decisions about how to govern themselves based on their own policy preferences rather than the preferences of other communities or the nation as a whole.[450] The value in federalism's promotion of local self-governance lies not so much in an abstract "respect . . . for the autonomy or dignity of states *qua* states."[451] Rather, the value is in enabling individuals and the communities in which they live to function according to laws that reflect, to the greatest extent possible, their own particular wants and principles.[452]

Of course, many public policy problems are truly national in scope and require a national response. A prime example of such a problem is the set of deficiencies in our healthcare delivery system that the ACA seeks to remedy.[453] Generally speaking, as the country's economy has grown larger and more complex, economic challenges have increasingly necessitated federal action, and the Court's broader, post-New Deal interpretation of the Commerce Clause rightly reflects that fact.

At the same time, however, many noneconomic policy issues remain decidedly local in nature, and the limits of the commerce power recognized in *Lopez* and *Morrison* reflect that fact, as well. Take, for example, the question of whether guns should be permitted in school zones. Should firearms be completely banned in such areas, or could arming students and teachers actually deter violent crime in schools? The right answer for New York City and the right answer for a small town in Wyoming might well be different. More to the point, residents of those two communities may have very different ideas as to what the correct approach is.[454] It is for precisely this reason that, as the Court held in *Lopez*, the power to regulate such matters is reserved to the states.[455]

To the extent that Congress is permitted to impose monetary penalties—disguised as taxes—on taxpayers who engage in conduct that Congress cannot

---

450 *See* Clark, *supra* note 9, at 571; *see also* Mason, *supra* note 10, at 979, 993.

451 Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 479–80 (2003), *quoted in* Clark, *supra* note 9, at 571.

452 *See* Baker & Berman, *supra* note 451, at 479–80; *see also* Clark, *supra* note 9, at 571.

453 *See* Jay, *supra* note 9, at 1140 (noting the inability of individual states to address on their own the problem of insuring persons with preexisting conditions, and recounting the experience of seven states that tried to mandate coverage of such persons, in each case with the result that either premiums "soared" or insurers exited the market in the particular state).

454 After all, "[a] state's freedom from federal interference, like an individual's freedom from governmental restrictions on expression or private choices, is a freedom to make choices, not just a freedom to choose wisely." Baker & Berman, *supra* note 451, at 479, quoted in Clark, *supra* note 9, at 571.

455 For a discussion of the *Lopez* holding, see *supra* text accompanying notes 138–44.

regulate directly, the "values served by federalism" are jeopardized.[456] If Congress were to lay more than a *de minimis* "tax" on those who possess guns in school zones, the exaction would constrain people from carrying guns in those areas. The practical, coercive effect of such an exaction would thus be the same—certainly in kind, if not necessarily in degree—as the direct ban on guns near schools that the Court struck down in *Lopez*. We must identify a doctrinal rule of general application for determining when a purported tax is really a regulatory penalty instead, to prevent Congress from overstepping the constitutional limits of its authority in that way.

D. Guidance from NFIB *and Prior Taxing-Power Decisions About the Constitutional Distinction Between Taxes and Penalties, and Questions Left Open by Those Decisions*

Although the Court found the shared responsibility payment to be a tax, it nevertheless emphasized in *NFIB* that "Congress's ability to use its taxing power to influence conduct is not without limits."[457] Citing the *Child Labor Tax Case* and *Butler*, the Court noted that "[a] few of [its prior] cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority."[458] Of course, the Court also noted that, in most of its taxing-power decisions (including its more recent ones), it has "declined to closely examine the regulatory motive or effect of revenue-raising measures."[459] Still, the Court expressly confirmed what it had originally recognized in the *Child Labor Tax Case*: Certain "characteristics of regulation and punishment" establish a purported revenue measure to be a penalty rather than a tax.[460]

Thus, in *NFIB*, the Court verified beyond doubt what its prior cases had already indicated: Both the *Child Labor Tax Case* and its progeny, on one hand, and the taxing-power decisions that came either before or after, on the other, are simultaneously good law.[461] In a case like *McCray*, *Sonzinsky*, or *Kahriger*, Congress's power to choose subjects (and rates) of taxation is to be respected, and a

---

456 Mason, *supra* note 10, at 979.

457 NFIB v. Sebelius, 132 S. Ct. 2566, 2599 (2012).

458 *Id.* (citing United States v. Butler, 297 U.S. 1, 70–71 (1936); Child Labor Tax Case, 259 U.S. 20, 42 (1922)).

459 *Id.* (citing United States v. Kahriger, 345 U.S. 22, 27–31 (1953)).

460 *Id.* (quoting Dep't of Rev. of Mont. v. Kurth Ranch, 511 U.S. 767, 779 (1994)) (quoting *Child Labor Tax Case*, 259 U.S. at 38) (internal quotation marks omitted); *see* Melone, *supra* note 9, at 1215 (observing that "despite the fact that the Court refused to consider the mandate a penalty, it clearly noted that the distinction between a penalty and a tax has continuing vitality—which, given the case law during the past seventy years or so, is no small matter").

461 In the *Child Labor Tax Case* and *Hill*, for example, the Court did not overrule or call into question the reasoning of *Veazie*, *McCray*, or *Doremus*; rather, it distinguished those earlier decisions on factual grounds. *See Child Labor Tax Case*, 259 U.S. at 40–43 (distinguishing the facts

measure that produces even modest revenue for the government is not to be invalidated on the basis of any non-revenue-related aims or consequences that the legislation may have. At the same time, in a case like the *Child Labor Tax Case*, *Hill*, or *Constantine*, Congress will not be permitted to avoid constitutional constraints on its powers by enacting monetary penalties (disguised as taxes) against conduct that it could not otherwise regulate. The question, of course, is how to tell when a particular exaction comes within the latter category instead of the former.

