THE PUNDITS DOPTH PROTEST TOO MUCH:  
NATIONAL FEDERATION OF INDEPENDENT  
BUSINESS V. SEBELIUS AND THE FUTURE OF THE  
TAXING POWER  

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This is a hard case—and we all know where hard cases can take a judge.  

INTRODUCTION  

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act, a broad and controversial piece of legisla-
tion that enacted sweeping changes to the health care industry. The Act, 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. Perhaps the most contentious provision in the legislation is the so-called individual mandate—the requirement, upon pain of financial penalty, that individuals obtain health insurance coverage. On June 28, 2012, the Supreme Court, in *National Federation of Independent Business v. Sebelius*, upheld the constitutionality of the individual mandate. The Court held that the imposition of the individual mandate was impermissible under the commerce power but that the imposition of the mandate was a proper exercise of Congress’s taxing power.

Chief Justice Roberts, writing for the majority of a divided Court on both the Commerce Clause and taxing powers issues, was portrayed simultaneously as statesmanlike and Machiavellian by supporters and detractors of the decision, respectively. The challenge to the individual mandate en-

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3. For a succinct discussion of the scope of the legislation, see *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1248-49 (11th Cir. 2011). According to a Treasury Inspector General report, this legislation “represents the largest set of tax law changes in more than 20 years.” *TREASURY INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2012-43-064, AFFORDABLE CARE ACT: PLANNING EFFORTS FOR THE TAX PROVISIONS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT APPEAR ADEQUATE; HOWEVER, THE RESOURCE ESTIMATION PROCESS NEEDS IMPROVEMENT 1 (2012).*


5. *Id.* at 2593, 2600. Seven Justices also held that the statute’s expansion of Medicaid was impermissibly coercive to the states and held that states could opt to decline to expand Medicaid eligibility without the loss of federal funds provided under existing programs. See *id.* at 2606-07; see also infra note 6 and accompanying text. A discussion of this issue is beyond the scope of this work. A related provision that prohibits a state from restricting existing Medicaid eligibility requirements prior to the establishment of its state exchange was not at issue in this case. See *Patient Protection and Affordable Care Act § 2001(b).* However, Maine has asserted that the Court’s holding has the result of striking down this related provision. See Christopher Weaver, *State Moves to Strike Patients From Medicaid*, WALL St. J., Aug. 2, 2012, at A2.

6. *Sebelius*, 132 S. Ct. at 2577. The Court unanimously held that the Anti-Injunction Act did not apply to the individual mandate. *Id.* at 2577; *id.* at 2609 (Ginsburg, J., dissenting in part); *id.* at 2655-56 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). Justices Ginsburg, Sotomayor, Breyer, and Kagan dissented from the majority’s holding that the individual mandate was unconstitutional under the Commerce Clause. *Sebelius*, 132 S. Ct. at 2609 (Ginsburg, J., dissenting in part). Justices Ginsburg and Sotomayor dissented from the majority’s holding that the statute’s Medicaid expansion provisions were unconstitutional. *Id.*

gendered the most sustained press scrutiny of a Supreme Court case, oral arguments included, than any case in this author’s memory. Most observers of the litigation focused their attention on whether Congress’s power to regulate interstate commerce extended to the power to compel a person to acquire a good or service. The fact that the taxing power ultimately was held to support the mandate came as quite a surprise to many, particularly since the Obama Administration steadfastly denied that the individual mandate was a tax.8 To proponents of a limited federal government, the relief that the Court limited the reach of the Commerce Clause gave way to the fear that the taxing power will now serve as cover for virtually limitless federal intrusion into the lives of Americans.

Part I of this Article provides a detailed analysis of the individual mandate. The Congressional Budget Office has estimated that approximately four million individuals will be liable for the mandate, which goes into effect on January 1, 2014.9 The amount of liability that a particular individual will incur depends upon that individual’s income, family status, and the national average cost of a statutorily defined level of insurance coverage.10 For many individuals the penalty due will be a flat amount, and for others the amount due will be determined as a percentage of income. In no event, however, will the penalty exceed the national average cost of coverage.11

Part II analyzes and critiques the Court’s decisions with respect to the taxing power issues and the Court’s holding that the Anti-Injunction Act, a threshold issue, was inapplicable in this case. The majority held, over a vigorous dissent, that the individual mandate was not a penalty but a tax.12 A determination by the Court that the mandate is a penalty would have removed the taxing power as an independent pillar of support for the exaction. The Court made clear that Congress may tax inaction and distinguished the taxing and commerce powers.13 However, the Court’s reasoning in this respect failed to provide principled guidance for the classification of future exactions of this sort.14 The Court also held that the individual mandate is not a direct tax that must be apportioned among the states.15 The Court’s attention to this issue was laconic and, similar to its resolution of the penalty versus tax issue, left many questions unanswered.16

9. See infra text accompanying note 79.
10. See I.R.C. § 5000A(c) (CCH 2012).
11. See infra note 27 and accompanying text.
12. See infra text accompanying notes 74–94.
13. See infra text accompanying notes 93–97, 103–04.
15. See infra text accompanying notes 98–100.
Part III takes exception, for several reasons, to the notion that this case has opened the door to unfettered federal taxing authority that will tempt Congress to tax what it cannot regulate. The taxing power has been wielded often in an intrusive manner. Whether the extension of such power to the taxation of inactivity is more objectionable than other actions that have been taken regularly under this power is questionable. Congress, without much controversy, could have achieved the individual mandate’s objective through alternative means.17 Assertions that such alternative means come with more political accountability are dubious.18 In fact, exactions in the form of the mandate are highly transparent and efficient.

The Court, however, did not recast the mandate in another form and examined it for what it is—a tax imposed on the failure to act in a prescribed manner. As a result, future attempts by Congress to impose similar exactions will face several barriers. In comparison to the common forms taken by behavior-altering tax provisions, the transparency of exactions in this form will make such exactions more susceptible to traditional constitutional challenges.19 More importantly, despite upholding the mandate, the Court awoke long somnolent precedent. The penalty or tax issue has been resurrected and, given the Court’s less than satisfactory analysis of this issue, it is likely that particularly intrusive future enactments will be challenged as impermissible penalties.20 Finally, whether a tax is a direct tax, an issue that prior to this case was perceived to be more of a curiosity than a limiting principle, is a question that may be put to exactions that result from Congress’s overaggressive use of its new-found power.21

I. THE INDIVIDUAL MANDATE

The Patient Protection and Affordable Care Act added § 5000A to the Internal Revenue Code.22 The statute requires that an applicable individual maintain minimum essential coverage for such individual and any depend-
ents who are also applicable individuals each month beginning after 2013. Failure to meet this requirement for one or more months results in the imposition of a shared responsibility payment. The statute terms the shared responsibility payment a penalty to be included with a taxpayer's income tax return for the taxable year that includes the month that such failure occurred. The requirement to maintain minimum essential coverage is variously met through, among other means, Medicare or Medicaid coverage, individual insurance policies, or eligible employer-sponsored group health plans or insurance coverage.

The amount of the penalty due for a taxable year is the lesser of the sum of the monthly penalty amounts or the amount of the national average insurance premiums for a particular level of coverage for the applicable family size involved offered through insurance Exchanges. The monthly

23. I.R.C. § 5000A(a). An applicable individual is an individual other than an individual who qualifies for statutorily defined religious conscience or health ministry exemptions, is not a citizen or national of the United States or a legal alien present in the United States, or is incarcerated. Id. § 5000A(d). Individuals whose required contribution exceeds 8% of household income, individuals with very low income, and members of Indian tribes are not subject to the penalty. Id. § 5000A(e)(1)-(3). There appears to be no practical distinction between an exemption from the mandate itself and an exemption from the penalty for the failure to comply with the mandate. Id. However, the dissenting Justices thought that the existence of a separate set of exemptions from the mandate and the penalty for failure to comply with the mandate evidenced that the shared responsibility payment is a penalty and not a tax. See infra text accompanying note 82.

24. I.R.C. § 5000A(b)(1). No penalty is imposed for gaps in coverage of less than three months. Id. § 5000A(e)(4).

25. Id. § 5000A(b)(1)-(2). If the failure to maintain minimum essential coverage relates to a dependent of the taxpayer then the penalty is imposed upon the taxpayer. Id. If the individual upon whom the penalty is imposed files a joint tax return, then both spouses are jointly liable for the penalty. Id. § 5000A(b)(3)(A)-(B). The penalty is assessed and collected in the same manner as other assessable penalties, but neither criminal penalties may be imposed nor criminal prosecution undertaken for failure to pay the penalty. Moreover, liens and levies to collect unpaid penalties are prohibited. Id. § 5000A(g).

26. Id. § 5000A(f). The minimum essential coverage requirement will be met by the coverage offered by typical employer-provided group plan coverage and individual insurance policies. Id. Policies that will not be deemed to provide minimum essential coverage are those whose medical coverage is secondary to the primary purpose of the policy, such as auto insurance policies, credit insurance policies, and workers' compensation coverage. Id. Also, policies whose coverage is limited to medical treatment received at on-site medical clinics or for specific illnesses or diseases will also not qualify as minimum essential coverage. See id. § 5000A(f)(3); 42 U.S.C. § 300gg-91(c) (2006).

27. I.R.C. § 5000A(c)(1). The national average premium is determined for plans that provide a "bronze" level of coverage, a level of coverage that is designed to provide benefits that are actuarially equivalent to sixty percent of the full actuarial value of statutorily enumerated benefits. Id.; 42 U.S.C. § 18022(b), (d) (2010); see infra note 36 and accompanying text for a brief description of insurance Exchanges. The use of the national average premium rather than state average premiums avoids the possibility that the shared responsibility payment violates the uniformity requirement for taxes that are not direct taxes. See infra notes 234–36 and accompanying text.
penalty amount is one-twelfth of the greater of a flat dollar amount or a percentage of income. The flat dollar amount is $95 per individual failure in 2014, increasing to $325 per individual failure in 2015, and then settling at $695 per individual failure thereafter. The flat dollar amount for individuals under the age of eighteen is one-half of the above amounts. The total flat dollar amount penalty cannot exceed 300% of the individual amounts. For example, assume that a family of six failed to maintain minimum essential coverage for all of 2014. The family consists of four members over the age of seventeen and two members under the age of eighteen. The flat dollar amount is $475. However, the flat dollar amount cannot exceed 300% of $95. Therefore, the flat dollar amount penalty that would be imposed on this family is $285.

The tax base for the percentage of income penalty amount is the taxpayer’s household income in excess of the amount of gross income that is necessary to impose a duty on the taxpayer to file an income tax return. The penalty is equal to 1% of the tax base in 2014, 2% of the tax base in 2015, and 2.5% of the tax base thereafter. Refer to the example described above with respect to the family of six that failed to maintain minimum essential coverage during the entire 2014 calendar year. The flat dollar amount penalty for such family is $285. Assume that the family’s tax base for purposes of the penalty is $75,000. The penalty for 2014, under the percentage of income method, is $750. Because this amount is greater than the flat dollar amount, this figure is compared to the average national cost of coverage for a family of six offered through an insurance Exchange, and the lesser of the two amounts is the penalty for the taxable year. It is likely

29. Id. § 5000A(c)(2)(A), (c)(3)(A)-(B). However, this figure is adjusted annually for cost of living increases beginning in 2017. Id. § 5000A(c)(3)(D).
30. Id. § 5000A(c)(3)(C).
31. Id. § 5000A(c)(2)(A)(ii). This limitation is determined without regard to the reduced applicable amount for individuals under the age of eighteen. Id.; see also supra text accompanying note 30.
32. (4*$95) + (2*47.50).
33. I.R.C. §§ 5000A(c)(2)(B), 6012(a)(1). For this purpose, household income is the modified adjusted gross income of the taxpayer and all dependents that are required to file a tax return for the year in question. Id. § 5000A(c)(4)(B). Modified adjusted gross income is adjusted gross income increased by certain foreign income and tax-exempt interest. Id. § 5000A(c)(4)(C).
34. Id. § 5000A(c)(2)(B).
35. ($75,000*.01). For 2014, the penalty under the percentage of income method is 1% of the statutory tax base. See supra text accompanying note 34.
36. The Patient Protection and Affordable Care Act segments the health insurance market into four markets: the individual market; two employer provided group insurance markets, the small and large group market, based on the size of the employer; and the Exchanges. See Patient Protection and Affordable Care Act, §§1304, 1312, 124 Stat. 171, 182 (2010) (codified at 42 U.S.C. §§ 18024, 18032 (Supp. 2010)). Each state must create and
that the penalty will be determined by a percentage of income for families of moderate to moderately high income. Lower income families will likely be subject to a flat dollar amount penalty. 37 High income families will likely find themselves subject to a penalty that is based on the cost of insurance coverage and, depending on their household income, incur the maximum penalty for failure to obtain insurance for a portion of the year. 38

operate, by January 1, 2014, an Exchange that offers insurance for purchase by individuals and employees of small employers. Id. § 1311(b). After 2017, states have the option of allowing large employers to participate in the Exchanges. Id. § 1312(f)(2)(B). The Exchanges are intended to function as insurance marketplaces in which individuals have the ability to comparison shop for insurance products. Qualified employers may also purchase group plans through the Exchanges. Id. § 1311(d)(2). The federal government will provide funding to states to establish the Exchanges until January 1, 2015. Id. § 1311(d)(5)(A). Under certain circumstances, a state may participate in a multi-state regional Exchange or establish subsidiary Exchanges to operate within a state. Id. § 1311(f). A state may opt out of creating and operating an Exchange in which case the Exchange will be established by the federal government. Id. § 1321(c). Some federal and state officials believe that Exchanges in approximately one-half of the states will be federally assisted. See Robert Pear, U.S. Officials Brace for Huge Task of Operating Health Exchanges, N.Y. TIMES, Aug. 5, 2012, at A17, available at http://www.nytimes.com/2012/08/05/us/us-officials-brace-for-huge-task-of-running-health-exchanges.html?pagewanted=all&_r=0. Moreover, not everyone believes that the process of establishing and implementing the Exchanges will proceed smoothly. See id.; Editorial, 'Exchange’ for the Worst, WALL ST. J., July 31, 2012, at A12, available at http://online.wsj.com/article/SB10001424052702303567704577516652566742514.html.

Federal tax credits are provided to individuals and families whose income is below a certain threshold, who do not obtain insurance through their employer, and who purchase insurance through an exchange. I.R.C. § 36B. Section 36B appears to limit the tax credit to taxpayers who are enrolled in state Exchanges. See id. § 36B(b)(2). However, regulations were issued recently that would allow participants in federally assisted Exchanges also to qualify for the credit. See Treas. Reg. § 1.36B-1(k) (2012) (defining Exchange by reference to Public Welfare, 45 C.F.R. § 155.20 (2010)); id. § 1.36B-2(a) (providing eligibility for credit by enrollment in an Exchange); 45 C.F.R. § 155.20 (stating that the term Exchange refers to State Exchanges, regional Exchanges, subsidiary Exchanges, and a Federally-facilitated Exchange) (emphasis added). These regulations have come under attack. See Louise Radnofsky, Health Law Opponents Challenge Tax Credit, WALL ST. J., July 17, 2012, at A7, available at http://online.wsj.com/article/SB100014240527023039337045775132716343114572.html. Two commentators have asserted that the statute’s omission of enrollment in federal exchanges as a condition for the tax credit was intentional. See Jonathan H. Adler & Michael F. Cannon, Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA (Case Research Paper Series in Legal Studies, Working Paper 2012-27, 2012), available at http://ssrn.com/abstract=2106789.

37. Very low income families are exempted from the penalty. See discussion supra note 23.

38. For example, a taxpayer with household income of $6,000,000 who chooses to self-insure for an entire year would incur a penalty, based on a percentage of income, of $60,000 in 2014. It is unlikely that the national average cost of insurance would exceed this amount. Moreover, high income households may very well find themselves subject to the maximum penalty within months and, therefore, will incur no further penalty for self-insuring during the remainder of the year. The taxpayer in the above example would incur a monthly penalty of $5,000. If the cost of national average cost of insurance for this taxpayer
In *National Federation of Independent Business v. Sebelius*, the Court first addressed the issue of whether, for purposes of the Anti-Injunction Act, the shared responsibility payment imposed by § 5000A is a tax. It then addressed whether the imposition of the shared responsibility payment is within Congress’s enumerated power to tax.

