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On Slippery Constitutional Slopes and the Affordable Care Act

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The Patient Protection and Affordable Care Act is one of the most significant laws ever passed by Congress. It is aimed at a social problem of the first order, the spiraling costs of health care and the millions of Americans without health insurance. The new law has engendered an enormous amount of public discussion and likely will be a major issue in the upcoming national elections. At the center of the controversy is the keystone of the Act: a mandate that almost all Americans obtain a minimum amount of health insurance or be assessed a penalty when paying their income taxes.

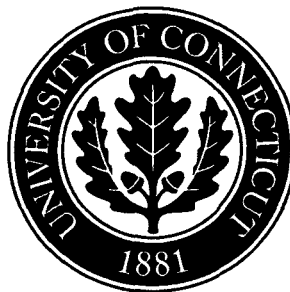
Lawsuits have been brought challenging the constitutionality of the mandate on numerous grounds. One of these cases, brought by twenty-six states and private plaintiffs, is pending before the Supreme Court and may very well be a landmark decision. Plaintiffs claim that Congress does not have power under Article I to impose the requirement.

There are two possible Article I bases for upholding the mandate: the Commerce Clause and the taxation provisions of the General Welfare Clause. Opponents deny that these are valid grounds. Their primary argument is that the Act either regulates or taxes inactivity and that allowing such a measure would give Congress limitless power to legislate. Further, if the mandate constitutes a tax under Article I, it must be an unapportioned "direct tax," which the Constitution prohibits.

This Article examines these challenges and others in detail. It concludes that the mandate can be justified under both the Commerce Clause (as augmented by the Necessary and Proper Clause) and the General Welfare Clause.

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I. INTRODUCTION

From a certain perspective, the Patient Protection and Affordable Care Act of 2010 (“ACA”) “poses one of the gravest challenges to republican self-government since the Civil War . . . [by] establish[ing] a vast array of new entitlements, cost controls, and regulations over the health sector that comprises one-sixth of the U.S. economy.”¹ More colorfully still, others claim that if the Act is sustained, “government would become Hobbes’ Leviathan.”² Yet many see the ACA as “the most important progressive legislation in decades,”³ and dismiss arguments that it exceeds Congress’ constitutional authority under Article I as “silly,” thinly disguised efforts to infuse the Constitution with libertarian principles.⁴

The main lawsuit against the Act, brought by twenty-six states and private plaintiffs, seems to many a partisan effort to achieve through litigation what the political process failed to accomplish. Opponents of the ACA have been castigated for employing the same types of arguments that underlay *Lochner v. New York* and *Hammer v. Dagenhart*.⁵ It is suspicious

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¹ Eric R. Claey's, *Obamacare and the Limits of Judicial Conservatism*, 8 NAT'L AFF. 56, 56 (2011).

² Kenneth T. Cuccinelli et al., *Why the Debate over the Constitutionality of the Federal Health Care Law is About Much More than Health Care*, 15 TEX. REV. L. & POL. 293, 335 (2011).

³ Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 2 (2011), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/constitutional-law/bad-news-for-mail-robbers-the-obvious-constitutionality-of-health-care-reform>.

⁴ *Id.* at 22 (“What really drives the constitutional claims against the bill is not arguments about the commerce power or the taxing power but an implicit libertarianism which focuses on the burden a law imposes on individuals and pays no attention at all to legitimate state interests.”); see also Richard Primus, Commentary, *How the Gun-Free School Zones Act Saved the Individual Mandate*, 110 MICH. L. REV. FIRST IMPRESSIONS 44, 44 (2012), <http://www.michiganlawreview.org/articles/how-the-gun-free-school-zones-act-saved-the-individual-mandate> (“Under existing doctrine, the provision is as valid as can be.”).

⁵ *Hammer v. Dagenhart*, 247 U.S. 251, 269, 277 (1918) (holding that a federal limitation on child labor exceeded Congress’ powers under the Commerce Clause); *Lochner v. New York*, 198 U.S. 45, 61, 64 (1905) (holding that limiting the working hours of bakers infringed on “liberty of contract” in violation of the Due Process Clause of the Fourteenth Amendment); see, e.g., Ian Millhiser, *Worse than Lochner*, 29 YALE L. & POL’Y REV. INTER ALIA 50 (2011) (comparing the arguments attacking the constitutionality of the ACA to the policy arguments made during the time of *Hammer* and *Lochner*), http://yalelawandpolicy.org/sites/default/files/YLPRIA29_Millhiser.pdf; Peter J. Smith, *Federalism*,

to them that almost all the attorneys general or governors supporting the litigation are Republicans.⁶ Moreover, the attacks on the most controversial feature of the Act, the mandate that almost all Americans ineligible for government-provided medical care or employer-based insurance plans must purchase insurance, strike more than a few as hypocritical. The idea for this feature originated in conservative think tanks and was first enacted in Massachusetts at the urging of a Republican governor.⁷ If the extraordinarily lengthy oral arguments in the Supreme Court over the constitutionality of the mandate result in derailing President Obama's signature legislative achievement, it would, in the minds of many, be a replay of the now-regretted decisions interring central provisions of New Deal legislation as well as *Bush v. Gore* redux.⁸

Although the ACA is an immensely complex piece of legislation, the constitutional attack mainly concerns two of its key components: (1) the insurance mandate,⁹ and (2) the expansion of Medicaid eligibility to cover the "near-poor."¹⁰ This paper will treat only the first claim.