The threshold criterion for determining when a purported tax should receive heightened judicial scrutiny as a potential penalty was first identified in the *Child Labor Tax Case*. Because Congress has the power to choose what to tax and how much to tax it, the Court stated in that case that it may not have had the authority to strike down the Child Labor Tax Law—regardless of the evidence of its aim and effect of curtailing child labor—if the act had been a tax on a "thing of value."[462] Instead, however, the Court viewed the measure as an "exaction for a departure from a . . . specified course of *conduct*."[463] The exactions invalidated

of the case from those of *Veazie*, *McCray*, and *Doremus*, respectively); Hill v. Wallace, 259 U.S. 44, 67 (1922) (distinguishing cases such as *Veazie* and *McCray* on the ground that "in none of those cases did the law objected to show on its face . . . detailed regulation of a concern or business wholly within the police power of the State, with a heavy exaction to promote the efficacy of such regulation"). Similarly, in *Sonzinsky*, the Court distinguished the facts of the case from those of the *Child Labor Tax Case* or *Hill*, noting that the measures at issue in the earlier cases contained suspect regulatory provisions. *See supra* text accompanying note 323 (quoting relevant language from *Sonzinsky*). By so doing, the Court indicated that, in any future cases involving such regulations, the *Child Labor Tax Case* and *Hill* would continue to be valid precedent. In *Kahriger*, the Court noted with continued approval that it had previously invalidated unconstitutional penalties in purported tax statutes, and cited the *Child Labor Tax Case* and *Constantine* as authority. Kahriger, 345 U.S. at 31, 32. It is thus clear that, as the Court's taxing-power jurisprudence evolved, the decisions that came later never negated or undermined those that came before. *See* Cushman, *supra* note 104, at 147–48, 151–53 (noting that *McCray* and *Child Labor Tax Case* lines of cases "coexisted" with one another, that *Kahriger* treated the *Child Labor Tax Case* and *Hill* as good law, and that none of the Court's post-1936 taxing-power decisions overruled the *Child Labor Tax Case* or its progeny). Nevertheless, prior to *NFIB*, some legal scholars took the position that "the *Lochner*-era tax cases [were] a special product of that historical period and [are] therefore of limited precedential value today." Mason, *supra* note 10, at 1030. The Court's discussion of the tax-vs.-penalty issue in *NFIB*—and its reference back to the *Child Labor Tax Case* in particular—makes clear, however, that the distinction between taxes and penalties continues to have constitutional significance and that the *Child Labor Tax Case* and its progeny continue to be good law.

462 *Child Labor Tax Case*, 259 U.S. at 36.

463 *Id.* (emphasis added). The Court's exact reference was to "a departure from a *detailed* and specified course of conduct in business." *Id.* (emphasis added). In his contemporary analysis of the *Child Labor Tax Case*, Professor Thomas Reed Powell assigned great significance to the Court's observations concerning the elaborateness of the behavioral regulations inherent in the Child Labor Tax Law. *See* Cushman, *supra* note 104, at 184 (citing Powell, *Child Labor*, *supra* note 261, at 72, 75). However, in a later decision citing that case, the Court made clear that behavioral regulations embedded in a purported revenue measure need not be detailed or complex in order to be indicia of a penalty against the behavior at issue. In *Department of Revenue of Montana v. Kurth Ranch*,

as penalties in *Hill*, *Constantine*, and *Butler* also shared this same defining characteristic: They were all imposed on *behavior* or *conduct* that Congress did not have the power to compel or prohibit directly.[464]

The Court has continued to recognize and apply that criterion—even in its later taxing-power cases: If the imposition of a purported federal tax is conditioned on the taxpayer's failure to abide by some rule or standard that is regulatory in nature and that relates to some *activity* (or inactivity) beyond the reach of any congressional power other than the taxing power, that exaction is constitutionally suspect as a penalty, in a way that other revenue measures are not.[465] Because such measures are rightly suspected to be bald attempts at unconstitutional regulation, and not really taxes at all, the Court has both the authority and the obligation to scrutinize them more aggressively than it evaluates federal

511 U.S. 767 (1994), the Court considered whether the Double Jeopardy Clause was violated by the State of Montana's imposition of a tax on marijuana possession upon persons previously convicted of (and sentenced to prison for) criminal possession of the same drugs that were the subject of the tax. After noting how it had previously recognized—in, *inter alia*, the *Child Labor Tax Case*—that punitive characteristics can cause a purported tax to be a penalty instead, *id.* at 779, the Court concluded that the Montana tax was indeed a penalty and that the proceeding initiated (after respondents' criminal conviction) to impose the tax "was the functional equivalent of a successive criminal prosecution that placed the [respondents] in jeopardy a second time 'for the same offense.'" *Id.* at 784. There plainly was nothing elaborate or complicated about the regulation inherent in the Montana tax: It was conditioned simply on criminal possession of marijuana. By adopting the tax-vs.-penalty analysis in the *Child Labor Tax Case* to that "simple" Montana statute and finding it to be a penalty, the Court clearly signaled that there need not be significant detail or complexity to the behavioral regulations embedded in a purported revenue measure in order for the exaction to constitute a regulatory penalty rather than a tax.

[464] *See supra* text accompanying notes 273–74 (discussing regulations of local grain futures trading activity under the Futures Trading Act of 1921, which regulations were enforced by the "tax" invalidated in *Hill*); *see also supra* text accompanying notes 283–89 (noting that the "tax" invalidated in *Constantine* was imposed specifically on those who violated state laws banning liquor sales following the repeal of national prohibition); *supra* text accompanying notes 298–303 (describing how the "tax" embedded in the Agricultural Adjustment Act of 1933, and invalidated in *Butler*, facilitated federal coercion of farmers to restrict or modify their intrastate agricultural activities in accordance with the act's regulations).

[465] *See Kahriger*, 345 U.S. at 29–31 (distinguishing the Court's authority to strike down penalty provisions for breaches of regulations concerning activities subject only to state regulation, on one hand, from the Court's obligation to defer to Congress's exercise of the taxing power when the exaction plainly relates to some "tax need," on the other); Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937) (distinguishing cases in which a statute "contains regulatory provisions related to a purported tax[,]" where the Court will recognize the exaction as a penalty to enforce the regulations, from cases where the tax "is not attended by . . . offensive regulation[s,]" in which case the Court will not inquire into the regulatory effects of, or motives for, the tax); *cf.* Steward Mach. Co. v. Davis, 301 U.S. 548, 591 (1937) (distinguishing credit against federal unemployment tax for employers contributing to state unemployment funds, which the Court found not to be unconstitutional coercion of the states, from the plainly coercive imposition of "a tax dependent upon the *conduct* of the taxpayers, or of the state in which they live, where the *conduct* to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national" (emphasis added)).