II. *NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS*

A. Anti-Injunction Act

Before considering whether the above described statutory provision was within Congress’s constitutional taxing power, the Court had to determine whether I.R.C. § 5000A imposed a tax for purposes of I.R.C. § 7421, the Anti-Injunction Act. This provision prohibits, subject to few exceptions, any “suit for the purpose of restraining the assessment or collection of any tax . . . in any court by any person, whether or not such person is the person against whom such tax was assessed.”

Because the shared responsibility payment does not go into effect is $20,000, then this taxpayer would be subject to the maximum penalty after four months after which no further penalty would be incurred. For the exemption from the penalty for gaps in coverage of less than three months, see sources cited supra note 24.
until 2014, a determination that the shared responsibility payment is a tax, in the absence of some exception to the Anti-Injunction Act, would have precluded the Court from adjudicating the case on the merits.

The Court has carved out several exceptions to the application of the Anti-Injunction Act. The Court has held that proceedings whose success would have the effect of increasing tax revenue are not barred by the Anti-Injunction Act. The Court has also acknowledged two narrow common law exceptions to the Anti-Injunction Act. First, a pre-enforcement challenge will be countenanced if the government could not prevail under any circumstances and the taxpayer would suffer irreparable harm from enforcement action. Second, a pre-enforcement action is permitted if, under the circumstances, no other legal remedy is available.

It was possible for the Court, in this case, to have created another exception to the applicability of the Anti-Injunction Act. Section 5000A does not become effective until 2014. Consequently, the IRS is not yet enforcing the provision and, therefore, challenges to the validity of the provision at this time do not impede the federal government’s assessment and collection of revenue. The creation of such an exception would have allowed the Court to sidestep the issue of whether the financial burden imposed by § 5000A is properly categorized as a tax, thereby triggering the application of the Anti-Injunction Act, or is more appropriately categorized as something else. The Court, however, chose to deal squarely with this issue.

Chief Justice Roberts’ opinion placed significant emphasis on the label that Congress chose to give to the shared responsibility payment. Emphasizing that the Anti-Injunction Act applies to suits that seek to restrain the assessment or collection of any tax, the Chief Justice stated that “[t]here...
is no immediate reason to think that a statute applying to 'any tax' would apply to a 'penalty.' He found the fact that § 5000A terms the exaction a penalty significant because many other exactions in the Patient Protection and Affordable Care Act are labeled taxes, and it is generally presumed that the use of one term in one part of a statute and a different term in another part of that statute is intentional. According to the Court, Congress may determine for itself whether a particular statutory enactment is subject to the Anti-Injunction Act, and the best evidence of such a determination is the text of the statute in question. Therefore, the Anti-Injunction Act can apply to exactions that are not considered taxes for other purposes. Moreover, the Anti-Injunction Act can apply to penalties if Congress chooses to make it applicable to particular penalties.

The Court noted that the Internal Revenue Code defines the term taxes to include penalties that are codified at subchapter 68B of the Code. However, the shared responsibility payment is not found in subchapter 68B. Although the statute itself states that the penalty “shall be assessed and collected in the same manner as an assessable penalty under subchapter” 68B, the Court interpreted this language merely as a procedural directive to the Secretary of the Treasury to employ assessment and collection mechanisms with respect to the penalty, similar to those mechanisms used to assess and collect taxes. The Court, for similar reasons, also dismissed the argument that the language of I.R.C. § 6201(a) requires that the penalty be deemed a tax for purposes of the Anti-Injunction Act. This provision authorizes the Secretary of the Treasury to assess all taxes and parenthetically defines taxes to include assessable penalties. The Court held that, for pur-

46. Id. (citing Russello v. United States, 464 U.S. 16, 23 (1983)); see, e.g., I.R.C. § 1411 (CCH 2012) (imposing 3.8% Medicare “tax” on unearned income beginning in 2013); id. § 4191 (imposing a 2.3% “tax” on the sale of medical devices beginning in 2013); id. § 4980I (imposing a 40% “tax” on employers providing high cost insurance coverage beginning in 2018); id. § 5000B (imposing a 10% “tax” on tanning salon service providers).
47. Sebelius, 132 S. Ct. at 2583.
48. Id.
49. Id.
50. Id. Section 6671(a) of the Internal Revenue Code provides that any reference in the Internal Revenue Code to taxes includes the penalties imposed by provisions codified in subchapter 68B. Therefore, because the Anti-Injunction Act is part of the Internal Revenue Code, it applies to assessable penalties included in subchapter 68B. See I.R.C. § 6671(a).
51. Id. Subchapter 68B provides for various assessable penalties that encompass a broad range of behaviors, including failure to file required information returns, promoting abusive tax shelters, and aiding and abetting the understatement of tax liability. See id. §§ 6671-6720C. Section 5000A of the Internal Revenue Code is codified in Chapter 48 of the Code. See generally id. § 5000A. In fact, it is the only provision included in that chapter. Id.
52. Sebelius, 132 S. Ct. at 2583-84 (quoting id. § 5000A(g)(1)).
53. Id.
54. Id.
poses of the Anti-Injunction Act, the shared responsibility payment imposed by § 5000A is a penalty and not a tax. Accordingly, the Anti-Injunction Act did not apply to bar adjudication of the issues on the merits. The Court was unanimous in this respect.

With respect to the exaction’s constitutional status, the Court examined whether the shared responsibility payment was, in substance, a tax or a penalty. As a result of the Court’s Commerce Clause holding in the case, the latter categorization would have rendered the exaction unconstitutional. Holding that the shared responsibility payment was, in fact, a tax, the Court then addressed whether this tax was a direct tax, a form of tax that must be apportioned according to population.

B. The Taxing Power

Chief Justice Roberts and Justices Scalia, Alito, Kennedy, and Thomas held that § 5000A could not be supported as a valid exercise of Congress’s power to regulate interstate commerce. Unlike the other Justices, however,

55. Id.
56. Id.
57. See discussion supra note 6. The exaction imposed on certain employers for their failure to provide adequate insurance coverage to their employees was not at issue in this case. See discussion supra note 22; Sebelius, 132 S. Ct. at 2576. This exaction, codified in Chapter 43 of the Internal Revenue Code, is termed an “assessable payment” in the statute, and is to be assessed and collected in the same manner as assessable penalties under Subchapter B of chapter 68 of the Internal Revenue Code without any limitations imposed on the use of criminal sanctions, liens, and levies. I.R.C. § 4980H(a)-(b), (d)(1). It appears that, based on the Court’s reasoning, this exaction also would not be subject to the Anti-Injunction Act. This provision was challenged along with § 5000A, and the Fourth Circuit held that challenges to both provisions were barred by the Anti-Injunction Act. See Liberty Univ., Inc. v. Geithner, 671 F.3d 391, 403 (4th Cir. 2011), vacated, 133 S. 679 (2012); see also discussion infra note 60.
58. Sebelius, 132 S. Ct. at 2594.
60. See supra note 6. Note that the constitutionality of § 4980H of the Internal Revenue Code was not at issue in this case. See supra note 22; Sebelius, 132 S. Ct. at 2576. This provision imposes an assessable payment on certain employers for their failure to provide adequate health insurance to their employees. See supra note 6. The Court held that the commerce power does not support a statutory mandate that requires individuals to purchase health insurance. Sebelius, 132 S. Ct. at 2593. It is not clear how the Court’s reasoning with respect to the individual mandate would translate to the constitutionality of the employer mandate under the commerce power. It is arguable that, unlike the individual mandate, the employer mandate attaches to an employment relationship and, therefore, the mandate does not force an employer to engage in commerce but rather it regulates an already existing commercial transaction. A federal district upheld the constitutionality, on Commerce Clause grounds, of both the individual and employer mandates, but its decision was vacated by the Fourth Circuit due to the application of the Anti-Injunction Act. See Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611, 635-36 (W.D. Va. 2010), vacated, Geithner, 671 F.3d at 415; see also discussion supra note 57. Both mandates were also challenged in another case. N.J.
this holding did not end the inquiry for the Chief Justice. Instead, Chief Justice Roberts examined whether Congress’s Article I power to lay and collect taxes provided constitutional support for the individual mandate. The Chief Justice’s opinion relied on a well-established rule of statutory construction that applies in the event that a statute has two possible meanings, one of which is constitutionally infirm and one of which is not. Under this rule of construction, the courts should adopt the meaning that preserves the statute’s constitutionality. The courts should resort to “every reasonable construction” of a statute in order to save it from unconstitutionality and consider any “fairly possible” interpretations, regardless of whether they are the most natural or straightforward interpretations of the statute. Despite his admission that the most natural reading of § 5000A is that it espouses a command to individuals to purchase insurance, the Chief Justice stated that the relevant inquiry is whether the statute can be reasonably interpreted not as a command to purchase insurance but as a tax increase on certain individuals who fail to purchase insurance. The dissent did not consider this interpretation of the statute reasonable and opined that such an interpretation amounted to the rewriting of the statute. Congress’s choice of descriptive labels for an exaction, germane to the issue of the applicability of the Anti-Injunction Act, is not determinative of an exaction’s constitutional status. Chief Justice Roberts, citing to several previous decisions of the Court, stated that the congressional description of an exaction does not control whether that exaction is within Congress’s power to tax. Instead, the substance and practical operation of the exaction determines whether it fits within the confines of the taxing power.

61. Sebelius, 132 S. Ct. at 2650 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) The dissenting Justices made clear that, but for the majority’s holding, their inquiry would have ended with the commerce power. Id.
62. Id. at 2593 (opinion of Roberts, C.J.)
63. Id.
64. Id. (citing Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448-49 (1830); Blodgett v. Holden, 275 U.S. 142, 148 (1927)).
65. Id. at 2594 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932); Hooper v. California, 155 U.S. 648, 657 (1895)).
66. Id.
67. Id. at 2655 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).
68. Id. at 2583, 2594 (opinion of Roberts, C.J.); see also infra text accompanying note 211.
69. Sebelius, 132 S. Ct. at 2594-95.
70. Id. at 2595.
The Chief Justice examined whether the exaction imposed by § 5000A had the indicia of a tax or a penalty. He also examined whether the exaction, if it is indeed a tax, is a direct tax that must be apportioned. Finally, Chief Justice Roberts explained the limitations on such power that justify its broad scope relative to the scope of the commerce power.

1. Tax vs. Penalty

In order to determine whether § 5000A imposes a penalty for the failure to obey a command or whether it imposes a tax increase on individuals who fail to purchase insurance, the Chief Justice set forth certain criteria to which he subjected the exaction in question. Several factors caused the shared responsibility payment to resemble a tax, the essential feature of which is the production of at least some government revenue: it is paid by taxpayers to the Treasury when they file their returns; it is inapplicable to low-income households; the amount due is based on factors such as taxable income, the number of dependents, and income tax filing status; it is codified in the Internal Revenue Code; and it is enforced by the IRS. The dissenting Justices found these features unpersuasive for two reasons. They disagreed that variations in the amount of an exaction are indicative of taxes and gave no credence to § 5000A’s codification in the Internal Revenue Code. They pointed out that the amounts of numerous penalties are influenced by the violators’ ability to pay and, moreover, asserted that the placement of the mandate in the operative provisions of the Patient Protection and Affordable Care Act, rather than in its revenue provisions, is evidence that the shared responsibility payment was enacted as a penalty.

Chief Justice Roberts noted that the distinguishing feature of a penalty is its punishment of an unlawful act or omission. He believed that the statute’s provision of an inducement to purchase insurance need not be interpreted to make the failure to do so unlawful. The fact that no consequences attach to the failure to purchase insurance, other than the requirement to pay

71. See infra notes 74–97 and accompanying text.
72. See infra notes 98–100 and accompanying text.
73. See infra notes 103–07 and accompanying text.
74. Sebelius, 132 S. Ct. at 2594. Technically, the amount of the shared responsibility payment is not based on taxable income but on modified adjusted gross income. See discussion supra note 33.
75. Sebelius, 132 S. Ct. at 2654-55 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).
76. Id.
77. Id. at 2596 (opinion of Roberts, C.J.) (citing United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996); United States v. La Franca, 282 U.S. 568, 572 (1931)).
78. Id. at 2596-97.
the exaction at issue, and the fact that the Congressional Budget Office estimated that four million people would choose to pay the tax and remain uninsured belie that Congress intended the failure to obtain insurance to be considered unlawful.\textsuperscript{79} The dissent remonstrated against this interpretation on what fairly can be described as formalistic grounds. In the dissenting Justices' opinion, the ubiquitous use of the terms "requirement," "shall," and "penalty" throughout the statute expressed a clear congressional decision to render the failure to obtain health insurance unlawful.\textsuperscript{80} Moreover, the dissent asserted that the Court has never categorized as a tax what Congress has called a penalty because the term "penalty" by itself implies that the thing penalized is unlawful regardless of whether there is any prohibitory language in the statute.\textsuperscript{81} The dissent also believed that the existence of one set of exemptions from the mandate and a different set of exemptions from the exaction indicated that the two were separate and distinct.\textsuperscript{82}

The Chief Justice discussed the three characteristics of penalties that were set forth in \textit{Bailey v. Drexel Furniture}, the child labor tax case.\textsuperscript{83} First, a penalty imposes an exceedingly heavy burden regardless of the extent of the infraction.\textsuperscript{84} Second, penalties typically include scienter requirements.\textsuperscript{85} Finally, penalties are enforced by agencies other than the IRS, an agency whose function is to collect revenue.\textsuperscript{86} The Chief Justice believed that the shared responsibility payment does not impose an exceedingly heavy burden because, for most individuals, the amount due will be far less than the

\begin{itemize}
  \item \textsuperscript{79} \textit{Id.} at 2597.
  \item \textsuperscript{80} \textit{Id.} at 2652 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).
  \item \textsuperscript{81} \textit{Id.} at 2653.
  \item \textsuperscript{82} \textit{Id.} For a description of which individuals are exempt from the requirement to obtain insurance and which individuals are exempt from the shared responsibility payment, see discussion \textit{supra} note 23. The dissent also found the government's argument on the briefs and in prior litigation to be inconsistent with this position. \textit{Sebelius}, 132 S. Ct. at 2653-54.
  \item \textsuperscript{83} In \textit{Bailey v. Drexel Furniture Co. (Child Labor Tax Case)}, the Court held that a statute enacted in 1919 that imposed a 10\% excise tax on the net profits of an enterprise that employed children was unconstitutional. 259 U.S. 20 (1922). According to the Court, the tax was, in reality, a penalty. \textit{Id.} at 44. This case was decided approximately four years after \textit{Hammer v. Dagenhart}, in which the Court held that it was not within Congress's power to regulate interstate commerce to enact a ban on the interstate transportation of goods manufactured with the use of child labor. 247 U.S. 251 (1918), \textit{overruled} by United States v. Darby, 312 U.S. 100 (1941) (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). The situation in \textit{Drexel Furniture} is analogous to this case in that the taxing power was posited as justification for a legislative action that was not supportable by the commerce power. A companion case, \textit{Bailey v. George}, was not decided on the merits. 259 U.S. 16 (1922). The Court held in that case that the Anti-Injunction Act prohibited the issuance of an injunction that prevented the assessment and collection of the tax. \textit{Id.} at 20.
  \item \textsuperscript{84} \textit{Sebelius}, 132 S. Ct. at 2595 (opinion of Roberts, J.).
  \item \textsuperscript{85} \textit{Id.}
  \item \textsuperscript{86} \textit{Id.}
cost of insurance and can never exceed the cost of such insurance. Consequently, individuals are left with the reasonable choice of paying the exaction and foregoing insurance. Section 5000A imposes no scienter requirement and the exaction it imposes is assessed and collected by the IRS through normal means. Moreover, the fact that the statute prohibits the use of criminal sanctions, liens, and levies further supported the categorization of the shared responsibility payment as a tax. Both the fact that the task of enforcing the exaction was given to the IRS and the mandate's lack of a scienter requirement were dismissed by the dissent, which pointed out that the IRS enforces numerous penalties and that strict liability penalties are common.

In addition to the moniker used by Congress to categorize an exaction, two other factors were deemed irrelevant by the majority with respect to Congress's power to tax—an objective to alter behavior and inactivity as the occasion to tax. According to the Chief Justice, exactions that seek to influence behavior are unremarkable and are not determinative of the constitutional status of such exactions. Numerous tax provisions seek to alter behavior. More importantly, he made clear that, despite its inability under its commerce power to penalize inaction, Congress has the power to tax inaction. The Chief Justice believed that the express constitutional authority to impose direct taxes—capitation taxes in his opinion—provides support for the notion that Congress may, if it chooses, tax inaction. The extent of Chief Justice Roberts' support for such a power is evidenced by his statement that the imposition of a $50 tax on the owner of a home that lacks energy efficient windows would pass constitutional muster. It is noteworthy that the dissent did not object to the proposition that Congress has the power

87. *Id.* at 2595-96. For a discussion of the statutory cap on the amount of the shared responsibility payment, see *supra* note 27 and accompanying text.
88. *Sebelius*, 132 S. Ct. at 2596. It is questionable whether those individuals that are subject to the national average insurance cost cap would, indeed, have a choice among reasonable alternatives. For example, it appears irrational for an individual to elect to pay $10,000 to the Treasury when, for the same outlay, she would receive the benefit of health insurance.
89. *Id.*
90. *Id.*
91. *Id.* at 2654-55 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).
92. *Id.* at 2596, 2599 (opinion of Roberts, C.J.)
93. *Id.* at 2596.
94. See, e.g., *id.*
95. *Id.* at 2599.
96. *Id.* The Chief Justice's equation of direct taxes with taxes on inactivity is not entirely convincing. A capitation tax cannot be avoided and does not, nor can it, alter behavior if suicide is excluded as a tax planning device. In contrast, a tax on inaction seeks to alter behavior. See *infra* notes 253–73 and accompanying text for a discussion of direct taxes.
to tax inaction. The dissent took issue with the characterization of the shared responsibility payment as a tax, but it did not discuss whether a tax on the failure to purchase insurance is, in fact, permissible. Drawing inferences from what is unsaid is usually unwise but a plausible inference can be drawn that the power to tax inaction was supported by all nine Justices.

2. Direct Taxes

The Chief Justice also pithily addressed the question of whether the shared responsibility payment, now considered a tax for constitutional purposes, is a direct tax that must be apportioned among the states. Chief Justice Roberts relied on the sparse Court precedent in this respect and held that direct taxes are limited to capitation taxes, taxes on real property, and taxes on personal property. According to the Chief Justice, capitation taxes are imposed on "every person 'without regard to property, profession, or any other circumstance.'" The shared responsibility payment is triggered by specific circumstances—a certain level of income and the failure to obtain health insurance—and is not, therefore, a capitation tax. Because the exaction is also not a tax on real or personal property, it is not a direct tax that must be apportioned among the states. The dissenting Justices reached no conclusion in this matter but they did criticize the majority's laconic inquiry into this issue.

3. Justification for an Expansive Taxing Power

As noted above, the Chief Justice held that Congress has the power to tax inactivity despite its lack of power to regulate inactivity under the Commerce Clause. However, according to the Chief Justice, there are limits to the taxing power. "We have nonetheless maintained that 'there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the

98. Id. at 2598. Note that the Court in Pollock v. Farmers' Loan & Trust Co. (Pollock I) and Pollock v. Farmers' Loan & Trust Co. (Pollock II) held that a tax on income derived from real and personal property, respectively, was a direct tax that must be apportioned among the several states. 157 U.S. 429, 580-83 (1895); 158 U.S. 601, 618 (1895). The Sixteenth Amendment, ratified in 1913, authorized the imposition of a tax on income from all sources without apportionment. U.S. CONST. amend. XVI; see infra notes 283–94 and accompanying text.

99. Sebelius, 132 S. Ct. at 2599 (quoting Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796) (emphasis omitted)).

100. Id. at 2655 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

101. Id. at 2599 (opinion of Roberts, C.J.)

102. Id.
characteristics of regulations and punishment. 103 In other words, the fact that this particular exaction passed muster does not assure a similar result for future exactions of this sort. Chief Justice Roberts proceeded to note that the power to tax is benign in comparison to the power to regulate because the latter power is accompanied by the full federal arsenal of enforcement mechanisms whereas the former power can do no more than impose a financial exaction. 104 The dissenting Justices believed that one of the most significant checks on the taxing power is political in nature. 105 The framers of the Constitution required that tax measures originate in the House of Representatives, the body most susceptible to the political repercussions that result from the enactment of tax increases. 106 In the dissenting Justices' opinion, the judicial rewriting of the statute by the majority resulted in a tax increase that was imposed upon the people by the least political branch of the government. 107

C. Analysis

The majority opinion made clear that the taxing power can support an exaction that Congress has chosen to label a penalty, that taxes may be imposed on inaction, and that direct taxes are limited to capitation taxes and taxes on real and personal property. 108 However, the majority failed to provide principled guidance for determining whether an exaction is, in substance, a tax or a regulation in the form of a penalty. It is not clear how much weight is to be given to each of the particular attributes that, according to the majority, caused the shared responsibility payment to resemble a tax. For example, in a footnote to the opinion, the Chief Justice, addressing the objections of the dissent, admitted 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. 109 Moreover, it is unclear whether the majority believed that the use of taxable income, filing status, and other income tax concepts as metrics used in the determination of the amount of an exaction is similarly suggestive or is, instead, something more. 110

The Chief Justice took pains to point out that formalistic niceties are not outcome determinative with respect to whether an action is constitution-

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103. *Id.* at 2599-600 (quoting Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 779 (1994)).
104. *Id.* at 2600.
105. *Id.* at 2655 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).
108. *See supra* notes 74–99 and accompanying text.
110. *See supra* note 74 and accompanying text.
ality permissible. Yet, it seems quite formalistic for the identity of the agency selected to enforce the exaction and the metrics upon which such exaction is determined to have significant constitutional consequences. According to Chief Justice Roberts, the use of the IRS to enforce an exaction is evidence that the exaction is a tax, and the use of another agency to enforce the exaction is evidence that exaction is a penalty. The fact that the IRS is enlisted as the enforcement agency for an exaction that applies to a broad segment of the population simply may reflect that it has a well-developed infrastructure to undertake such a task. A number of penalties are enforced by the IRS and not all of them relate to tax-related failures by taxpayers. Other agencies routinely collect funds from their charges—the SEC and the FDA, for example—and it may come to pass that, given the ubiquity of online information filing, other agencies will enforce taxes on products or services that fall within their jurisdiction. Likewise, as the dissent noted, the fact that a penalty is based on income or other affordability factors is unremarkable. If such factors are impactful at the margins then this fact should have been made clear.

The majority stated that the distinguishing feature of a penalty is its punishment for an unlawful act and held that § 5000A need not be read to make unlawful the failure to obtain health insurance. According to the majority, both the fact that no consequences, other than the exaction itself, attach to such failure and the fact that it had been estimated that four million individuals would choose to forego insurance in favor of the shared responsibility payment supported the notion that the statute did not render the failure to obtain insurance unlawful. However, the majority also noted that

111. Sebelius, 132 S. Ct. at 2583, 2593-94.
112. See supra note 74 and accompanying text.
113. See, e.g., I.R.C. § 5871 (CCH 2012) (imposing penalties for various violations with respect to possession, reception, or transportation of firearms); id. § 6711 (imposing a penalty on tax-exempt organizations that offer to sell information or services without disclosure that such information or services are readily available at nominal or no charge from the federal government); id. § 6720A (imposing a penalty on any person who knowingly resells certain fuel that fails to meet Environmental Protection Agency specifications).
115. See supra note 73 and accompanying text.
116. See supra notes 77-78 and accompanying text. In Bailey v. Drexel Furniture (Child Labor Tax Case), however, the Court held that the child labor tax was a penalty despite the fact that the Court admitted that the statute at issue did not render the employment of child labor an unlawful act. 259 U.S. 20 (1922). “Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result . . . .” Id. at 38 (emphasis added). Note that the expansion of the commerce power during the New Deal era made the specific issue of whether one could penalize child labor a moot point. See supra note 83.
117. See supra text accompanying note 79. The dissent believed that the statutory language made the failure to obtain insurance unlawful because, in large part, it used the
penalties impose an exceedingly heavy burden on those to whom they apply regardless of the extent of the infraction.\textsuperscript{118} It is not clear how these factors interrelate, if at all. For example, does the imposition of an exceedingly heavy burden, by itself, overcome the fact that this burden is the only consequence of the failure to meet a statute’s strictures?

Moreover, the term “exceedingly heavy burden”\textsuperscript{119} is an invitation to litigation because it is susceptible to various meanings. The Chief Justice noted that the shared responsibility payment is modest and can never exceed the cost of insurance, as defined in the statute.\textsuperscript{120} However, it is difficult to imagine that any rational person who is faced with the choice of either paying $10,000 to the IRS and receiving nothing in return or paying $10,000 to an insurance provider and obtaining insurance coverage for herself and her family would choose the former course of action. The statute often will leave higher income taxpayers with no rational choice among alternatives—a logical interpretation of the term “exceedingly heavy burden” and one seemingly embraced by the Court.\textsuperscript{121}

The notion that an exaction whose amount is determined without regard to the extent of the infraction resembles a penalty is, frankly, perplexing. In \textit{Drexel Furniture}, the fact that the child labor tax statute imposed a 10% income tax regardless of whether one child or five hundred children were employed was a contributing factor in persuading the Court to hold that the statute was punitive in character.\textsuperscript{122} However, this particular attribute of an exaction is ambiguous at best. For example, the federal excise tax on cigarettes will result in the imposition of a greater exaction on a person purchasing two packs of cigarettes per day than the exaction that is imposed on a person purchasing two packs per week. On the one hand, the tax rea-
sonably can be interpreted as a penalty on smokers, and the heavy smoker is behaving in a more deleterious fashion than the casual smoker, thereby incurring a greater penalty. On the other hand, the tax reasonably can be interpreted as just that, an excise tax that raises revenue based on purchases. The ambiguity inherent in this characteristic is evident in the workings of the individual mandate. On the one hand, the application of this reasoning to the shared responsibility payment could yield the conclusion that such payment is a penalty because, in many cases, the exaction will not vary with the extent of the infraction. On the other hand, the liability imposed by the individual mandate will often vary based on the extent of the infraction. For example, the amount of the shared responsibility payment will be the same for a very high income individual regardless of the number of months in the year that such person is uninsured, but for other individuals, the amount due will vary depending upon the number of months that such individuals are uninsured.\footnote{123}

Chief Justice Roberts supported his assertion that Congress's taxing power extends to the taxation of inactivity by noting Congress's express constitutional authority to levy direct taxes, specifically capitation taxes.\footnote{124} According to the Chief Justice, such taxes are the paradigm tax on inactivity because they are taxes "that everyone must pay simply for existing."\footnote{125} There are two reasonable objections to this assertion, however. First, a tax imposed for merely existing is not the same thing as a tax imposed on inaction. The former does not seek to alter behavior and, I surmise, would be seen by many as less intrusive than the latter. The obligation to pay a capitation tax reasonably can be viewed as a citizen's obligation to support the government and nothing more. It should come as no surprise if the obligation to pay a tax resulting from the failure to behave as the government mandates one to behave is found by many citizens to be more objectionable than a capitation tax. More importantly, direct taxes, although clearly con-

\footnote{123. The shared responsibility payment is triggered by a failure to maintain minimum essential coverage and the annual amount is often determined by the sum of the penalties imposed on monthly failures to obtain proper coverage. \textit{See supra} note 24 and accompanying text. However, the amount of the penalty is capped at the average national cost of insurance coverage. \textit{See supra} text accompanying note 36. Therefore, a very high income individual may reach the cap after the imposition of one month's penalty and, consequently, will incur no further penalty for failing to obtain insurance during the remainder of the year. \textit{See supra} notes 23-24, 38 and accompanying text. Moreover, in limited circumstances, individuals who are underinsured will be subject to the same penalty as individuals who are uninsured. Generally, employer-provided group coverage and individual health insurance policies will provide minimum essential coverage. However, certain individuals could have limited medical coverage—for example, specific illness coverage—that will not satisfy the mandate. \textit{See discussion supra} note 26.}

\footnote{124. \textit{Nat'l Fed'n of Indep. Bus. v. Sebelius}, 132 S. Ct. 2566, 2599 (2012); \textit{see also supra} note 96 and accompanying text.}

\footnote{125. \textit{Sebelius}, 132 S. Ct. at 2599.
constitutional, are subject to apportionment among the states—a very significant impediment to their utility. The analogy to direct taxes may very well weaken the Chief Justice’s argument if the apportionment requirement is taken as evidence that the Constitution makes the imposition of taxes on inactivity very difficult.

Moreover, Drexel Furniture, on which the Chief Justice placed significant reliance in ascertaining the distinguishing features of a penalty, is not particularly helpful in this regard. In that case, the Court actually reframed the statute that imposed a tax on child labor as one that imposed an exaction for the failure to behave in a specified manner.

If it were an excise on a commodity or other thing of value, we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than 16 years; in mills and factories, children of an age greater than 14 years, and shall prevent children of less than 16 years in mills and factories from working more than 8 hours a day or 6 days in the week.

Thus, a tax on the use of child labor became, according to the Court, an exaction on the failure to employ workers of an appropriate age and, thus, a penalty. This sort of verbal legerdemain would support the characterization of the cigarette excise tax as an exaction for the failure to not smoke. It would have been helpful had the Court addressed Drexel Furniture in this respect. For example, it is possible that most, if not all, excise taxes can be recharacterized as an imposition for the failure to behave in a specified manner and, therefore, the distinction between taxing action and inaction is a distinction without a difference. My point is not to disagree with the Chief Justice’s conclusion with respect to the power to tax a failure to act but merely to point out that his reasoning in this respect was not entirely satisfactory.

The majority opinion supported an expansive taxing power due, in part, to its benign nature relative to the commerce power. A mandate sanctioned under the Commerce Clause would empower the government to unleash a host of enforcement mechanisms to ensure compliance, whereas the taxing power has only one weapon in its enforcement arsenal—financial exactions. This view of the taxing power appears to be more of a justification of, rather than a limitation on, its broad scope. After all, it is precisely

126. See infra notes 253–56 and accompanying text.
127. See supra notes 82–86 and accompanying text.
129. Id. (emphasis added).
130. Id. at 39–49
132. See supra text accompanying note 104.
in situations in which Congress cannot resort to non-tax enforcement mechanisms that it will be inclined to resort to the taxing power to achieve what it could not achieve by other means. The fact that an action's consequences are less draconian than the consequences of alternative actions is hardly support for the permissibility of an action. This sort of justification is familiar to most parents from a child's protestation that "I know what I did was wrong, but you should be happy that I didn't do (fill in the blanks)." The Chief Justice may have underestimated the power to tax. After all, long ago the Court itself acknowledged the force of a sovereign's taxing power. Chief Justice Marshall stated "[t]hat the power of taxing . . . may be exercised so as to destroy it . . . is too obvious to be denied." 133

It is likely that the taxing power issues raised in this case 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. 134 Part III posits that the notion that the Court has unmoored the taxing power from any meaningful constitutional restriction is, for several reasons, unduly pessimistic. The discomfort caused by taxes that are imposed on inactivity is unwarranted. Congress can achieve, and has achieved, the same result in alternative ways. In comparison to what has gone before, the individual mandate is benign in its intrusiveness. Moreover, the ability to impose exactions for the failure to act is not an invitation to Congress to seek political cover and disguise its actions. To the contrary, such exactions are transparent and politically toxic. Despite the Court's holding with respect to the individual mandate, constitutional limitations on the taxing power have not been gutted. The transparency of taxes that take a form similar to the mandate assures that Congress cannot utilize such taxes with impunity. Such exactions will be susceptible to attack on traditional constitutional grounds. In addition, rather than end the tax versus penalty debate, the Court has resurrected it. Finally, the direct tax clauses very well may have continued vitality.