taxes. The Court has unequivocally stated that, when considering a constitutional challenge to such a measure, it need not and should not exercise the sort of judicial deference to congressional judgment that the Constitution's separation of federal powers requires in the case of a valid exercise of the taxing power.[466] Accordingly, when determining whether such a measure should be invalidated as an unconstitutional penalty, it is neither necessary nor appropriate to ignore the regulatory effects of the measure or the regulatory motives underlying it.[467]

Adopting this approach to potentially unconstitutional penalties does not threaten to constrict or infringe upon Congress's necessarily broad power to tax, because the heightened standard of review applies only in the narrow case where (1) the exaction relates to enforcement of some rule of conduct or behavior and (2) the conduct or behavior in question is outside Congress's constitutional power to regulate directly.[468] Applying this standard to suspected penalties on conduct would not undermine Congress's constitutional authority to choose which subjects to tax or the rates at which to tax them, even when those choices are driven by regulatory motives. Instead, it would permit the Supreme Court to review and invalidate exactions that are not taxes, in cases where Congress tries to manage or dictate citizens' behavior in ways that the Constitution does not permit. This approach would not prevent Congress from laying an excise on colored margarine, *à la McCray*, even at rates designed to restrict the manufacture or consumption of that product. Nor would it prevent Congress from laying an occupation tax on bookies, *à la Kahriger*, even if one impetus for that excise were to discourage wagering. However, if Congress attempted to force people either to engage in or to refrain from activities that it is not constitutionally empowered to control, this heightened standard of review would prevent Congress from imposing punitory monetary exactions on those who deviate from the desired course of conduct—regardless of whether those exactions were labeled "taxes." For example, in *Constantine*, while Congress had the power to lay an

466 *See* United States v. Constantine, 296 U.S. 287, 296 (1935) (stating that precedents establishing judicial deference to congressional exercises of the taxing power are inapplicable in cases where, "under the guise of a taxing act the purpose is to usurp the police powers of the State"); *see also* United States v. Butler, 297 U.S. 1, 68–69 (1936) (quoting *McCulloch* in support of the proposition that the Court has the duty to invalidate any attempt by Congress to attain the "prohibited end" of regulating beyond the scope of its other constitutional powers under the pretext of exerting the power to tax).

467 *See Constantine*, 296 U.S. at 296 (when exaction is suspect as an unconstitutional penalty, the motive for the exaction may be questioned); *see also Sonzinsky*, 300 U.S. at 514 (indicating that judicial inquiry into "the regulatory effect of a tax" or "the motives which moved Congress to impose it," while generally inappropriate, *would* be warranted whenever evaluating a purported taxing measure "attended by an offensive regulation").

468 *See, e.g.*, *Sonzinsky*, 300 U.S. at 514 (declining to strike down tax on noxious firearms on basis of tax's regulatory motives or effects, where taxing measure did not include, and was not enforcement mechanism for, regulations of behavior that were unrelated to facilitating collection of the revenue).

excise on liquor dealers generally, it did not have the power to impose an additional exorbitant exaction on liquor dealers who engaged in conduct that could have been prohibited only by the states.[469] By parity of reasoning, while Congress has the power to lay an excise on guns (or even just on guns that it does not like),[470] any exaction on the *act* of carrying a gun in a school zone should be constitutionally suspect.

In *NFIB*, the Court curiously regarded "going without insurance" not as conduct that might be penalized, but rather as "just another thing" that could be taxed—like gasoline or income.[471] It reached that odd and internally inconsistent[472] conclusion only after reading any "legal command to buy insurance" out of the individual mandate.[473] From there, the Court determined that the decided lawfulness of not having health insurance strongly militated against finding the shared responsibility payment to be a penalty.[474] It appears to have based that view on two precedents defining a "penalty" as a punishment for an unlawful act or omission.[475]

But does that mean that an exaction can never be a penalty unless the conduct that triggers the payment obligation is illegal? The short answer is "no." The definition to which the Court referred in *NFIB* traces back to a 1931 decision concerning whether a particular exaction functioned as a second penalty for the same crime, "in violation of the Double Jeopardy Clause."[476] That decision had nothing to do with any constitutional distinction between taxes and penalties, and the conception of what constituted a "penalty" in that case was accordingly far narrower than the conception that had guided the Court in the *Child Labor Tax Case*. The employment of children was legal at the time of the Child Labor Tax Law, but the Court nevertheless found the exaction to have been an unconstitutional regulatory penalty. Indeed, the very reason why Congress resorted to the

---

469 *See supra* text accompanying notes 290–91 (discussing holding in *Constantine*).

470 *See supra* text accompanying notes 322–31 (discussing holding in *Sonzinsky*).

471 NFIB v. Sebelius, 132 S. Ct. 2566, 2594 (2012).

472 To determine whether the shared responsibility payment is a tax or a penalty for constitutional purposes, the Court adopted the "functional approach" that it had used in the *Child Labor Tax Case*. *Id.* at 2595–96. However, as just noted above, in the *Child Labor Tax Case* itself, the Court indicated that it might not have been "permitted" to engage in the tax-vs.-penalty determination in the first place, if the "tax" in question had been an excise on a "thing of value" rather than an exaction triggered by "a departure from a . . . specified course of conduct." Child Labor Tax Case, 259 U.S. 20, 36 (1922). It is thus inconsistent to apply the tax-vs.-penalty analysis from the *Child Labor Tax Case*, on one hand, and to determine that forgoing the purchase of health insurance is a "thing" rather than an activity (or inactivity), on the other.

473 *NFIB*, 132 S. Ct. at 2593–94.

474 *Id.* at 2596–97; *see supra* text accompanying note 420 (discussing Court's reference to precedent suggesting that, if anything, a penalty is imposed on unlawful conduct).

475 *NFIB*, 132 S. Ct. at 2596–97 (citing United States v. Reorganized CF&I Fabricators of Utah, 518 U.S. 213, 224 (1996); United States v. La Franca, 282 U.S. 568, 572 (1931)).