134. Much of the Commerce Clause debate over the individual mandate centered on the precise contours of what the statute sought to regulate and whether the decision to forego insurance could be interpreted as the commercial activity to self-insure. Compare Sebelius, 132 S. Ct. at 2589 n.6 (refusing to categorize the failure to insure as a self-insurance transaction), with id. at 2622 (Ginsburg, J., dissenting in part) (considering the failure to insure as a self-insurance activity). It is also likely that whether a statute seeks to compel individuals to engage in commerce or merely regulates existing commercial transactions will be the subject of future litigation. For example, the statute's mandate that certain employers provide their employees with a minimum level of health insurance coverage raises the question of whether this mandate forces such employers to engage in commerce or merely regulates existing commercial transactions—the employment agreements. See supra note 22 and accompanying text.
III. LIMITATIONS ON TAXING INACTION

In today’s media saturated world, exaggerated views of the importance of, and the consequences stemming from, an event or occurrence often are given prominence over more nuanced and reasoned opinions. The enormous—perhaps unprecedented—media coverage of this case resulted, as would be expected, in a variety of opinions about the decision to uphold the individual mandate, some of which ascribed teleological dimensions to the decision.135 Included among the pundits’ comments was that the Court’s imprimatur on the use of the taxing power to support the individual mandate “has confirmed that there are no limits to regulatory taxation as long as the revenue is deposited in the U.S. Treasury.”136 Before examining whether such an assertion is reasonable or Malthusian, it is helpful to put this decision in context.

A. The Individual Mandate in Context

Congress has used its taxing power to intrude on the affairs of taxpayers from the inception of the republic. Chief Justice Roberts’ statement that “taxes that seek to influence conduct are nothing new” can be described fairly as an understatement.137 Our current tax system is intrusive at its core. I use the term “intrusive” purposely to avoid labeling a particular provision either as an incentive or as a penalty because of the protean nature of such terms. Whether a particular provision is considered an incentive rather than a penalty depends on the baseline from which the effects of a particular provision are measured. For example, if the baseline point of reference is the tax base as it existed prior to the enactment of a provision, then whether a provision is an incentive or a penalty will turn on whether the provision decreases or increases a person’s tax liability in comparison to the tax liability that would have been incurred prior to the enactment of the provision.

137. Sebelius, 132 S. Ct. at 2596 (opinion of Roberts, C.J.). Other provisions in the legislation are, arguably, more intrusive than the individual mandate. For example, one provision requires health insurers to provide rebates to group and individual policy holders if such insurer’s non-claims-related costs exceed 20% of its total costs. Id. Perhaps insurance companies need to reduce their overhead costs, but whether the federal government is best positioned to determine what constitutes excessive overhead and mandate a consumer remedy in the event an insurance company fails to comply with its dictate is questionable. See Patient Protection and Affordable Care Act, § 2718 (codified at 42 U.S.C. § 300gg-18 (Supp. 2010)). In addition, the mandate that employers provide coverage for contraceptive services, a result of executive action implementing the legislation, has proven extremely controversial. See infra note 205.
However, if the baseline is determined on normative grounds, then the categorization of a provision will be influenced by the definition of the normative tax base. Any deviation, plus or minus, from that base will determine whether the provision is an incentive or penalty.\footnote{For discussion of this point, see infra notes 170–71 and accompanying text.}

Federal taxes intrude, to a breathtaking extent, on human affairs. Of course, the mere existence of federal taxes influences behavior in a general way because whatever amount a person turns over to the federal government necessarily diminishes the amount that such person has available for consumption or investment according to her preferences. However, the taxing power has more specific influences. The following discussion is but a brief description of a small sample of such intrusions. Federal taxes intrude on the terms of employment in various ways. Payroll taxes increase the cost of labor, thereby influencing employers’ hiring decisions and wage levels.\footnote{For example, a 6.2\% tax on a statutorily determined base amount of wages and a 1.45\% tax on all wages is imposed on an employer for old age, survivor, and disability insurance (Social Security) and Medicare, respectively. See I.R.C. § 3111(b) (CCH 2012). Moreover, a very limited payroll tax is imposed upon employers to fund federal unemployment benefits. See id. §§ 3301-3302. A tax is also imposed on employees in similar amounts. See id. § 3101. However, a temporary payroll tax holiday that expired on December 31, 2012 reduced the tax rate applicable to employee Social Security contributions to 4.2\%. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 1001, 126 Stat. 158-159 (2012); Tax Relief, Unemployment Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 601, 124 Stat. 3296, 3309-10 (2010).}

Limitations on tax deductions influence the structure of executive compensation and the exclusion from income of certain forms of compensation skews the composition of employee compensation generally.\footnote{Limits are imposed on the ability of publicly held corporations to deduct executive compensation expenses. Compensation in excess of $1,000,000 paid by a publicly-traded corporation to the chief executive officer or the four highest paid officers other than the chief executive is not deductible. I.R.C. § 162(m)(1)-(3). However, performance-based compensation is not subject to this limitation. Id. § 162(m)(4)(A)-(B). Section 162(m) had, and continues to have, the effect of shifting top level executive compensation toward equity-based compensation. The American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 885(a), 118 Stat. 1418, 1634-41 (2004), added § 409A to the Internal Revenue Code to curb deferred compensation practices that were perceived as abusive. The statute imposes certain operational and design requirements on deferred compensation plans within its scope. Section 409A(a)(1) requires that all compensation deferred under the plan for the taxable year and all preceding taxable years be included in gross income during the taxable year in which the deferred compensation plan fails to meet the requirements specified in the statute. I.R.C. § 409A(d)(5). The fact that certain forms of compensation are tax exempt influences the manner in which employees are compensated. For example, among other employee benefits, employer-provided health insurance and a limited amount of educational assistance are not taxable to employees. See id. §§ 106, 127 (2006).} Federal taxes also influence to a significant extent savings and investment choices. Disparate tax treatment of various forms of income derived from capital favor equity investments over debt, state and local debt over other debt, and...
investment in housing over other forms of personal consumption. Federal taxes also intrude on areas that are traditionally seen as state matters, such as the form in which business is conducted. Foreign policy or foreign trade objectives are also aided by tax provisions.

In addition to economic matters, the taxing power has supported intrusions into the most personal aspects of individuals' lives. Whether a person is married, has children, or adopts children has significant effects on that person's tax liability. Federal estate taxes play an enormous role in the decision to whom to leave one's assets upon death. Decisions concerning the education of one's children, whether to buy or rent a home, what type of car to drive and appliances to use are, to different extents, influenced by the Internal Revenue Code.

141. Capital assets, including stock, are subject to favorable tax rates upon their sale or exchange at a gain provided that such assets are held for the statutorily required holding period so as to qualify the income as long-term capital gains. See id. § 1222(4). Qualified dividends are also taxed at favorable rates. Qualified dividends are dividends paid by domestic corporations and certain foreign corporations on stock that has been held for more than sixty days and for which no offsetting position exists. id. § 1(h)(11)(B)(i). Effective on January 1, 2013, the maximum tax rate imposed on long-term capital gains and qualified dividends increased from 15% to 20% for taxpayers whose income exceeds certain thresholds. The American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, §102(b), 126 Stat. 2313 (2013) (codified at I.R.C. § 1(h)). Note that, effective on January 1, 2013, dividends received by taxpayers whose adjusted gross income exceeds $250,000 or $200,000 for joint and single filers, respectively, will be subject to a 3.8% hospital insurance tax. Id. § 1411. Interest income received from most state and local bonds is tax exempt. See id. § 103(a). Up to $500,000 of gain from the sale or exchange of a principal residence is, if the statutory requirements are met, excludible from income. Id. § 121.

142. Most corporations are subject to an entity-level income tax. Id. § 11. Partnerships, however, are not subject to an entity-level tax. Id. § 701. Limited liability companies are taxed as partnerships although they may elect to be taxed as corporations under Treasury Regulation 301.7701-3(a)—the so-called “check the box” regulations. Treas. Reg. § 301.7701-3(a) (2012).

143. See, e.g., I.R.C. § 199 (providing a deduction for certain domestic production activities); id. § 901(j) (denying foreign tax credits for taxes paid to, among others, countries with which the United States has severed diplomatic relations or countries that support international terrorism); id. § 4371 (imposing a tax on certain insurance policies issued by foreign insurers).

144. For example, married taxpayers are subject to a specific income tax rate schedule, are eligible for certain tax-free fringe benefits through their spouse's employer, and are able to bequeath or gift unlimited amounts to their spouses. See id. §§ 2(a), (d), 105-106, 2056, 2523. Parents are entitled to personal exemptions for dependent children, under certain circumstances are entitled to tax credits due to their children, may obtain tax-free employee dependent care assistance, and may obtain credits for certain adoption related expenses. See id. §§ 24, 36C, 129, 151.

145. For example, property bequeathed to a spouse or a qualified charity is not taxable. See id. §§ 2055-2056.

146. See, e.g., id. § 25A (providing credits for certain educational expenses); id. § 25D (providing a credit for solar, wind, fuel cell, and geothermal property); id. § 30B (providing a credit for certain alternative fuel motor vehicles); id. § 45M (providing a credit for certain energy efficient home appliances); id. § 163(h) (allowing a deduction for mort-
income tax exerts some influence on the choice to either forego leisure or forego labor, but the tax code sometimes more pointedly affects that decision.\textsuperscript{147}

How and why we arrived at this point are beyond the scope of this Article but we are here and, in comparison to what has gone on before it, the enactment of a provision that seeks to influence a person’s decision to either obtain or forsake health insurance appears prosaic and rather benign. For its critics, the malignancy in the individual mandate is not in its substance but in its method—taxing the failure to obtain insurance. The Court’s sanction of such a method to achieve a policy goal opens a proverbial Pandora’s box, thereby unleashing “‘the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane.”\textsuperscript{148} Had the Court upheld the individual mandate under the Commerce Clause, the taxing power issue, most likely, would have been ignored despite the fact that the power to tax is an independent power subject to its own limitations.\textsuperscript{149} Now, however, the taxing power is the linchpin in Congressional attempts to induce persons to engage in commerce. As a result, it is likely that occasions for a more searching analysis of the scope of this power will present themselves.

It remains to be seen whether the Court has expanded the taxing power to an extent that permits Congress to wield its taxing power unfettered by anything other than political limitations. Despite the protestations to the contrary, it is possible that this case will be seen not as an abject capitulation to a federal plenary taxing power but as the catalyst for more robust enforcement of the structural limitations on the taxing power. The Court’s majority did several things and failed to do one thing in \textit{National Federation of Independent Business v. Sebelius} that should provide some encour-

\textsuperscript{147} In general, losses from passive activities incurred by individuals are not deductible against income from non-passive activities. A passive activity is defined as a trade or business in which the taxpayer does not materially participate. Consequently, these rules provide an incentive to owners of certain trade or businesses to either participate or not participate in the trade or business depending on whether the activity generates income or losses. \textit{See generally} id. § 469.


agement to those discouraged by the outcome of the case. First, by refusing to sanction the individual mandate through the commerce power, attempts to require persons to engage in commerce must now be supported by the taxing power. Second, 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. Moreover, the majority’s insistence that the label attached to an exaction is not constitutionally determinative will provide support to assertions that what Congress labeled a tax is, in reality, a penalty. Drexel Furniture itself is a case in which the Court deemed a penalty what Congress called a tax. Substance over form cuts both ways, after all. Finally, although the Court dismissed the notion that the mandate is a form of direct tax, it did not indicate just what type of tax it is. The Court provided some indication that it viewed the mandate as a form of income tax and not another form of excise tax. If so, this is important for reasons discussed subsequently.

In essence, constitutional limitations on the taxing power serve as a hedge against the enactment of future mandates that go too far. The value ascribed to such hedge depends on the extent to which one believes that mandates are, in some fundamental sense, different than other forms of taxation. If the individual mandate is perceived as nothing more than a tax incentive to obtain health insurance, then the mandate is quite unremarkable as far as tax provisions go. Perhaps one may quibble over Congress’s use of the term “penalty” to describe the mandate. If so, any objections are over process, not substance, and future mandates that are referred to as taxes should be unobjectionable. The following discussion asserts that tax provisions in the form of mandates are nothing more than the typical behavior modifying tax provisions to which we have become accustomed enacted in a different form. To be sure, mandates come with their own set of practical and political difficulties. However, the practical and political differences between traditional tax incentives and mandates should not have constitutional dimensions. In fact, the transparency of mandate provisions heightens the potential political repercussions over their enactment. Moreover, the Court’s reasoning in this case will make such mandates susceptible to con-

150. See supra notes 74–91 and accompanying text; see also infra notes 210–20 and accompanying text.
151. See supra notes 68–70 and accompanying text.
152. See supra note 83 and accompanying text.
153. See supra notes 98–100 and accompanying text.
154. One of the factors used by the majority in concluding that the statute’s shared responsibility payment was, in fact, a tax was the fact that the amount of the payment was determined, at least in part, by income and family status—attributes that are part of the income tax scheme. See supra note 74 and accompanying text.
155. See infra notes 297–306 and accompanying text.
institutional restrictions that, prior to this case, were more aptly described as curiosities rather than principled limitations.

B. Taxing Inactivity or Activity: Are the Differences Substantive or Chimerical?

We now know that Congress cannot compel persons to engage in commercial activities under the Commerce Clause. The Justices dissenting from this portion of the Court's opinion set forth a very plausible case that the individual mandate, "[w]hen viewed as a component of the entire" statutory scheme, is supported by the Necessary and Proper clause as a proper exercise of the commerce power. In fact, the Necessary and Proper clause supports federal mandates to engage in various forms of action that fall within Congress's other enumerated powers, including the taxing power itself. It certainly is arguable that most of these forced actions are not commerce—filing a tax return with the IRS or financial information with the SEC—but actions are federally mandated that clearly require a person to engage in commerce. For example, the securities laws require publicly traded corporations to engage independent auditors to certify their financial statements. It would appear that Congress could, if it believed that the tax code has grown so complex and unwieldy, legislate that all individual income tax returns must be professionally prepared.

This Article is not intended as an analysis or critique of the Court's Commerce Clause jurisprudence, which is well beyond the scope of this work and this author's expertise. Congress has the power to mandate commerce if such a mandate is necessary and proper to the execution of an enumerated power other than the commerce power. It appears, moreover,

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156. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2625 (2012) (Ginsburg, J., dissenting in part). Justice Ginsburg also characterized the decision to self-insure as an economic decision subject to Congressional regulation. "Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to 'doing nothing'; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause." Id. at 2617.

157. The Necessary and Proper Clause grants Congress the power to "make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. CONST. art. I, § 8, cl. 18. This provision is not an independent grant of authority but rather the authority to enact provisions ""incidental to the [enumerated] power"" and is ""merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant."" Sebelius, 132 S. Ct. at 2591 (opinion of Roberts, J.) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 418 (1819); Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 247 (1960)). Various actions are mandated by the federal government in order to execute policies enacted under an enumerated power. Justice Ginsburg noted several such provisions, which included the requirement to file an income tax return. Id. at 2627 n.10 (Ginsburg, J., dissenting in part).

that Congress has the power to mandate commerce when the regulated person is already engaged in related commerce—for example, the requirement that public companies hire independent auditors. This power, presumably, supports the constitutionality of the Patient Protection and Affordable Care Act’s employer mandate because this mandate, unlike the individual mandate, operates on an existing commercial relationship. Regardless of the intricacies of the Necessary and Proper Clause, a sense of disquiet has emerged after the Court upheld the individual mandate as a tax. After all, Congress imposed an exaction for the mere failure to take an action whose undertaking the Court held was not necessary to the enforcement of a broader regulatory scheme.

Does the discomfort created by the mandate evidence a fundamental difference between it and other forms of tax exactions, or does it represent an example of the behavioral effects driven by the form in which a message is presented?

The tax code is riddled with provisions that seek to influence behavior, and the imposition of exactions for the engagement in certain forms of commerce passes without notice. For example, imposition of a federal excise tax on cigarettes, high cost employer-provided health insurance, and policies issued by foreign insurers are transparent in their effects and a potential party to a taxed transaction has the choice to either forsake or enter into a taxed transaction.

The tax code also influences behavior in ways that are less transparent than the imposition of a discrete excise tax on the purchase of a good or service. It is not so obvious that these less transparent tax code provisions yield substantively different results than an exaction for a failure to act. Whether a tax provision is an incentive to take a particular action or an exaction for the failure to take that action depends on the frame of reference, or baseline, from which the provision is examined. Why are the provisions that provide deductions or credits for a taxpayer’s dependent children generally seen as an incentive to have a family instead of penalties for the failure to do so? Professor Jensen believes that there is a distinction between a tax on inaction and a tax on action and that it is a “stretch” to term the additional taxes owed that result from the failure to take advantage of an incen-

159. See supra note 158 and accompanying text.
160. See supra note 22 and accompanying text.
161. Whether such exactions are taxes or penalties is largely irrelevant because such exactions would be supported by either the taxing power or the commerce power.
162. See I.R.C. § 5701(b) (CCH 2012).
163. See supra text accompanying note 46.
164. See supra note 143 and accompanying text.
165. The choice not to enter into a taxed transaction is perhaps a more difficult one for the cigarette smoker than it would be for a potential purchaser of another taxed product.
tive as a penalty.\textsuperscript{166} He notes, for example, that any additional tax due from the failure to make a deductible charitable contribution would be less than the amount saved from not making the contribution in the first place.\textsuperscript{167} Therefore, the failure to make the contribution leaves one better off on an after-tax basis.\textsuperscript{168} Presumably, Professor Jensen is suggesting that if the failure to act leaves one better off on an after-tax basis, then such failure is not being penalized. However, the same can be said of a tax imposed directly on the failure to act. If health insurance would cost a family of four $6,000 in a given taxable year and § 5000A imposes a $695 tax on the failure to obtain insurance, then the failure to act increases the family’s after-tax position by $5,305. I fail to see a distinction, on this basis at least, between a tax provision that imposes an exaction directly on the failure to act and tax provisions that impose a tax generally and provide a tax benefit for acting in a desired manner.

Incentive provisions are, in reality, a combination of two legislative decisions. The legislated tax rates and the tax base to which such rates are applied must be set at a level that will support the second legislative action—the incentives for favored activities. The rates and tax base thus set become the baseline from which subsequent enactments will be measured. The status quo ante is the logical frame of reference for a determination of whether a tax provision is an incentive or an additional exaction. Deductions or credits are, therefore, recognized as an incentive because they reduce the tax base that otherwise would apply or the taxes that otherwise would be owed.

One of the most famous judicial statements ever made with respect to taxation reflects this sentiment. Justice Van Devanter, in \textit{New Colonial Ice Co. v. Helvering}, stated that “[t]he power to tax income . . . extends to the gross income. Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.”\textsuperscript{169} Any reduction in the tax base is a benefit conferred upon taxpayers by the Congress if one begins with the premise that all gross income is taxable. At this point in our economic history, I doubt most people would subscribe to such a view because their frame of reference is not gross income but taxable income as it is presently defined. One political commentator noted the need to establish a metric from which the effects of a change will be measured as follows:

\begin{itemize}
\item \textsuperscript{166} Erik M. Jensen, \textit{The Individual Mandate and the Taxing Power}, \textit{TAX NOTES}, Jan. 2, 2012, at 97, 103 n.56.
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} \textit{Id.} It is possible, however, that an exaction whose size leaves an individual worse off by failing to act may be considered a penalty. \textit{See infra} notes 225–30 and accompanying text.
\item \textsuperscript{169} 292 U.S. 435, 440 (1934).
\end{itemize}
Every day it seems, reason and the English language are ravished by contemporary American politics. For example, as there is no God-given tax rate, when the rate increases it is an increase, not the expiration of a decrease. Were it the latter, one could say that the Bush tax cuts were not tax cuts but the expiration of the Clinton increases, the Clinton increases the expiration of the Reagan cuts, the Reagan cuts the expiration of previous increases, and so on. . . . The nation appears more and more able to eat whatever words are shoved down its throat.\textsuperscript{170}

Long standing deductions lead taxpayers to a sense of entitlement, particularly when such deductions implicate reliance interests.\textsuperscript{171} In any case, some point of reference is used to draw conclusions about whether a change in the status quo is an incentive or penalty. On occasion, that point of reference may change and a provision commonly interpreted as an incentive may come to be seen as penalty imposed on those who fail to qualify for the putative incentive. Same-sex couples, for example, generally perceive that they are being penalized due to their inability to qualify for the various tax benefits provided to married couples as a result of the Defense of Marriage Act.\textsuperscript{172}

That said, there are two substitutes for the imposition of a tax that is triggered by the failure to act. The issue is whether the differences, if any, between these alternatives and an exaction imposed on the failure to act have constitutional dimensions. As enacted, the individual health insurance mandate takes the form of a shared responsibility payment that is due only from certain individuals who have failed to obtain health insurance.\textsuperscript{173} The statute makes explicit that it imposes an exaction for the failure to act in a prescribed manner.\textsuperscript{174} Alternatively, Congress could have achieved the same


\textsuperscript{171.} The deductions for mortgage interest and real estate taxes are an example of long-standing deductions that have significant reliance implications. The purchase of a home is a major financial investment whose related after-tax costs are considered over long periods of time. Moreover, it is inconceivable that state and local authorities have not factored in the federal tax deduction into their real estate tax rate setting process. Elimination of this deduction would have significant effects on the mortgage and real estate markets and state and local government budgets.

\textsuperscript{172.} The Defense of Marriage Act states that, for purposes of any federal legislation, marriage is defined as the "legal union between one man and one woman." 1 U.S.C. § 7 (2006). Consequently, same-sex couples that are legally married under state law cannot file a joint federal income tax return, do not qualify for tax-free fringe benefits available to the spouse of an employee, and cannot gift or bequeath unlimited tax-free amounts to a spouse. The statute has been subject to numerous legal challenges, and the Obama administration has chosen not to defend it. See Roberta A. Kaplan & Julie E. Fink, The Defense of Marriage Act: The Application of Heightened Scrutiny to Discrimination on the Basis of Sexual Orientation, 2012 CARDOZO L. REV. DE NOVO 203, 209.

\textsuperscript{173.} See supra notes 23–24 and accompanying text.

\textsuperscript{174.} I.R.C. § 5000A(b)(1) (CCH 2012).
result either by reframing the legislation to provide a benefit for obtaining health insurance or by using a combination of its tax and spending powers.

Assume that instead of enacting § 5000A, Congress merely amended § 1 of the Internal Revenue Code, the section that sets forth individual tax rates, to either include a surcharge that mirrored the present section 5000A or altered the tax rate schedules to achieve the same result—in effect, enacting a tax increase applicable to taxpayers generally. Assume further that Congress then enacted the new section 36AA of the Internal Revenue Code that provided a credit for taxpayers who obtained health insurance that equaled the tax increase just enacted. In substance, this regime achieves the same result as section 5000A.

Alternatively, after adjusting § 1 of the Internal Revenue Code as described above, Congress could have enacted, through its spending power, a rebate program administered by the Department of Health and Human Services that provided individuals who could show proof of health insurance with a rebate based on certain income and family criteria so that the rebate amount would mirror the exaction imposed by § 5000A. Similar to the previous example, the consequences of such a scheme are similar to the consequences that arise from the application of § 5000A.

Substantively, there is no difference between these two alternatives. The latter alternative provides a subsidy for health insurance directly through the spending power while the former does so indirectly through the use of a tax credit. In fact, many scholars and commentators have equated the use of tax incentives—so-called “tax expenditures”—with direct spending after the publication of Professor Surrey’s seminal article on the subject in 1970.175 From an economic standpoint, incentives provided by either direct federal spending or by tax incentives are, arguably, indistinguishable and, in most respects, the spending and taxing powers are constitutionally

175. See generally Stanley S. Surrey, Tax Incentives As a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 83 HARV. L. REV. 705 (1970). For budget purposes, the distinction between direct spending and tax expenditures has been eroded. Revenue losses attributable to tax expenditure provisions must be specified pursuant to federal law. See, e.g., 2 U.S.C. § 622(3) (2006). For these purposes, “tax expenditures” means those revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.” Id. However, not all commentators are convinced of the equivalence of tax expenditures and direct spending. The late Professor Boris Bittker was perhaps the leading critic of assertions of such equivalence. According to Professor Bittker, identification of tax expenditures requires that provisions necessary for the determination of the tax base be distinguished from other provisions. Boris I. Bittker, Accounting for Federal “Tax Subsidies” in the National Budget, 22 NAT’L TAX J. 244, 252 (1969). Such distinctions are influenced by subjective beliefs about what constitutes an appropriate tax base. Id. at 260. “[E]very man can create his own set of ‘tax expenditures,’ but it will be no more than his collection of disparities between the income tax law as it is, and as he thinks it ought to be.” Id.
similar. Both the spending and taxing powers are subject to the limitation that they be exercised for national defense, repayment of federal debt, or to advance the general welfare but, unlike the Necessary and Proper Clause, neither power is limited in its exercise to actions that are supported by another enumerated power. Moreover, both powers are limited by other constitutional provisions, such as provisions in the Bill of Rights, the Fourteenth Amendment, and principles of federalism. Despite these similarities, the two powers are not constitutionally indistinguishable. For example, the Court has distinguished between tax incentives and direct spending for purposes of taxpayer standing. Moreover, unlike the spending power, the

176. U.S. CONST. art. I, § 8, cl. 1; see, e.g., South Dakota v. Dole, 483 U.S. 203, 207 (1987); United States v. Butler, 297 U.S. 1, 66 (1936). For a discussion of the limitations on the taxing power, see infra notes 232–44 and accompanying text. Note, however, that the Court, in Butler, did not believe that the disentanglement of the tax and spending powers from other enumerated powers meant that there were no limitations on the use of such powers. 297 U.S. at 66–67; see also Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2643 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). It is possible that a narrowly imposed and coordinated tax and spend scheme put in place to achieve an otherwise impermissible objective could be struck down. See infra note 222.

177. Dole, 483 U.S. at 210; Butler, 297 U.S. at 69–70; Moritz v. Comm'r, 469 F.2d 466, 469–70 (10th Cir. 1972). Federalism limitations on the spending power were at issue in National Federation of Independent Business v. Sebelius. The Court held that the statute's expansion of Medicaid was unconstitutional due to the coercive nature of such expansion. See Sebelius, 132 S. Ct. at 2607 (opinion of Roberts, C.J.); see also supra notes 5–6. It has been suggested that § 5000B of the Internal Revenue Code, added to the tax code by the Patient Protection and Affordable Care Act, possibly could be challenged on equal protection grounds because this provision, imposing a 10% excise tax on tanning salon services, will apply virtually exclusively to Caucasians. See Maximilian Held, Note, Go Forth and Sin [Tax] No More: Important Tax Provisions, and Their Hazards, in the Patient Protection and Affordable Care Act, 46 GONZ. L. REV. 717, 737–38 (2011). At least one prominent scholar believes that Congress's attempt to impose a punitive tax on bonuses received by employees of AIG, the large insurer bailed out by the federal government in 2008, raises Fifth Amendment Takings Clause concerns. See Jensen, supra note 166, at 104–05. See generally Erik M. Jensen, Would a Tax on AIG Bonus Recipients Really Be a Tax?, TAX NOTES, May 25, 2009, at 1033. Another prominent legal scholar has posited that the progressive federal income tax, because it poorly correlates the taxes it imposes with the benefits such taxes provide, should, in certain circumstances, be considered a taking. See Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 297–300 (1985). On occasion, a tax provision may implicate constitutional issues not because of the exaction it imposes but due to the information that it requires taxpayers to provide. See, e.g., Marchetti v. United States, 390 U.S. 39, 41–44 (1968) (holding that the information required to be provided pursuant to a wagering tax violated the Fifth Amendment).

178. In Massachusetts v. Mellon, a taxpayer brought a challenge to a federal statute that provided financing to states in order to reduce infant and maternal mortality. 262 U.S. 447, 479 (1923). The taxpayer alleged that the statute, by encroaching on areas that were traditionally the states' domain, violated the Tenth Amendment, and that the federal expenditures under the statute increased her tax bill in violation of due process. Id. at 483, 486. The Court denied the taxpayer standing, stating that the effect of the expenditures on his federal tax liability was so "remote, fluctuating and uncertain" and that "[h]is interest in the moneys
taxing power is subject to certain structural constitutional limitations.\textsuperscript{179} However, it is unlikely that the provision of income tax deductions or credits will implicate any structural limitations to the taxing power.\textsuperscript{180}

The fact that the individual mandate could have been enacted in a different form by an alternative use of the taxing power or by a combination of the taxing and spending powers does not suggest that there is no difference between the method chosen and the methods that could have been chosen. Practical and political implications inform the choices made by Congress. From a practical standpoint, a tax imposed on the failure to act in a prescribed manner is, in one sense, efficient. Raising tax rates and offering an offsetting deduction or credit requires that both the rate structure and the deduction or credit mechanism be calibrated to yield results comparable to the results achieved by a tax imposed directly on the failure to act, a process whose difficulty will be proportional to the number of exceptions and other variables included in the provision in question.\textsuperscript{181} Implementation of a tax and spend scheme will require the enlistment of another federal agency and

of the Treasury” was “shared with millions of others.” \textit{Id.} at 487. In \textit{Flast v. Cohen}, the Court created an exception for taxpayer claims of Establishment Clause violations. 392 U.S. 83, 105-06 (1968). The Court allowed taxpayer standing because, in the Court’s opinion, the framers adopted the Establishment Clause because they feared that “the taxing and spending power would be used to favor one religion over another or to support religion in general.” \textit{Id.} at 103. Therefore, the Establishment Clause serves as a “specific constitutional limitation” on Congress’s power to tax and spend. \textit{Id.} at 104. However, the Court has refused to equate tax expenditures and direct spending for purposes of applying the \textit{Flast} exception. In \textit{Arizona Christian School Tuition Organization v. Winn}, taxpayers brought an action to enjoin the state of Arizona from issuing tax credits to taxpayers for contributions to religious School Tuition Organizations (STOs). 131 S. Ct. 1436, 1440 (2011). The Court held that the taxpayers did not have standing to maintain the action. \textit{Id.} In the Court’s opinion, the \textit{Flast} test was not met because any subsidies to religious groups that the tax credit scheme created were not traceable to government expenditures. \textit{Id.} at 1445-47. Instead, the “contributions result from the decisions of private taxpayers regarding their own funds .... While the State, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention.” \textit{Id.} at 1448. Justice Kagan, in dissent, failed the see a distinction between tax expenditures and direct spending and believed that “targeted tax breaks . . . are just spending under a different name.” \textit{Id.} at 1455-56 (Kagan, J., dissenting in part). Although this case dealt with a state tax expenditure, nothing in the opinion suggests that the Court would view federal tax expenditures differently for the purposes of taxpayer standing.

\textsuperscript{179} See infra Subsection III.C.3.

\textsuperscript{180} See infra Subsection III.C.3.

\textsuperscript{181} Tax incentives are often extremely complex to decipher or impose significant inconveniences. See John D. McKinnon, \textit{Firms Pass Up Tax Breaks, Citing Hassles, Complexity}, WALL ST. J., July 23, 2012, at A1. Also, it is possible, and perhaps likely, that the benefits of federal subsidies and tax incentives do not flow entirely to the persons to whom they are directed. For example, the existence of federal assistance and tax breaks for higher education expenditures may have resulted in an increase in tuition costs. I have no opinion if a tax on the failure to act would diminish, exacerbate, or have no impact on this phenomenon.
the development of an infrastructure to carry out the subsidy part of the scheme. In another sense, however, such taxes are inefficient. Taxes imposed on the failure to act are difficult to enforce. The fact that many individuals’ compliance with the individual mandate will be documented and reported to the IRS significantly aids in the enforcement of the mandate.\footnote{182}{Effective in 2014, “[e]very person who provides minimum essential coverage to an individual during a calendar year” is required to furnish various information to the IRS and the covered individual. See I.R.C. § 6055 (CCH 2012). In addition, large employers subject to the employer mandate, described supra note 22, also must furnish information to the IRS for periods beginning after 2013. See id. § 6056.} However, most mandates will not have that luxury. Politically, either alternative would require Congress to vote for an across-the-board tax increase.