476 Cushman, *supra* note 104, at 178.

imposition of a "tax" in that case is because the Court had previously held that the Commerce Clause did not then authorize Congress to criminalize child labor.[477] As the *Child Labor Tax Case* thus makes clear, the very paradigm of an unconstitutional regulatory penalty is a coercive exaction on legal behavior that Congress would like to make unlawful, but cannot.[478]

While plainly acknowledging that a purported tax's punitory or coercive characteristics could cause it to be a penalty for constitutional purposes, the Supreme Court declined to identify in *NFIB* "the precise point at which an exaction becomes so punitive that the taxing power does not authorize it."[479] The Court did not need to determine that boundary because it had found that "the shared responsibility payment's practical characteristics pass muster as a tax under [even the] narrowest interpretations of the taxing power."[480]

Unfortunately, the three characteristics on which the Court focused to determine that the shared responsibility payment "functions" as a tax cannot serve as a definitive test for establishing whether any potentially suspect future exaction is a tax or a penalty.[481] In particular, such a determination cannot possibly depend on the latter two of those characteristics—whether the exaction is triggered by scienter and whether it is collected by the IRS as opposed to another agency.[482] If those features were outcome-determinative, the test would not provide adequate protection against extraconstitutional congressional action because Congress could too easily take such features into account when disguising a penalty as a tax. A drafter with even the dullest pencil could fashion an exaction collected by the IRS that is not expressly predicated on a scienter requirement.[483] Accordingly, the Court acknowledged in a footnote in *NFIB* that those two factors are not dispositive: "We do not suggest that any exaction lacking a scienter

---

477 *Id.* at 178–79. For a discussion of *Hammer v. Dagenhart*, in which the Court struck down child labor regulations as beyond the scope of the commerce power, see *supra* text accompanying notes 116–18. For a discussion of *United States v. Darby*, which overruled *Dagenhart*, see *supra* text accompanying notes 128–30.

478 *See supra* text accompanying notes 268–69 (discussing Court's analysis in the *Child Labor Tax Case* that the Child Labor Tax Law had exhibited Congress's intent to accomplish through a penalty the same result as it had been prohibited in *Dagenhart* from obtaining by outlawing child labor). It is also worth noting that the penalties that the Court struck down in *Hill* and *Butler* had also been imposed on legal conduct. Within that line of cases, only *Constantine* involved a penalty on conduct that was unlawful.

479 *NFIB*, 132 S. Ct. at 2600.

480 *Id.*

481 *See supra* text accompanying notes 414–19 (discussing the Court's three-characteristic "functional" analysis of the shared responsibility payment).

482 *NFIB*, 132 S. Ct. at 2595–96 (identifying those factors from the *Child Labor Tax Case* and applying them to an analysis of the shared responsibility payment).

483 *See* Melone, *supra* note 9, at 1230 (noting that "a scienter requirement" and "the use of nontax enforcement powers" are "markers" that could be "easily avoided" by Congress when enacting an exaction).

requirement and enforced by the IRS is within the taxing power."[484] That leaves the first characteristic—whether the exaction inflicts an "exceedingly heavy burden"[485] upon those on whom it is imposed.

The Court did not explain exactly how great a particular imposition would have to be to constitute an "exceedingly heavy burden" and, standing alone, that phrase is open to differing interpretations.[486] However, the Court found that the shared responsibility payment does not impose such a burden because it usually will result in an exaction lower than the cost of the forgone health insurance and will never result in an exaction greater than the cost of such insurance.[487] This provides at least some guidance. First, by emphasizing that the shared responsibility payment could never exceed the cost of the health insurance that Congress intended people to purchase, the Court strongly implied that any exaction that were greater than the cost of complying with some congressionally specified course of conduct *would* impose an "exceedingly heavy burden" on those who did not so comply. In that case, any such exaction would necessarily constitute a penalty for noncompliance with what would effectively be a regulation of the conduct in question. Second, the Court also stressed that, because the shared responsibility payment will be less than the cost of health insurance for most people, "[i]t may often be a reasonable financial decision to make the payment rather than purchase insurance."[488] This suggests that—at least in the case of a "tax" that is imposed for failure to follow some rule of *economic* conduct—the exaction is not a penalty if an economic cost-benefit analysis determines that it would be financially worthwhile for the taxpayer to (1) break the rule that the exaction is intended to enforce and (2) pay the exaction instead.

Although *NFIB* identified several factors germane to the constitutional distinction between taxes and penalties, the only factor that actually seems to be dispositive is the degree of burden that the exaction imposes on those whose behavior triggers the obligation to pay. Constructing a test for distinguishing penalties from taxes thus consists in determining when an exaction for engaging in (or refraining from) a given course of conduct becomes burdensome enough to constitute a penalty.

---

484 *NFIB*, 132 S. Ct. at 2596 n.9; *see* Melone, *supra* note 9, at 1205 (discussing the aforementioned footnote and the Chief Justice's "admi[ssion]" that "the enlistment of the IRS as the enforcement agency and the lack of a scienter requirement do not, per se, qualify an exaction as a tax but are merely suggestive of this status").

485 *NFIB*, 132 S. Ct. at 2595.

486 *See* Melone, *supra* note 9, at 1207 (arguing that "the term 'exceedingly heavy burden' is an invitation to litigation because it is susceptible to various meanings").

487 *NFIB*, 132 S. Ct. at 2595–96.

488 *Id.* at 2596. The Court distinguished this "reasonable" choice from what it regarded as "the 'prohibitory' financial punishment in [the *Child Labor Tax Case*]." *Id.* However, as discussed below, although highly burdensome and obviously punitive, the Child Labor Tax Law was in fact not entirely "prohibitory." *See infra* note 510.

E. *The Cooter and Siegel "Effects Test" for Distinguishing Taxes from Penalties, and Certain Shortcomings of That Test*

Professors Robert Cooter and Neil Siegel have rightly observed that, because the Supreme Court has in recent years recognized certain limits on Congress's commerce power, and because the distinction between taxes and penalties has thus again become constitutionally significant, "[f]ederalism doctrine now requires a distinction between taxing and penalizing that it lacks."[489] To fill the void, Professors Cooter and Siegel have endeavored "to develop an *effects theory* of the tax power in order to distinguish a tax from a penalty" for constitutional purposes,[490] and their work has been an important and influential contribution to the topic. Unfortunately, however, their theory is ultimately insufficient for at least one of two reasons, depending on exactly how one interprets the test for penalties that they propose. On one reading, their test would deem an exaction to be a penalty only if the exaction's effects were more extreme than could ever actually be possible. In that case, no exaction would be a penalty. On another reading, the "effects" requirements for a penalty would be so indeterminate or imprecise that the test would not be useful in deciding any particular case. Moreover, on either reading, certain of their criteria for distinguishing penalties from taxes are incompatible with the Supreme Court's taxing-power jurisprudence.