It is difficult to ascertain any reason why the efficiency or inefficiency of a tax scheme has constitutional implications. Political differences between alternative approaches justifiably may raise constitutional concerns. The dissenting Justices placed significant stock in the political difficulties of enacting tax increases and insisted that Congress live with the “penalty” label it chose to give to the individual mandate.\footnote{183}{Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2651, 2655 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).} Acknowledging that the Court often has considered an exaction that “bore an agnostic label” to be a tax, they emphatically noted that “we have never—never—treated as a tax an exaction which . . . explicitly denominates the exaction a ‘penalty.’”\footnote{184}{Id. at 2653.} The dissenters’ belief that judicial deference should be given to Congressional terminology when the term “penalty” is used but not otherwise suggests that they believe that the use of that particular term mitigates the negative political consequences attendant to a tax increase.\footnote{185}{Id. at 2650-51.}

Assuming, \textit{arguendo}, that the dissenting Justices’ view in this respect contains some validity, such view will hold some validity for this enactment only. Considering the controversy surrounding this case, it is highly unlikely that a future tax increase disguised as a penalty will pass without a political brouhaha. Moreover, is the enactment of an across-the-board tax increase coupled with either a concomitant deduction/credit for, or a direct federal subsidy to, qualified individuals more difficult politically than a direct tax on the failure to act? A compelling argument can be made that the latter is more difficult politically. A tax on the failure to act is transparent and, as evidenced by the public opprobrium that the individual mandate generated, is generally not well-received. It hardly strains credulity to believe that public opposition to a tax imposed on the failure to purchase energy efficient windows, to use the Chief Justice’s hypothetical, would be less
than the public opposition to a minor tweak to tax rates coupled with a deduction or credit for purchasing such windows.\textsuperscript{186}

The manner in which a provision is framed affects public opinion.\textsuperscript{187} The recent antitrust lawsuit settlement between credit card issuers and retail merchants is stark evidence of this phenomenon.\textsuperscript{188} Prior to the settlement, merchants were authorized to offer cash discounts but were prohibited from imposing a surcharge for credit transactions.\textsuperscript{189} Obviously, the credit card issuers believed that consumers perceived a difference between a cash discount and a credit surcharge despite the fact that they are economically equivalent.\textsuperscript{190} Imagine for a moment that an employer established a compensation system whereby total compensation was determined for all employees but that such compensation was then adjusted downward for employees who were unmarried. Most employees would find such a scheme outrageous. However, most employers have compensation schemes that do precisely that by the provision of greater employee benefits to married employees.\textsuperscript{191} Thus, single employees are not penalized. Instead, married employees are rewarded. An explicit tax on the failure to act does not have the advantage of political cover. To the contrary, such a tax has no political cover because it is not reframed, as the alternative measures are, as an incentive.\textsuperscript{192}

\begin{footnotes}
\textsuperscript{186.} See supra text accompanying note 97.

\textsuperscript{187.} For example, whether merchants frame a promotion as a discount or as a bonus has significant marketing implications. See generally Haipeng (Allan) Chen et al., \textit{When More Is Less: The Impact of Base Value Neglect on Consumer Preferences for Bonus Packs over Price Discounts}, 76 \textit{J. Marketing} 64 (2012). For a more general discussion of the behavioral aspects of consumer choice, see generally Richard Thaler, \textit{Mental Accounting and Consumer Choice}, 4 \textit{Marketing Sci.} 199 (1985).


\textsuperscript{190.} Id. at 279-80.

\textsuperscript{191.} A standard employee fringe benefit is employer subsidized health insurance. Many employers provide a greater subsidy for the coverage of married employees than they do for the coverage of single individuals. A recent survey of employer-provided health insurance benefits found that the average cost to an employer of providing health insurance to an employee in 2012 was $6,266 and $12,212 for single and family coverage, respectively. \textit{See 2012 Survey of Employer-Provided Health Benefits}, \textit{Savitz} (2012), available at http://www.savitz.com/docs/2012_SurveyReport.pdf. A common fringe benefit provided by universities to its employees is free or heavily subsidized tuition for dependent children that, with few exceptions, is unavailable to single individuals. A rudimentary understanding of economics makes plain that the cost of fringe benefits is factored into the determination of salary levels. Consequently, single employees bear the burden of salary reductions without the commensurate amount of employee benefits that are available to married employees.

\textsuperscript{192.} See Luigi Zingales, \textit{A Capitalism for the People: Recapturing the Lost Genius of American Prosperity} 223-24 (2012) (arguing that framing a measure as either a tax or an incentive has political ramifications).
\end{footnotes}
This intuition corresponds with predictions based on public choice theory.\textsuperscript{193} A legislative imposition that is perceived to apply to a relatively small group of persons will generate greater opposition than an imposition that is perceived to be broad-based.\textsuperscript{194}

C. Predictions of the Demise of Constitutional Impediments to Tax Are Premature

Despite the fact that a tax on the failure to act should be no more objectionable than alternative tax or tax and spend schemes that achieve the same result, the Court gave no indication that it equates such a tax with alternatives that are clearly constitutionally permissible. The Court did note that taxes may seek to influence behavior but it did not attempt to reframe a tax on inactivity as something else.\textsuperscript{195} In fact, Chief Justice Roberts took pains to provide constitutional support for a tax on inaction as just that.\textsuperscript{196} It appears that the Court will take such exactions in the form that Congress chooses to give them. The question of whether Congress "had the power to" do something will not substitute for the question of whether Congress actually "did so."\textsuperscript{197} As a result, there are three reasons why such a tax will not become a commonplace method for Congress to wield unfettered power over economic affairs. First, the transparency of a tax on the failure to act will make it more susceptible than alternative schemes to constitutional attacks of a traditional nature.\textsuperscript{198} Second, such a tax may be subject to re-characterization as a penalty—a remote possibility for other forms of tax.\textsuperscript{199} Third, aggressive provisions of this nature may very well run afoul of structural limitations on the taxing power—namely the direct tax clauses.\textsuperscript{200}

1. Traditional Constitutional Impediments

The typical method in which Congress uses the tax code to influence behavior is by the provision of incentives to encourage whatever behavior it deems desirable. Achieving the same result directly by taxing the failure to

\begin{itemize}
\item \textsuperscript{193} See id.
\item \textsuperscript{196} See supra notes 124–26 and accompanying text.
\item \textsuperscript{197} These quotes are taken from the dissenting opinion and were made in the context of the dissent’s examination of whether the individual mandate was a tax or a penalty. Sebelius, 132 S. Ct. at 2651 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (emphasis omitted).
\item \textsuperscript{198} See infra Subsection III.C.1.
\item \textsuperscript{199} See infra notes 205–31 and accompanying text.
\item \textsuperscript{200} See infra Subsection III.C.3.
\end{itemize}
act in the desired manner is more overt and thus more susceptible to constitutional attack. For example, assume that Congress wants to encourage all men over the age of forty to undergo annual colonoscopies. Congress can incentivize men to do so by providing a tax deduction or tax credit for the cost of the procedure, and it is unlikely that many people would find such an incentive objectionable. However, a tax imposed on the failure to undergo the procedure could, quite plausibly, be challenged on substantive due process grounds as a violation of the right to privacy. Likewise, a tax on the failure to hire a certain number of employees could be subject to First Amendment challenge, whereas hiring incentives routinely have been enacted. As previously shown, there is no substantive difference between a penalty and an incentive that cannot be explained away by the baseline from which the effects of a provision are measured. However, whether any differences between alternative means to the same end are more illusory than real, these differences are perceived as real and important. Ironically, an unrelated mandate that was promulgated under the authority of the Patient Protection and Affordable Care Act is under constitutional fire—the mandate that employer-provided health coverage include contraceptive coverage.


202. Although freedom of association is not a right made explicit in the First Amendment, the Court, in NAACP v. Alabama, held that such a right is protected by the First Amendment. 357 U.S. 449, 460 (1958). This freedom also includes the freedom to not associate with persons. See, e.g., Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) (holding that a New Jersey statute that required the Boy Scouts to admit an openly gay member was unconstitutional).

203. See supra notes 168-73 and accompanying text.

204. One objective of the Patient Protection and Affordable Care Act is the provision of preventative care for women. See Patient Protection and Affordable Care Act § 1001(5) (codified at 42 U.S.C. § 300gg-13(a)(4) (Supp. 2011)). Recommended guidelines were published on August 3, 2011 that included, as part of such preventive care, contraceptive services for women, with discretionary exemptions for certain religious employers. See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011) (codified at 45 C.F.R. pt. 147 (2012)). After originally providing religious employers with an additional year to comply with the contraception coverage, the Obama Administration, under pressure from various religious groups, announced a compromise whereby insurance companies would provide contraception coverage for employees of religious employers free of charge if the employers decided not to provide such coverage. See Rebecca Hall, Comment, The Women's Health Amendment and Religious Freedom: Finding a Sufficient Compromise, 15 J. HEALTH CARE L. & Pol'y 401, 403 (2012); see also Press Release, White House Office of the Press Sec'y, Fact Sheet: Women's Preventive Services and Religious Institutions (Feb. 10, 2012), available at http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions. This compromise did not placate the religious groups opposed to the mandate, and legal actions were brought alleging that the mandate violated the First Amendment. See Hall, supra note
2. Penalty vs. Tax: Drexel Furniture Resurrected

Congress’s power to regulate interstate commerce and its power to tax are separate and distinct powers. However, these two powers are inexorably linked when it comes to the issue of whether an exaction is a tax or a penalty. If Congress has the power to regulate an activity as commerce then whether it has imposed a penalty or a tax is virtually moot. A consequence of a restrictive interpretation of the Commerce Clause is the concomitant heightened importance of the inquiry into the nature of a so-called tax. It is no coincidence that the Court’s penalty versus tax jurisprudence reached its nadir before the New Deal expansion of the commerce power. Drexel Furniture was a rebuff to Congress’s attempts to achieve its aim through the tax back door after Hammer v. Dagenhart shut the front door. Once the Court, in Darby, opened the front door, Drexel Furniture became a curiosity, much like Lochner. Or so it seemed.


205. In unusual circumstances, an exaction may be subject to attack as an unconstitutional taking in violation of the Fifth Amendment. See discussion supra note 177. Also, an exaction may be deemed a fee. Whether an exaction is a fee or a tax could have constitutional consequences. Excessive executive branch discretion over taxes may constitute an unconstitutional delegation of power by Congress. Moreover, fees may vary significantly among the constituency of an agency without raising due process, equal protection, or uniformity issues. An exaction is characterized as a fee if it is imposed either to compensate for benefits derived from an agency or to defray the regulatory costs of the agency. For a general discussion of the fee versus tax issue, see Barbara A. Cherry & Donald D. Nystrom, Universal Service Contributions: An Unconstitutional Delegation of Taxing Power, 2000 L. REV. M.S.U.-D.C.L. 107, 133-37.

206. The power to tax comes with certain structural limitations that do not apply to the commerce power. See infra notes 233-44 and accompanying text.

207. See supra note 83.

208. Id. In Lochner v. New York, the Court held that liberty of contract was a right protected by the Due Process Clause of the Fourteenth Amendment, thereby providing the rationale for courts to later invalidate a host of federal and state statutes that sought to regulate health and welfare. 198 U.S. 45, 53 (1905). The case ushered in the so-called Lochner era, during which government power over economic matters was circumscribed. The Lochner era survived until the Court took a more expansive view of the commerce power during the New Deal era. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding
The Court’s refusal to countenance the expansion of the commerce power so as to encompass the power to compel the engagement in commerce has resurrected the penalty versus tax issue and infused it with new vitality. Although *Drexel Furniture* was never overruled, it lay dormant and there appeared to be no reason to believe it would rise from its somnolence. But rise it did in this case. Although the Court upheld the individual mandate as a tax, the majority’s examination of the mandate through the prism of *Drexel Furniture* assures that future enactments similar in form to the one at issue in this case will be challenged and closely scrutinized.

It would not have been much of an exaggeration to have suggested, prior to the Court’s holding in this case, that any tax is virtually immune from judicial interference. The label attached to an exaction had long been dismissed as a determining factor in the classification of an exaction. The refusal by a majority of the Court to give credence to the description of the individual mandate as a penalty should have come as no surprise. Descriptive terms have been ignored for almost 150 years. After a licensing requirement was upheld as a valid exercise of Congress’s taxing power in 1866, the courts have been consistent that the validity of a tax does not depend on whether “the tax itself bear[s] an accurate label.”

Moreover, both the purpose of an exaction and the extent of the revenue it is predicted to raise have also been deemed factors that are not germane to the determination of whether an exaction is supported by the taxing power. In *United States v. Doremus*, the Court acknowledged “that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject.” In *Sonzinsky v. United States*, the Court, upholding a tax on firearms dealers, was more direct, stating that the courts “will not undertake . . . to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution.” The fact that a purported tax is projected to raise little revenue, a fact that may be seen as evidentiary of a regulatory purpose for the exaction, has likewise drawn shrugs from the Court. For example, an occu-

Washington state’s minimum wage law. This case marked a turning point in the Court’s Commerce Clause jurisprudence and was followed by several cases that effectively eviscerated the Commerce Clause as a barrier to federal action. *See e.g.*, United States v. Darby, 312 U.S. 100 (1941) (upholding the federal Fair Labor Standards Act); United States v. Wrightwood Dairy Co, 315 U.S. 110 (1942) (upholding federal price regulations on milk); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding the application of the Agricultural Adjustment Act to wheat grown for internal consumption).

209. Of course, the determination of whether tax legislation violates constitutional provisions other than the Commerce Clause is unaffected by judicial expansions or contractions of the commerce power. *See supra* notes 202–05 and accompanying text.


211. 249 U.S. 86, 93 (1919).

212. 300 U.S. 506, 511, 514 (1937).
pational tax on bookies and a tax on yellow margarine were upheld by the Court in *United States v. Kahriger*213 and *McCray v. United States*,214 respectively, despite the fact that both taxes likely would generate little revenue. Finally, not only has the Court refused to draw distinctions based on a purported regulatory purpose of an exaction, it also has chosen to ignore the extent to which the exaction is effective in achieving that purpose. According to the Court, "[t]he power to tax may be exercised oppressively"215 and may "restrict or suppress the thing taxed."216 Congress is responsible to its constituents, not to the courts, for the manner in which it exercises its taxing power.217

Critical examination into the nature of a statutory exaction for the most part ceased after the Court expanded the scope of the Commerce Clause in the wake of the New Deal.218 The significant cases in which the Court refused to countenance a provision as a proper exercise of the taxing power arose at a time during which the Commerce Clause resembled a significant and vital limitation on federal power.219 As discussed above, *Drexel Furniture* struck down a tax on child labor that was enacted after the Court held that child labor was not a proper subject for federal regulation.220 In *Hill v. Wallace*, decided during the same term as *Drexel Furniture*, the Court invalidated a tax on commodities futures that were not sold on certain boards of trade because the Court characterized the taxes as an attempt to regulate activities over which the federal government had no authority.221 For similar reasons, in the mid-1930s, the Court struck down an excise tax imposed on liquor dealers who violated state liquor laws and a tax on agricultural producers that was intended to raise funds to implement an agricultural subsidy program.222 Once the Commerce Clause was interpreted as a

214. 195 U.S. 27, 59 (1904).
215. *Id.* at 58 (quoting *Spencer v. Merchant*, 125 U.S. 345, 355 (1888)).
219. *Cf.* id.
220. *See supra* note 83 and accompanying text.
221. 259 U.S. 44, 45, 67-69 (1922).

If the act before us is a proper exercise of the federal taxing power, evidently the regulation of all industry throughout the United States may be accomplished by similar exercises of the same power. It would be possible to exact money from
grant of virtually limitless power over economic matters, the distinction between a tax and a penalty, for constitutional purposes, became irrelevant. 223

The Court's refusal to bless the individual mandate as a proper exercise of the commerce power has made the tax versus penalty issue relevant again and will serve as a catalyst for challenges to exactions that Congress may choose to enact in similar form. As noted earlier, the Court did not provide much in the way of practical guidance for determining at which point an exaction crosses the line from a tax to a penalty. 224 Several of the markers that the Court specified are easily avoided—for example, a scienter requirement, the use of nontax enforcement powers to induce the action desired by the legislation, and the use of agencies other than the IRS to enforce the exaction. 225 It is noteworthy that the Court examined whether the exaction in question "impose[d] an exceedingly heavy burden." 226 This is pre-New Deal era language and contradicts the Court's own admonitions that the taxing power can be exercised oppressively. 227 It is unclear whether this factor, by itself, can be outcome determinative. It is arguable that a purported tax imposed on the failure to act is, in reality, a penalty if the terms of the tax leave a person with no reasonable choice but to act. Take Chief Justice Roberts' approval of a hypothetical $50 tax imposed on owners of homes without energy efficient windows, for example. 228

one branch of an industry and pay it to another branch in every field of activity which lies within the province of the states. The mere threat of such a procedure might well induce the surrender of rights and the compliance with federal regulation as the price of continuance in business. A few instances will illustrate the thought.