Several commentators, including Cooter and Siegel themselves, have suggested that the Professors' theory may have influenced Chief Justice Roberts' taxing-power analysis in *NFIB*.[491] They contend, in particular, that two of the three functional characteristics of the shared responsibility payment on which the Court focused—the level of the exaction and whether there is a scienter requirement—mirror two of the characteristics that the Professors identify as material to whether an exaction is a tax or a penalty.[492] However, as noted above, the

---

[489] Cooter & Siegel, *supra* note 56, at 1219. Professors Cooter and Siegel distinguish the Court's current Commerce Clause jurisprudence—including the limits on the commerce power recognized in *Lopez* and *Morrison*, as well as the limit more recently recognized in *NFIB*—from that during the period between 1937 and 1994, when the Court did not enforce any limits on the commerce power. *See id.* at 1196–97, 1219. During that earlier period, the Court had no occasion "to rethink distinctions between taxes and penalties[,]" *id.* at 1197, but now "[t]he Court requires a viable theory of the tax power" that takes account of "the difference between taxes and regulations backed by penalties," and such theory must be "consistent with its limits on the commerce power." *Id.* at 1221.

[490] *Id.* at 1198 (emphasis in original).

[491] *See id.* at 1197, 1248. Although the final version of the Professors' article was published after the *NFIB* decision, an earlier version of their work appeared online prior to that decision. *See id.* at 1197 n.10. The Chief Justice's opinion does not cite the Professors' work, however.

[492] *Id.* at 1248. For a discussion of the Court's "functional" analysis of the shared responsibility payment, see *supra* text accompanying notes 414–19. The three characteristics that Cooter and Siegel identify as "the most important criteria for predicting whether [an exaction] is a tax or a penalty" are:

Court plainly acknowledged in *NFIB* that the presence or absence of a scienter argument is not dispositive.[493] Thus, the only element of the Professors' theory with an analog to the Court's actual tax-vs.-penalty analysis in *NFIB* is their focus on how great the amount of an exaction must be in order for that exaction to constitute a penalty rather than a tax.[494]

Cooter and Siegel assert that a tax on conduct "exacts a low cost relative to the gain from the assessed conduct."[495] Thus, they postulate that, while a tax may "dampen" the assessed conduct (i.e., reduce the amount of the activity in question), it does not *prevent* the conduct altogether. And, since at least some people will still engage in at least some level of the assessed conduct, the tax will produce revenue for the government.[496] In contrast, Cooter and Siegel assert that a penalty on conduct "exacts a high cost relative to the gain" from the assessed conduct.[497] In turn, they posit that, because a penalty imposes a cost higher than the gain, it prevents almost everyone from engaging in virtually any of the targeted conduct. And, given that the conduct that triggers the penalty is essentially stopped, the penalty does not produce revenue for the government.[498] In other words, Cooter and Siegel hold that "[a]n exaction produces revenues and operates as a tax if it dampens permitted conduct. Conduct is dampened when many people do less of it."[499] On the other hand, "an exaction raises little or no revenue and operates as a penalty if it prevents forbidden conduct. Conduct is prevented when few people do it."[500] From these hypotheses, Cooter and Siegel deduce the following "effects" test for determining whether an exaction on conduct is a tax or a penalty: If the exaction "has the effect of a penalty by preventing conduct, then it should be interpreted as a penalty. If it has the effect of a tax by dampening conduct and raising revenue, then it should be interpreted as a tax."[501]

> (1) Is the amount of the exaction so high that it exceeds the expected benefit from engaging in the assessed conduct for almost everyone? (2) Does the exaction's amount depend on whether the assessed individual has a certain mental state, especially the intention to perform the assessed conduct? (3) Does the amount of the exaction increase with repetition of the assessed conduct?

Cooter & Siegel, *supra* note 56, at 1230.

493 *See supra* text accompanying note 484.

494 There is no express mention of Cooter and Siegel's third characteristic—whether the exaction increases with repetition of the assessed conduct—either in *NFIB* or in any of the Court's prior taxing-power decisions.

495 Cooter & Siegel, *supra* note 56, at 1224.

496 *See id.*

497 *Id.* at 1223–24.

498 *Id.* at 1224.

499 *Id.* at 1225.

500 *Id.* at 1225–26.

501 *Id.* at 1226.

Applying their own test to the shared responsibility payment, Cooter and Siegel conclude that their theory "justifies" the Supreme Court's taxing-power decision in *NFIB*.[502] The amount of the payment will never exceed the cost of the health insurance that an individual decides not to obtain, and will often be less. Accordingly, many people will choose not to get insurance and "will make the shared responsibility payment" instead.[503] As a result, the payment will produce considerable revenue for the government.[504] Based on these features, Cooter and Siegel maintain that "the shared responsibility payment has all of the material characteristics of a tax, [and] it should work like a tax by dampening (but not preventing) behavior and thereby raising revenues from the uninsured."[505] On their view, "[b]ecause the predicted effect of the [shared responsibility payment] is to dampen uninsured behavior, not to prevent it, it is a *tax equivalent* for purposes of Congress's tax power."[506]

However, the mere fact that Cooter and Siegel agree with the Court's conclusion does not mean their theory presents a viable rule of general application that the Court either endorsed in *NFIB* or would adopt in future cases. The essence of their theory is that "[t]he test of whether an exaction is a tax or a penalty is whether it dampens or prevents conduct."[507] As it turns out, that test is neither workable nor consistent with Supreme Court precedent.

Cooter and Siegel do not identify the line between "dampening" and "preventing" conduct, nor do they propose a plausible rule for determining where that line exists in any particular case. By just how much must the exaction reduce occurrences of the conduct in question in order for the conduct to have been "prevented" rather than merely "dampened?" Cooter and Siegel say that "[a] penalty prevents almost everyone from engaging in the forbidden conduct."[508] Does that mean the exaction must prevent *all* (or "almost" all) of the targeted conduct in order for it to be a penalty? If so, then the test is untenable. After all, not even the death penalty prevents all of the conduct to which it applies. Certainly, no monetary penalty can realistically be expected to stop *all* of any particular kind of conduct. If absolute prevention is an absolute requirement, then no exaction will ever be a penalty.