Let us suppose Congress should determine that the farmer, the miner, or some other producer of raw materials is receiving too much for his products, with consequent depression of the processing industry and idleness of its employees. Though, by confession, there is no power vested in Congress to compel by statute a lowering of the prices of the raw material, the same result might be accomplished, if the questioned act be valid, by taxing the producer upon his output and appropriating the proceeds to the processors, either with or without conditions imposed as the consideration for payment of the subsidy.

Id. at 75.

223. See generally Virelli & Leibowitz, supra note 218. For certain statutory purposes, the distinction between a tax and a penalty had, and continues to have, relevance, as evidenced by the Court's holding with respect to the application of the Anti-Injunction Act. See supra notes 45–57 and accompanying text; see also United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 220-26 (1996) (distinguishing taxes and penalties for purposes of bankruptcy law priorities).

224. See supra text accompanying notes 109–23.

225. See supra notes 74, 84–91 and accompanying text.


227. See supra notes 215 and accompanying text.

228. See supra text accompanying note 97. For a discussion of whether such a tax might be a direct tax that must be apportioned, see infra text accompanying note 305.
stead of a $50 tax, the tax equaled or exceeded the cost of such windows. No reasonable individual could resist the purchase of the windows under such circumstances. 229

Another factor that may be relevant in classifying an exaction is whether the action compelled is one that most, if not all, persons subject to the exaction would be expected to enter into regardless of the exaction. For example, instead of a tax on the failure to purchase windows, assume that the tax is imposed on the failure to purchase energy efficient light bulbs. It is likely that virtually everyone subject to the tax would have purchased light bulbs at some point during the taxable year. Therefore, a tax on the failure to purchase energy efficient light bulbs reasonably can be recast as an excise tax on the purchase of other types of light bulbs—a tax that is certainly permissible. Another relevant factor is the time at which the tax is imposed. A tax on the failure to purchase windows or, for example, a tax on the failure to purchase a particular type of automobile, that is imposed only upon the purchase of a nonconforming item is a fundamentally different type of tax than a tax that is imposed simply on the failure to purchase the required items. The former is the equivalent of an excise tax on items that the statute disfavors, but it does not compel the engagement in commerce, while the latter tax is compulsive.

A strong argument can be made that a tax that compels its subjects to engage in commerce because its terms leave one with no reasonable choice but to act can be interpreted, like the child labor tax, as an attempt to circumvent Commerce Clause restrictions. Alternatively, such a tax can be seen as nothing more than a direct means to an end that is achievable through other, more indirect, means. As illustrated earlier, Congress can compel action by raising tax rates and providing a large credit, deduction, or direct subsidy for engaging in a favored activity. 230 I doubt there would be any constitutionally-based objection to the provision of a 200% tax credit for the purchase of energy efficient windows that was funded through an increase in tax rates. This sort of provision should be enough to compel reasonable people to purchase such windows as effectively as a direct tax imposed on the failure to purchase such windows. The Court, at least based on the language in the opinion, does not appear inclined to examine an exaction in a form other than the form used by Congress. The Court looked beyond the formalism of an exaction’s label but it did not view the method by which Congress chose to achieve its objective as a formality. It is likely that the Court will examine a tax on the failure to act on its own terms. Ac-

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229. Although, for most taxpayers, the cost of health insurance will exceed the amount of the shared responsibility payment imposed by § 5000A, for higher income taxpayers the exaction will be comparable to the cost of insurance. See supra notes 33–38 and accompanying text.

230. See supra notes 175–81 and accompanying text.
cordingly, the reasoning in *Drexel Furniture* and the other cases that reached similar results will provide a check on egregious exercises of the taxing power that manifest themselves in similar form. Justice Cardozo noted that "motive or temptation" is not equivalent to "coercion" and that the law is guided by the assumption that the "freedom of the will" provides solutions to problems.231 Compulsion should be the apotheosis of a penalty.

3. *Structural Constraints on the Taxing Power—The Direct Tax Clauses*

Congress’s power to tax is expansive, but it is not unlimited. In addition to the constitutional limitations applicable to the exercise of any federal power, there are structural limitations specific to the taxing power.232 First, certain taxes must be uniform. Congress has the power "[t]o lay and collect Taxes, Duties, Imposts, and Excises... but all Duties, Imposts, and Excises shall be uniform throughout the United States."233 The precise contours of the uniformity requirement was subject to some debate during the first century of the republic, but it now refers simply to geographic uniformity—federal tax rates must be the same throughout the United States.234 The uniformity requirement rarely surfaces as a point of contention, perhaps due to the political difficulties that would be encountered in enacting a provision that overtly disfavored a particular geographic region, but on occasion the issue does arise.235 Duties and imposts are taxes imposed on imported goods—in modern parlance, tariffs.236 According to one scholar, the framers may have limited the term "excises" to taxes on whiskey.237 However, the term came to govern an exceedingly broad array of exactions, including inheritance taxes, gift taxes, the corporate income tax, and the individual

232. *See infra* text accompanying notes 233–44.
234. *Knowlton v. Moore*, 178 U.S. 41, 82-106 (1900). The language of the Sixteenth Amendment could be interpreted to excuse income taxes from the uniformity requirement. *See supra* text accompanying note 243. However, the Court did not subscribe to such an interpretation.
235. *See*, e.g., United States v. Ptasynski, 462 U.S. 74, 75, 85-86 (1983) (stating that an exemption from an oil profits tax for certain Alaskan oil did not provide Alaska with an undue preference over other states). One scholar opined that the uniformity requirement rivals, in its neglect, the reference to "Letters of Marque and Reprisal" in art. I, § 8, cl. 1. *See* Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"
*33 ARIZ. ST. L.J. 1057, 1065 (2001)* (citing *U.S. CONST.* art I, § 8, cl. 1.).
237. *Id.* at 60-61.
income tax. By the time of the New Deal, the Court defined the term expansively as an exaction "imposed upon a particular use of property or the exercise of a single power over property incidental to ownership." Second, Congress is expressly prohibited from imposing any taxes on exports or any duties on ships that depart from a port in one state and arrive at a port in another state. Finally, capitation, or other direct taxes must be apportioned among the states according to population. However, taxes on incomes may be imposed without apportionment among the states and without regard to population, although they must be imposed uniformly. Therefore, certain taxes—duties, imposts, excises, and income taxes—must be uniform, and direct taxes must be apportioned. With one exception, a tax cannot be both uniform and apportioned according to population. As a result, depending on the type of tax in question, it must be either uniform or apportioned.

Whether a tax is a direct tax subject to the apportionment requirement was an issue that appeared to be settled. As discussed subsequently and as noted by Chief Justice Roberts, direct taxes have been confined to capitation taxes, taxes on real property, and taxes on personal property. However, the Court’s imprimatur on taxes imposed on the failure to act has unsettled the issue somewhat. The Court’s rather prosaic treatment of this issue leaves some doubt as to whether future exactions taking similar form are immune to apportionment challenges.

238. See infra notes 281–82 and accompanying text. The Court, in Hylton v. United States, believed that the taxing power was flexible enough to support exactions that did not fit the traditional notions of direct taxes, duties, imposts, and excises. 3 U.S. (3 Dall.) 171, 173-74 (1796) (opinion of Chase, J).
240. U.S. CONST. art. I, § 9 cls. 5-6. The Court has interpreted the prohibition on laying taxes on exports to prohibit Congress from imposing a tax on bills of lading for export items, a stamp tax on export insurance, and a tax on charter ships carrying export cargo. See Fairbank v. United States, 181 U.S. 283, 294 (1901); Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19, 25-27 (1915); United States v. Hvoslef, 237 U.S. 1, 17-18 (1915). One limitation on Congress’s power to tax is, thankfully, truly a dead letter. A tax or duty on imported slaves cannot exceed $10 per slave. U.S. CONST. art. I, § 9, cl. 1.
241. U.S. CONST. amend. XVI. The Sixteenth Amendment did not create a separate classification for the income tax that was subject neither to apportionment nor to the uniformity requirement. See id. Income taxes are subject to the uniformity requirement. See Brushaber v. Union Pac. R.R., 240 U.S. 1, 18 (1916).
242. See infra note 253 and accompanying text.
243. See infra note 253 and accompanying text.
244. See supra note 98 and accompanying text; see also infra notes 279–83 and accompanying text.
A majority of the Court held that the individual mandate was not a direct tax and, therefore, not subject to apportionment.245 However, the Court never made explicit whether the individual mandate is an income tax or another form of excise tax. Chief Justice Roberts held that two factors distinguished the mandate from a capitation tax—the fact that it is determined by income and the fact that it is triggered by the failure to obtain insurance.246 One factor suggests the mandate is an income tax while the other suggests it is an excise tax. The Chief Justice seemingly approved a hypothetical $50 tax imposed on taxpayers who own homes without energy efficient windows because such a tax is adjusted based on income and filing status.247 This suggests that his hypothetical tax is an income tax, but reading more into this hypothetical is mere speculation. In fact, this hypothetical tax, without the income and filing status caveats, appears remarkably similar to a tax on real property, a direct tax.248

If a tax is not a direct tax subject to apportionment because it is an income tax, then the question of whether a tax that is imposed on the failure to act that does not reference income needing to be apportioned has not been answered. If the Court believed that the individual mandate is a form of excise tax regardless of how it is calculated, then the apportionment issue is generally, but not entirely, moot.249 Regardless of whether the individual mandate was seen by the Court as an excise tax or an income tax, it is quite possible that the aggressive imposition of taxes on the failure to act could implicate the apportionment requirement.

The framers’ purpose in subjecting direct taxes to apportionment is not clear and, therefore, the scope of the term “other direct tax”250 is uncertain. The phrase “[c]apitation, or other direct, [t]ax”251 indicates that the framers intended that some taxes other than capitation taxes would be subject to apportionment. Keep in mind that, with one exception, a tax is either uniform or apportioned, but not both. In order to apportion taxes according to population, the tax base, tax rates, or both would have to vary in order to synchronize revenue with population. The only exception is a lump-sum capitation tax. A fixed tax imposed on all individuals will be both uniform and, obviously, apportioned according to population. Apportioned taxes are difficult to implement and politically toxic because they will vary facially from state to state. The fact that a constitutional amendment was necessary
in order to implement an income tax after the Court held such a tax to be direct attests to the fact that apportionment is a political nonstarter. 252 At present, there are no apportioned taxes in effect in the United States and the last enactment of a direct tax took place in 1861. 253

In general terms, there are two schools of thought regarding the direct tax clauses. Professor Erik Jensen is perhaps the leading proponent of the view that the constitutional text and the intent of the framers support the continued vitality of the clauses and that the courts have been remiss in ignoring them. 254 A second school of thought that includes Professors Calvin Johnson and Bruce Ackerman believes that the direct tax clauses were the result of the compromises made by the framers with respect to slavery and were never intended to be applicable to most forms of taxation. 255 Therefore, the clauses rightly have been ignored.

Professor Jensen believes that the framers understood that the burden of indirect taxes such as excise taxes was "shiftable." 256 In other words, such taxes are ultimately borne by the consumer in the form of higher prices. 257 Moreover, such taxes also have inherent prophylactic properties because repressive taxes could be avoided by the reduction or cessation of the activity to which the tax applied. 258 In contrast, the burden of direct taxes falls on the individuals on whom they are imposed and cannot be shifted or avoided. 259 Direct taxes are also regressive. 260 These factors contributed to their unpopularity. In addition, the apportionment requirement was a mechanism used by the framers to reduce the possibility of taxes that are directed at particular sections of the country and the taxation of slaves was but a part of their concern in this regard. 261 Professor Jensen believes that the universe of direct taxes was understood to include, in addition to capitation taxes, all

252. See infra notes 283–85 and accompanying text.
254. See infra notes 256–65 and accompanying text.
255. See infra notes 266–72 and accompanying text.
257. See Jensen, supra note 235, at 1075. Although this property is not universal, the framers understood this feature as a general characteristic of indirect taxes. See Erik M. Jensen, The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?, 97 COLUM. L. REV. 2334, 2393-96, 2394 n.325 (1997).
258. See Jensen, supra note 235, at 1076.
259. Id. at 1075-77; Jensen, supra note 257, at 2396.
260. See Jensen, supra note 257, at 2391. Regressive taxes are taxes that, when expressed as a percentage of income, are greater as income declines. See id. The U.S. income tax system is, for the most part, progressive in that higher tax rates are applied as income increases.
261. Jensen, supra note 253, at 372. Slaves often were taxed as part of levies imposed on real estate but were not taxed independently of the real estate. Id.
taxes other than those understood to be indirect taxes. 262 He also believes that to limit direct taxes to capitation taxes that are by their very nature apportioned, as suggested by Professors Johnson and Ackerman, is simplistic. 263 At the time of the Constitution's ratification, capitation taxes were not self-apportioning because of the three-fifths rule for the counting of slaves for apportionment purposes. 264 Moreover, there is no requirement that capitation taxes be imposed as a lump sum without any exclusion or adjustments. 265

Professor Johnson asserts that the apportionment requirement was intended to link the burden of taxation with representation and wealth. 266 The apportionment requirement extended the three-fifths compromise with respect to slaves' effect on representation to taxation. 267 Moreover, the apportionment requirement may have been a practical compromise to avoid the necessity of property appraisals and, perhaps, as a disincentive for the South to add to the slave population. 268 According to Professor Johnson, all taxes except imposts were considered direct taxes. 269 The framers divided the universe of taxes into those that are subject to uniformity and those subject to apportionment. 270 Only taxes that can be apportioned practically should be considered direct taxes. 271 Professor Ackerman subscribes to this narrow view of direct taxes and asserts further that the textual reference to direct taxes other than capitation taxes was meant to constrain the federal government in enforcing state requisition obligations under the Articles of Confederation. 272

In summary, the Jensen school of thought believes that the nature of a tax exaction should be examined and taxes that do not contain the characteristics of indirect taxes should be subject to apportionment. 273 The fact that the requirement to apportion a tax causes a tax to face virtually insurmountable practical and political difficulties is of no moment. 274 The direct tax clauses were meant as a substantive limitation on the federal taxing pow-

262. See Jensen, supra note 257, at 2390, 2395.
263. See infra text accompanying notes 266–75.
264. See Jensen, supra note 257, at 2392.
265. See id. at 2392.
266. Johnson, supra note 256, at 300-06; see also Johnson, supra note 236, at 30-34.
267. See Johnson, supra note 256, at 304-05.
268. See id. at 302, 307. Slaves were often taxed in conjunction with levies on real property. See Jensen, supra note 253, at 372.
271. Id.; see also Bruce Ackerman, Taxation and the Constitution, 99 COLUM. L. REV. 1, 23 (1999) (quoting Hylton v. United States, 3 U.S. (3 Dall.) 171, 174 (1796) (opinion of Chase, J)).
272. Ackerman, supra note 271, at 13.
273. See supra text accompanying note 262.
274. See supra notes 263–68 and accompanying text.
er. The Johnson-Ackerman school of thought posits that the direct tax clauses merely reflect a truism—a direct tax was one that practically could be apportioned—and their purpose was inextricably linked to the slavery compromises. Accordingly, except for capitation taxes and property taxes, the direct tax clauses are dead letters. It is questionable whether textual provisions should be ignored because they were the result of compromises over the issue of slavery. For example, the Electoral College provisions are not ignored—much as we may desire to do so. Nonetheless, the Court, with a few detours along the way, has leaned strongly toward the Johnson-Ackerman approach to interpreting the direct tax clauses.