Perhaps Cooter and Siegel are not arguing for such an extreme standard, but in that case their test is hopelessly unclear. If the line between dampening

---

502 *Id.* at 1248.

503 *Id.* at 1246 (noting the Congressional Budget Office's conclusion that four million people will pay the shared responsibility payment).

504 *See id.* at 1248–50 (applying Cooter and Siegel's material characteristics test to the shared responsibility payment and comparing the outcome with the Court's tax-vs.-penalty analysis in *NFIB*).

505 *Id.* at 1242.

506 *Id.* at 1247 (emphasis in original).

507 *Id.* at 1229–30.

508 *Id.* at 1223.

and preventing conduct falls somewhere short of complete prevention, there has to be some coherent rule for how and where to draw that line. Cooter and Siegel say that "[a]n exaction that dampens conduct raises significant revenues, and an exaction that prevents conduct does not raise significant revenues."[509] But that leads merely to a reshaping of, rather than an answer to, the question of where the boundary lies. What is the formula or criterion for determining whether the amount of revenue raised by a given measure is "significant" or "insignificant?" Cooter and Siegel do not provide one. Beyond summarily announcing these vague categories, they fail to offer any guiding principle for applying their prevention-vs.-dampening test to future exactions.

Moreover, even if there were a practicable way to apply such a test, the Supreme Court has repeatedly signaled that the constitutional distinction between a tax and a penalty does not rest on the degree to which the exaction deters the targeted conduct. In prior taxing-power decisions, the Court has indicated that an exaction need not prevent all conduct to be a penalty.[510] Conversely, the Court has also stated that an exaction is not necessarily a penalty just because it prevents conduct.[511] In addition, the Court has plainly eschewed any distinction between "significant" and "insignificant" revenue as a dispositive factor in a tax-vs.-penalty analysis. On one hand, the Court has repeatedly upheld facially valid taxes even where the funds raised for the government were "obviously negligible."[512] On the other, the Court has recognized that "civil penalties . . . generate

---

[509] *Id.* at 1230.

[510] For example, the unconstitutional penalty in the *Child Labor Tax Case* did not prevent all child labor. As Professor Thomas Reed Powell pointed out in his contemporary analysis of that case, the Child Labor Tax Law "was not completely prohibitive . . . as some concerns might prefer to pay an added ten per cent of their profits rather than to deny to children the opportunity to aid in supporting themselves and their family." Cushman, *supra* note 104, at 182 (internal quotation marks omitted) (quoting Powell, *Child Labor*, *supra* note 261, at 71). Indeed, as Powell observed, one of the taxpayers challenging the constitutionality of the measure had paid the tax before bringing a refund claim. *Id.* (citing Powell, *Child Labor*, *supra* note 261, at 71). Similarly, in *Butler*, the Court made clear that a regulatory measure need not prevent all of the targeted conduct in order to constitute unconstitutional coercion. *See supra* note 309 (discussing Court's finding in *Butler* that regulations within the Agricultural Adjustment Act of 1933, facilitated by the "tax" at issue in that case, were unconstitutionally coercive, even though not perfectly successful at causing all farmers to act as the regulations intended).

[511] *See* United States v. Sanchez, 340 U.S. 42, 44 (1950) (proclaiming that "a tax does not cease to be valid merely because it regulates, discourages, *or even definitely deters* the activities taxed") (emphasis added); Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937) (tax on noxious firearms upheld despite its "prohibitive" effects); McCray v. United States, 195 U.S. 27, 59 (1904) (whether tax on colored oleomargarine was constitutionally sustainable did not turn on whether it would "destroy or restrict the manufacture of" that product).

[512] *Sanchez*, 340 U.S. at 44; *see, e.g.*, *Sonzinsky*, 300 U.S. at 513 (tax on noxious firearms upheld as revenue measure even though, due to its "prohibitive" effects, it produced only nominal revenue); *see also supra* text accompanying notes 227, 234 (describing nominal amount of revenue raised by narcotics tax upheld in *Doremus*).

government revenues," just like taxes do.[513] Thus, adopting the Cooter and Siegel "effects" test would require the Court to depart from much of its taxing-power precedent—something it is unlikely to do.

VI. A CLEAR AND CONCISE RULE FOR IDENTIFYING UNCONSTITUTIONAL REGULATORY PENALTIES

Because of the practical difficulties in applying Cooter and Siegel's test, and because their theory deviates from Supreme Court precedent, we must construct an alternative test for distinguishing valid exercises of the taxing power from unconstitutional regulatory penalties. The test must be clear and must provide a dispositive answer when applied to any future constitutionally suspect exaction. Crucially, it must also align with the Court's taxing-power decisions to date. And, of course, as with any rule of law or legal analysis—the simpler, the better.

A. The Rule that Applies in the Case of Exactions on Economic Conduct

The starting point should be with the Supreme Court's most recent pronouncement on the tax-vs.-penalty distinction. In *NFIB*, the Court declined to identify "the precise point at which an exaction becomes" a penalty.[514] Nonetheless, we can identify a logical tipping point from tax to penalty by considering why the Court found the shared responsibility payment *not* to be a penalty. The Court based its finding on the fact that an individual's shared responsibility payment cannot exceed the cost of the health insurance that he or she failed to obtain and, for most people, will be "far less" than the cost of such insurance.[515] From this, we can glean two criteria for determining whether a federal "tax" on one who fails to comply with some rule of conduct is really (i) a valid exercise of Congress's taxing power or instead (ii) a penalty imposed to enforce a regulation of conduct embedded in the purported revenue measure.[516] First and foremost, we can infer that, if an exaction is greater—for at least some taxpayers[517]—than the cost of complying with the rule of conduct (including the opportunity cost of

---

[513] Dep't of Rev. of Mont. v. Kurth Ranch, 511 U.S. 767, 778 (1994)); *see* Cushman, *supra* note 104, at 155 (noting Eleventh Circuit's citation of *Kurth Ranch*, in ACA litigation, for proposition that "in our world of less than perfect compliance, penalties generate revenue just as surely as taxes").