As noted by Chief Justice Roberts, direct taxes are limited to capitation taxes and taxes imposed directly on real and personal property. In Hylton v. United States, the Court, holding that a tax on carriages was not a direct tax, stated that “[t]he rule of apportionment is only to be adopted in such cases where it can reasonably apply” and limited apportionment to capitation taxes and taxes on real property. The Court later held that inheritance taxes and gift taxes were not direct taxes but instead taxes on the succession of property. Likewise, the Civil War income tax and the corporate income tax were held to have been excise taxes.

The Court, however, in the two Pollock cases that eventually led to the ratification of the Sixteenth Amendment, held that a tax on income from real property and personal property was a direct tax on that property, and therefore a direct tax subject to the apportionment requirement. Although

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275. Ackerman, supra note 271, at 13.
276. See supra notes 266–72 and accompanying text.
277. The Electoral College is also a product of the three-fifths slavery compromise. Because each state has a number of electors determined by the sum of the number of its representatives and senators, the southern states were assured that their slave populations would increase their political influence in presidential elections. U.S. Const. art. II, § 1.
278. See supra note 98 and accompanying text.
279. 3 U.S. (3 Dall.) 171, 174-75 (Chase, J) (emphasis omitted).
281. Springer v. United States, 102 U.S. 586, 598-99 (1881); Flint v. Stone Tracy Co., 220 U.S. 107, 150-51 (1911). Flint was decided after Pollock v. Farmers' Loan & Trust Co. and before the ratification of the Sixteenth Amendment. The Court interpreted the corporate income tax as a tax on the privilege of doing business in corporate form. Flint, 220 U.S. at 151.
282. Pollock v. Farmers' Loan & Trust Co. (Pollock I), 157 U.S. 429, 580, 581-83 (1895) (holding that a tax on income derived from real property was a direct tax), overruled by South Carolina v. Baker, 485 U.S. 505, 524 (1988); Pollock v. Farmers' Loan & Trust Co. (Pollock II), 158 U.S. 601, 618 (1895) (holding that a tax on income derived from personal property was a direct tax). The Court, in the earlier Pollock case, struck down a tax on income from state and local securities on federalism grounds, a decision that was later overruled. Pollock I, 157 U.S. at 584-86. However, it did not decide the issue of whether a tax on
these decisions did not call into question whether a tax on earned income was indirect, they erected an insurmountable impediment to the burgeoning Progressive movement's aim to tax the vast accumulations of wealth that industrialization had made possible. These cases were very controversial. So controversial, in fact, that Justice Harlan opined that the decisions "will become as hateful with the American people as the Dred Scott case." 283 In 1913, the Sixteenth Amendment was ratified, which enables Congress to tax incomes, from whatever source derived, without apportionment.284

The debate between Professor Jensen and Professors Johnson and Ackerman extends to the effect that the Sixteenth Amendment has on the meaning of the direct tax clauses. Professor Johnson believes that "[t]he Sixteenth Amendment came to bury Pollock, not to praise it." 285 His interpretation, shared by Professor Ackerman, of the political debate surrounding the proposal and ratification of the amendment indicated that the measure was intended to repudiate Pollock and put an end to assertions that various forms of tax are direct. 286 In contrast, Professor Jensen believes that a number of Congressmen did not think that Pollock was indefensible and that the Sixteenth Amendment represented a tacit admission that income taxes were direct taxes, thereby necessitating a constitutional amendment for their imposition. 287 The amendment's language, on its face, merely empowers the federal government to levy income taxes without apportionment, nothing more and nothing less. 288 This was the effect given to the amendment by the Court in Brushaber v. Union Pacific Railroad Co. 289

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284. U.S. CONST. amend. XVI.
286. See id. at 347-50; Ackerman, supra note 272, at 33-34, 38.
287. See Jensen, supra note 253, at 392-93; Johnson, supra note 256, at 347.
289. The Court explained as follows:

[T]he Amendment contains nothing repudiating or challenging the ruling in the Pollock Case that the word direct had a broader significance since it embraced also taxes levied directly on personal property because of its ownership, and therefore the Amendment at least impliedly makes such wider significance a part of the Constitution—a condition which clearly demonstrates that the purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended, that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself and thereby to take an income tax out of the class of excises, duties and imposts and place it in the class of direct taxes.

240 U.S. 1, 19 (1916).
In *Eisner v. Macomber*, the Court did not believe that the Sixteenth Amendment gutted the direct tax clauses. In that case the Court held that a proportional stock dividend was not income because such a dividend merely retains the shareholders’ status quo ante ownership of the corporation. The Court proceeded to classify such a tax as a tax on capital and, therefore, a direct tax:

That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interests might be valued in view of the condition of the company, including its accumulated and undivided profits, is equally clear. But that this would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this Court.

The Court, in *Weiss v. Stearn*, cited approvingly to *Eisner* in holding that the receipt of stock by shareholders in a reorganization transaction was not income.

As previously discussed, Chief Justice Roberts stated that direct taxes are limited to capitation taxes and taxes imposed upon real and personal property. Obviously, the individual mandate could not be considered a tax on real or personal property. However, the Court’s dismissal of the individual mandate as a capitation tax raises more questions than it answers. Moreover, the rather cursory examination that the Court gave this issue, as noted by the dissent, leaves open the possibility that future enactments of this sort

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290. 252 U.S. 189, 206 (1920).
291. Id. at 210-13. The holding in *Eisner* has been codified, albeit with numerous exceptions to prevent abuse. See I.R.C. § 305 (CCH 2012). It is not so obvious that a proportional stock dividend is not income. In the case that the stock held by the recipients of the dividend has appreciated in value, it is plausible that the receipt of the stock dividend is a realization event sufficient to tax, to the extent of the value of the dividend, the appreciation in the shares.
292. *Eisner*, 252 U.S. at 217. Justice Holmes, however, believed that the Sixteenth Amendment did more than just allow for the imposition of a nonapportioned income tax:

The known purpose of this Amendment was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest. I am of opinion that the Amendment justifies the tax.

*Id.* at 220 (Holmes, J., dissenting).
293. 265 U.S. 242, 253-54 (1924). The facts of this case would support the assertion that the consideration received by the shareholders was income more so than the facts in *Eisner*. The shareholders received shares in a new corporation and, therefore, could be considered to have realized income from a discrete and measurable transaction. See *id.* at 244-45. The current tax treatment of corporate reorganizations is complex, but the receipt of stock in corporate reorganizations is taxable unless the transaction meets various statutory requirements. See generally I.R.C. §§ 354, 355, 368. *Eisner* was also cited in *Edwards v. Cuba Railroad Co.*, in which the Court held that subsidies paid by the Cuban government to subsidize construction and reduce rates were not income. 268 U.S. 628, 629-30, 633 (1925). This sort of transaction is now dealt with statutorily. See I.R.C. § 118.
294. *See supra* note 98 and accompanying text.
could be challenged as enactments of a direct tax subject to apportionment.\textsuperscript{295} It is not clear whether the Court believed that the individual mandate is not a direct tax subject to apportionment because it is an income tax or because it is an excise tax irrespective of the method in which it is calculated. As noted earlier, the Court appeared to suggest that it viewed the mandate as an income tax.\textsuperscript{296}

However, the Court also stated that the individual mandate was not a capitation tax because “[c]apitations are taxes paid by every person, ‘without regard to property, profession, or any other circumstance.’ The whole point of the shared responsibility payment is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance.”\textsuperscript{297} This language implies that the individual mandate is not a capitation tax regardless of its reference to income because “any other circumstance” should include the failure to obtain insurance standing alone. The Court’s cursory analysis in this respect—four paragraphs in the majority opinion—fails to provide any principled guidance for determining whether future enactments of this sort are direct taxes.\textsuperscript{298}

Surely, the definition put forth by the Court cannot be applied literally without nuance. Taken literally, this definition would exclude from the category of capitation taxes a $100 tax imposed on all individuals who fail to take a ride in the space shuttle. Moreover, it is not necessary to resort to such an absurd example to evidence the Court’s unsatisfactory analysis of capitation taxes. For example, a tax of $100 imposed on every individual except full-time students not over eighteen years of age is a capitation tax despite the fact that the tax is not paid by every person regardless of any other circumstance.\textsuperscript{299} Alternatively, a tax of $100 imposed on every individual except those individuals whose income is below some statutorily defined poverty threshold strongly resembles a capitation tax.\textsuperscript{300} Although

\begin{footnotes}
\item[295] See supra text accompanying note 100.
\item[296] See supra notes 247–49 and accompanying text.
\item[298] Id. at 2598-99.
\item[299] The township in which this author resides imposes a per capita tax on each resident or inhabitant of the township over the age of twenty-one. UPPER PROVIDENCE TWP., PA, CODIFIED ORDINANCES pt. 8, tit. 4, ch. 880, § 880.01 (2011). It defies logic that a similar federal exaction would fail to constitute a capitation tax solely because it does not apply to individuals that are under the age of twenty-two. To consider such a tax an excise tax imposed on the privilege of living beyond the age of twenty-one stretches the concept of an excise beyond all reasonable bounds.
\item[300] State and local governments that impose per capita taxes often exempt from such taxes individuals whose income is below a defined threshold. See, e.g., 53 PA. CONS. STAT. ANN. § 6924.301.1(b) (West 2011) (authorizing political subdivisions to exempt individuals with annual income below $12,000 from per capita or head taxes).
\end{footnotes}
the tax is excused for persons of a certain income level, its amount is not determined by income for anyone.

If a tax is not a capitation or other direct tax then it must be either an income tax or another form of excise tax. Let us assume for the moment that the mandate is considered an income tax because it is determined by reference to income and family status. The mandate amount, however, will be determined by income for only a subset of individuals to whom it applies. For many individuals, the mandate will be a flat amount. Is an exaction an income tax if anyone's liability is determined by income? It strains credulity to classify an exaction that is fixed for all but a small number of individuals as an income tax.

Alternatively, the Court may have considered the individual mandate as an excise tax that is permissible regardless of whether its amount is based, in any part, on incomes. Unfortunately, the Court failed to explain just how this type of tax is an excise tax. Notwithstanding the expansive scope that the term "excise" has taken on, to fit a tax on the failure to purchase something under this label requires some explanation. Does a tax that is imposed on the failure to purchase insurance constitute a tax "imposed upon a particular use of property or the exercise of a single power over property incidental to ownership"? I guess it is possible to squeeze the tax within the scope of an excise tax by deeming the failure to purchase insurance as a tax imposed on the power to retain one's assets for alternative uses. This is a rather odd, but possible, way to interpret such a tax. Alternatively, the tax can be interpreted as an excise tax on the economic decision to self-insure. However, if this interpretation of the failure to obtain insurance is tenable, then the mandate should have passed muster under the commerce power. Perhaps the Court has decoupled excise taxes from any connection to privileges, transactions, or other affirmative deployment of assets so that they encompass taxes on the failure to behave in a prescribed way. If so, it should have said as much. In any event, such an expansive view of excise power will not settle all disputes.

Let me go back again to the Chief Justice's example of a $50 tax imposed on the owners of homes without energy efficient windows. In the example, the tax is paid with an income tax return and is adjusted based on income and filing status. Assume that the tax is $50 without adjustment for the other factors. I fail to see how such a tax could be considered as any-

301. See supra notes 27-38 and accompanying text.
302. See Bromley v. McCaughn, 280 U.S. 124, 136 (1929); see also supra text accompanying note 239.
304. Id. at 2597-98; see also supra text accompanying note 97.
305. See supra text accompanying note 247.
thing other than a tax on real property—a direct tax. Surely, a direct tax on realty does not have to tax all realty. Just why the Chief Justice sanctioned such a tax is not clear. Apparently, it was because it was income adjusted.

I tend to believe that future exactions of this type will be subject to challenge in several circumstances. First, nonincome-based exactions that reach all but an insignificant number of individuals will be challenged as capitation taxes. This will provide a check on Congress’s use of the taxing power to get too far ahead of the people in economic and social matters. For example, assume that Congress wishes to prod people to become more educated about some perceived social ill and enacts a $20 tax on the failure to take a $400 self-study course that deals with the matter in question. Assume further that the country does not share Congress’s concern and, consequently, the tax is incurred by virtually all individuals. The combination of the small amount of the exaction and the public’s apathy concerning the social ill in question assures that such a tax, in its effect, will bear a striking resemblance to a capitation tax and, perhaps, be subject to challenge as such.306

Second, flat taxes that are imposed on the failure to take action to improve or modify property will be subject to challenge as direct taxes imposed on property not so improved or modified. Finally, the status of an exaction as an income tax may be challenged if the exaction is, in fact, determined by income for an insignificant number of people. Such a challenge will leave the exaction vulnerable to the objections discussed in the preceding examples.

In effect, the Court narrowly defined capitation and other direct taxes and then concluded that any exaction not captured by that narrow definition is an indirect tax. I am not asserting that the individual mandate is a direct tax. Certainly a sufficient number of people will be exempt from the tax to deny, quite reasonably, its status as a capitation tax. Alternatively, a reasonable conclusion could be drawn that the mandate is sufficiently tied to income to classify it as an income tax. The mandate is a relatively easy case. It is quite possible that future mandates will be categorically dismissed from the universe of direct taxes regardless of their application and effect. The Federal Circuit, for example, has interpreted the direct tax clauses to apply only to broad-based property taxes and not to property taxes of more limited scope.307 The Court ultimately may conclude that only taxes that, on their

306. If such a tax is imposed on all individuals, then the tax will be self-apportioning and, thus, permissible whether or not it is considered a direct tax. However, if such a tax is imposed on households or contains exemptions for children, for example, it would no longer be self-apportioning.

307. The Federal Circuit narrowly defined direct taxes to include broad-based taxes imposed on personal property but not narrowly tailored property assessments. Union Electric Co. v. United States, 363 F.3d 1292, 1302 (Fed. Cir. 2004). The issue before the court was
face, are either universally applicable capitations or broad-based property
taxes constitute direct taxes and that mandates, regardless of their impact,
do not fit within this category of tax. However, it did not do so in this case
and perhaps it will not, because "[t]he law is not indifferent to considera-
tions of degree." The Court's failure to probe the boundaries of direct
taxes in this case is understandable. After all, this case was seen, first and
foremost, as a test of the commerce power. The attention given to the taxing
power was focused on the tax versus penalty debate. The direct tax issue
appears to have been a collateral issue.

CONCLUSION

The possibility that the Court's approval of the individual mandate
will lead to a Congress run-amok, intoxicated by its power to tax, is negated
by the newfound vigor of Drexel Furniture, traditional constitutional safe-
guards, and the potential resurrection of the direct tax clauses as limiting
principles. More importantly, however, are the political checks on Congress.
As previously noted, the transparency of failure to act taxes will result in
more, not less, scrutiny of the wisdom of similar exactions—as evidenced
both by the unprecedented public attention focused on the individual man-
date and by the dearth of intrusive mandates imposed at the state level.
Moreover, taxes imposed on the failure to act are often difficult to enforce, a
fact that should diminish any proclivity that Congress may have to enact
such taxes.

I believe that most people would agree that the tax law suffers
the validity of a special assessment imposed on domestic utility companies that purchased
government enriched uranium:

[T]he tax at issue here is not a general tax on the whole of one's personal property
or even a tax on a broad class of personal property. Rather, it is a carefully tailored
tax, like the one sustained in Hylton and other cases, levied upon only one particu-
lar kind of personal property, government-enriched uranium. It is therefore not a
direct tax.

Id. at 1294-95, 1302. The court also held that the tax at issue was an excise tax:

Also, the tax here on the ownership of government-enriched uranium purchased di-
rectly or indirectly from the government is indistinguishable from taxes on carriag-
es, tobacco, yachts and other types of personal property that have long been ac-
cepted as excise taxes. The EPACT tax is not therefore a direct tax, and does not
require apportionment.

Id. at 1302, 1304.

(Cardozo, J., concurring).

309. See supra notes 184-91 and accompanying text. I know of no state impositions
that can be used as evidence that this case will usher in a parade of ridiculous mandates. I
have not scoured the various state tax codes but the fact that no such exactions come to mind
is evidence of the dearth of such transactions. It may very well be possible that various states
are limited in their exercise of their taxing powers in such fashion by their own constitutions.

310. See supra text accompanying note 166-74.
from a lack of respect due to, in part, the abundance of noncompliance with the tax law as it is. One would hope that Congress would avoid actions that invite further noncompliance.