[514] NFIB v. Sebelius, 132 S. Ct. 2566, 2600 (2012).

[515] *Id.* at 2595–96.

[516] For additional discussion of how these criteria may be deduced from the *NFIB* decision, see *supra* Part V.D.

[517] For example, the penalty at issue in the *Child Labor Tax Case* would not have exceeded the net profit derived from the employment of children in all cases, but it could have greatly exceeded such profit as applied to at least some taxpayers. *See supra* note 415 (discussing potential effects of Child Labor Tax Law as applied to different taxpayers).

any forgone economic gain that could have resulted from noncompliance with the rule),[518] then the exaction is *necessarily* a penalty. Second, if the amount of an exaction, relative to the expected gain from not complying with the rule, makes it financially sensible for at least some taxpayers to pay the exaction and deviate from the prescribed conduct, then the exaction is a tax.[519]

The first criterion is clear-cut: If an exaction exceeds the cost of complying with a related rule of conduct—or exceeds the gain to be expected from not complying with that rule—by *any* amount, then it is a penalty. But does the second criterion mean that, if the expected gain from noncompliance with the rule exceeds the amount of the exaction by even a *de minimis* amount, then the exaction must be a tax? Obviously, the answer has to be "no." Otherwise, the test for regulatory penalties would be wholly ineffective at curbing extraconstitutional regulation because Congress could too easily draft around it. If that had been the test at the time, for example, Congress could have rewritten the Child Labor Tax Law to become a tax rather than a penalty simply by providing that the exaction would never exceed 99% of the profit derived specifically from child labor—even though the revised exaction would likely have remained equally effective at coercing employers to comply with the then-unconstitutional regulation against employing children.

The *NFIB* decision makes it clear that, in order for an exaction triggered by a departure from some rule of conduct *not* to be a penalty, the gain to be expected by departing from the rule must exceed the amount of the exaction by some significant amount. After all, the shared responsibility payment is not merely less than the cost of health insurance in most cases—it is "*far* less."[520] In evaluating the potential effects of that exaction, the Court noted, in particular, two hypothetical taxpayers for whom the amount saved by not paying health insurance premiums would exceed their shared responsibility payment by either 100% or approximately 567%, respectively.[521] The lower of those percentages

518 The cost of complying with the regulation against employing children embedded in the Child Labor Tax Law, for example, would have included forgoing profits that could have been generated by the labor of the children whom the taxpayer would otherwise have employed.

519 For example, for some taxpayers, the shared responsibility payment is exactly the same as the cost of qualifying health insurance would be. However, for most taxpayers who opt not to purchase such health insurance, the savings resulting from not paying the premiums will be significantly greater than the amount of their shared responsibility payment. *See supra* note 416 and accompanying text*; see also supra* text accompanying notes 55–72 (describing the formula for determining the amount of an individual's shared responsibility payment, and noting that the amount of the payment is always capped at the cost of premiums for the health insurance that the individual failed to obtain).

520 *NFIB*, 132 S. Ct. at 2595 (emphasis added).

521 *See supra* note 416 (discussing Court's findings as to relative costs for different taxpayers). For the hypothetical taxpayer with an annual income of $100,000 for 2016, his $400-per-month insurance premiums would be twice as great (or 100% greater) than his $200-per-month shared responsibility payment. For the hypothetical taxpayer with an annual income of $35,000 for 2016,

sets a reasonable boundary between exactions that are or are not punitive—at least in the case of exactions triggered by some rule of *economic* conduct that Congress has no authority (independent of the taxing power) to impose. If the gain to be expected by departing from some course of economic conduct prescribed in a purported revenue measure is at least *twice* the amount of the "tax" imposed on those who so depart, then it is plainly rational for a taxpayer to choose to garner the gain and pay the tax. In such a case, the amount of the exaction cannot be said to be punitory. On the other hand, if the amount of the "tax" is more than *half* the amount of the gain to be had by deviating from the prescribed conduct, then the cost-benefit analysis becomes somewhat murkier. It seems far less obvious that a taxpayer should deviate from the conduct prescribed in a "revenue measure" when the resulting "tax" would expropriate more than half of any potential gain. If the exaction wipes out more than half of the gain, it crosses the line from taxing that gain (or the activity that gave rise to it) to punishing the taxpayer for violating the regulation of conduct embedded in the statute. Any such exaction should thus be deemed a regulatory penalty, and not a tax.

Of course, the issue will arise in this particular context only if the Court is faced in the future with an exaction that enforces a regulation on economic conduct when the regulation itself is not within the scope of Congress's commerce power. Assume, for example, that an unmarried individual's cost of buying broccoli for dinner twice a week for a year would be $200. If Congress were to impose an annual "tax" of $100 or less on unmarried individuals who choose not to purchase broccoli, the exaction would indeed be a tax under the above-proposed rule. However, if the exaction were more than $100, then it would be an unconstitutional penalty. Because the Court's interpretation of the Commerce Clause still permits congressional regulation of virtually all economic activity (other than the choice not to engage in commerce in the first place), it is unlikely that the Court will have occasion to engage in a tax-vs.-penalty analysis of future exactions on economic conduct. If it ever does, however, the Court should apply the rule above to thwart any attempt by Congress to end-run the limits of its commerce power. After all, if Congress were ever to pursue the ridiculous policy of coercing the purchase of broccoli by imposing a "tax" of more than half the amount to be saved by doing without the cruciferous plant, the Justices would presumably recognize what was happening to the taxpayer as surely as they know pornography when they see it.[522]

---

his $400-per-month insurance premiums would be approximately 5.67 times (or 567%) greater than his $60-per-month shared responsibility payment. *See NFIB*, 132 S. Ct. at 2596 n.8 (outlining costs for these hypothetical taxpayers).

522 In perhaps one of the most oft-quoted Court snippets of the modern era, Justice Potter Stewart famously mused that, while unable to define "pornography" precisely, "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

B. The Rule that Applies in the Case of Exactions on Noneconomic Conduct

Given that the commerce power still does not extend generally to the regulation of noneconomic behavior, the more likely scenario is that the Court will someday be faced with an exaction that enforces a regulation on *non*economic conduct when the regulation itself is beyond the scope of Congress's enumerated powers. Therefore, the more important question is how to determine whether a "tax" is really a penalty when it is triggered by the taxpayer's failure to conform to some course of noneconomic conduct that is prescribed in the purported "revenue measure."

The rule proposed above, suggested by the Court's review of the shared responsibility payment in *NFIB*, essentially rests on an economic cost-benefit analysis. The challenge, though, is how to apply that cost-benefit analysis to an exaction imposed on *non*economic conduct. Even the first criterion—whereby the exaction is necessarily a penalty if exceeds the cost of complying with a related rule of conduct by *any* amount—becomes harder to apply when the conduct in question is not economic in nature. The difficulty stems from the fact that, when conduct is undertaken for some reason other than economic gain, it is impossible to quantify the amount or degree by which an exaction on that conduct decreases the benefit of engaging in the conduct.

For example, how high would a "tax" on possession of a gun in a school zone have to be in order to eliminate the perceived benefit of carrying the gun? One student commentator has suggested that a $695 tax would "almost certainly . . . exceed[] the expected benefit of possessing a gun near a school, unless perhaps one is a school security guard."[523] That suggestion is notably lower than the $25,000 exaction that Cooter and Siegel suggest would constitute a penalty for gun possession in a school zone.[524] What both suggestions have in common, of course, is that each is entirely without basis. Assuming, *arguendo*, that a person seeks to carry a gun to school for protection against bodily harm, on what ground can we possibly conclude that such protection is worth less to the person than $695 (or, for that matter, less than $25,000)? The precise amount that an exaction would have to be in order to exceed the benefit of carrying the gun is impossible to pinpoint because the benefit itself, if any, cannot be measured or expressed in monetary terms.

There are no principled grounds for determining whether $695 or $25,000 (or some other specific amount higher or lower or in between) is the minimum amount of an exaction that would constitute a penalty, rather than a tax, on gun possession near a school. At the same time, the Commerce Clause does not permit Congress to regulate that activity. Therefore, there is only one

---

523 Sidhu, *supra* note 183, at 136–37.

524 *See* Cooter & Siegel, *supra* note 56, at 1234.

way to prevent Congress from invoking its taxing power as a pretext for circumventing the limits of its commerce power in such a case: Literally any congressional exaction triggered by carrying a gun in a school zone must be pronounced an unconstitutional penalty on that conduct.

Of course, one might object that such an absolute rule could, in theory, result in striking down even exactions so modest that they do not intuitively seem punitive. To this, there are at least two responses. First, in the case of any "tax" triggered by noneconomic conduct, there should be a particular suspicion that the intent of the measure is to punish the conduct rather than to raise revenue. Taxes on noneconomic activity are a comparatively less sensible (and, thus, inherently more suspect) way to raise revenue because the activity being taxed does not generate any funds with which to pay the tax. Second, because any such exaction would therefore likely be an attempt to effect an unconstitutional regulation of noneconomic conduct through a penalty disguised as a tax, Congress would likely set the exaction at an amount intended to achieve the change in conduct it desires. Thus, the question of how to deal with modest or *de minimis* exactions on noneconomic conduct is unlikely to arise as a practical matter.

Noneconomic behavior, by its very nature, does not produce an economic benefit. Therefore, there is only one possible conclusion to be drawn from the economic cost-benefit analysis, suggested by *NFIB*, of any "tax" triggered by a failure to follow some particular course of noneconomic conduct. The amount of the "tax" will always exceed the economic gain to be had by departing from the specified course of conduct, because the amount of the gain will always be zero. Accordingly, there is only one possible rule for distinguishing taxes from monetary penalties on noneconomic conduct that is not completely arbitrary: If Congress imposes an exaction styled as a "tax" on those who deviate from some course of *non*economic conduct prescribed in the purported "revenue measure," and if no enumerated constitutional power supports direct congressional regulation of such conduct, then the so-called "tax" must *always* be invalidated as a penalty that effectuates or enforces the unconstitutional regulation—regardless of the exaction's amount.

VII. CONCLUSION

This Article develops a bright-line rule for determining whether a federal exaction imposed on conduct (as opposed to some "thing" of value) is a tax or a penalty in the suspect case where Congress has no constitutional authority to penalize the conduct. The rule derives from an economic cost-benefit analysis that the Supreme Court applied both in *NFIB* and prior taxing-power decisions in which the tax-vs.-penalty distinction was relevant.

Such a rule is necessary because, even if styled as a revenue measure, a congressional exaction may nevertheless be a penalty outside the scope of the taxing power if it punishes or coerces certain behavior of the taxpayer on whom it is imposed. In particular, there are grounds for concern that the *NFIB* decision might embolden a future Congress to try to enact penalties masquerading as taxes on behavior—especially noneconomic behavior—that Congress cannot regulate directly under its commerce power. Any such attempt would compromise important interests promoted by our federalist system, including the interests of subnational communities in being governed in accordance with their own policy preferences on matters of local (rather than truly national) import. To protect against such potential congressional overreach, there must be a clear, dispositive test for identifying unconstitutional penalties on conduct as such.

In any future case of constitutionally suspect exactions on *economic* conduct, the rule proposed in this Article provides that a supposed "tax" is instead a penalty whenever the exaction is more than one-half as much as the expected economic gain from noncompliance with the rule of conduct embedded in the purported revenue measure. In the more likely future case of a constitutionally suspect federal exaction on *noneconomic* conduct, the expected economic gain from noncompliance with the embedded rule of conduct will be, by definition, zero. Accordingly, under the rule proposed herein, *any* federal exaction on noneconomic conduct is a penalty rather than a tax—and is thus constitutionally invalid—unless an Article I, Section 8 power other than the taxing power authorizes Congress to penalize the conduct in question.

By applying the Article's proposed rule in any future case in which Congress may enact a "tax" to regulate conduct beyond its constitutional reach, the Court would be able to protect important principles of federalism. At the same time, because there is indeed a constitutional distinction between taxes and penalties—as the Court has long recognized—applying this rule to tell the one from the other would in no way constrict or infringe upon the obvious and necessary breadth of Congress's taxing power to enact legitimate revenue measures. If the rule were adopted, Congress would be unhampered in tending to the nation's finances. Congress would simply be precluded from exercising plenary police power under the guise of laying a tax. And best of all, we would never have to worry about eating our broccoli ever again.