To many observers in the legal academy, this writer included, the constitutional objections to the insurance mandate seem exceptionally weak under the Court's approach to congressional powers since 1937. However, some of us who were in the business of constitutional prognostication prior to the Court's decisions in *United States v. Lopez*¹¹ and *United States v. Morrison*¹² view the current proceedings with a sinking feeling that our confidence may be every bit as mistaken as it was prior to those historic rulings limiting the scope of congressional power

Lochner, and the Individual Mandate, 91 B.U. L. REV. 1723, 1726 (2011) ("But because the objections to the individual mandate, though couched in federalism terms, have very little to do with federalism at all, it is difficult to see them as anything other than *Lochner* under a different guise.").

⁶ See Linda Greenhouse, *Never Before*, OPINIONATOR (Mar. 21, 2012, 9:00PM), <http://opinionator.blogs.nytimes.com/2012/03/21/never-before> (noting that the lawsuit against the ACA is brought by Republican governors or attorneys general in 26 states).

⁷ The government's brief on the mandate before the Supreme Court notes that the insurance mandate was originally the idea of health economists and lawyers at the Heritage Foundation and the American Enterprise Institute. Brief for the Petitioners (Minimum Coverage Provision) at 14–15, *Dep't of Health & Human Servs. v. Florida*, No. 11-398 (Jan. 6, 2012).

⁸ See Koppelman, *supra* note 3, at 1 ("The Supreme Court may be headed for its most dramatic intervention in American politics—and most flagrant abuse of its power—since *Bush v. Gore*."); David Orentlicher, Response, *Constitutional Challenges to the Health Care Mandate: Based in Politics, Not Law*, 160 U. PA. L. REV. PENNUMBRA 19, 32 n.52 (2011), <http://www.pennumbra.com/responses/09-2011/Orentlicher.pdf> (noting that invalidating the ACA would require "a special rule . . . it would not be the first time that the Court took such a path. Recall *Bush v. Gore* . . .").

⁹ 26 U.S.C.A. § 5000A (West 2003 and Supp. 2011).

¹⁰ See 42 U.S.C.A. § 1396A(A)(10)(a)(i)(VIII) (West 2003 & Supp. 2011) (requiring that starting in 2004 state Medicaid plans must cover individuals whose family income does not exceed 133% of the poverty line).

¹¹ 514 U.S. 549 (1995).

¹² 529 U.S. 598 (2000).

under the Commerce Clause.¹³ Many of us had told our students that as a practical matter the only limits to national legislation were political, and our confidence did not seem misplaced. After all, the Court had time and again since 1937 consistently approved expanding uses of the Commerce Clause to support congressional action. The one major effort by the Court to wall off the states from federal legislation was *National League of Cities v. Usery*¹⁴ in 1976 and its progeny, which had attempted to delineate areas in which state sovereignty was supreme by virtue of the Tenth Amendment regardless of whether Congress was acting within its powers under Article I.¹⁵ That effort ended decisively nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁶ which eviscerated *National League of Cities*, instilling an “I-told-you-so” feeling of vindication among those who thought the Court had interred the Tenth Amendment a generation earlier in *United States v. Darby*.¹⁷ In *Darby*, the Court famously pronounced the Tenth Amendment to be a mere “truism” that imposed no constraints on federal power that was otherwise within Article I’s ambit.¹⁸ Seven years after *Garcia*, however, the Court shocked us again by resurrecting state sovereignty as an independent force in *New York v. United States*,¹⁹ followed by *Printz v. United States* in 1997.²⁰ While not disavowing *Darby*, the Court in those cases discovered a new limit to federal authority in “the structure of the Constitution,”²¹ namely “the principle of state sovereignty,”²² which forbade Congress from “commandeering”²³ the states into enacting or administering laws even if the statute could be justified under Article I. And then came *Lopez* and *Morrison*, the first decisions in nearly sixty years to hold that Congress had overreached its authority in enacting laws based on the Commerce Clause.²⁴

¹³ U.S. CONST. art. I, § 8, cl. 3.

¹⁴ 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

¹⁵ *See id.* at 852 (“We hold that insofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.”).

¹⁶ *Garcia*, 469 U.S. 528.

¹⁷ *United States v. Darby*, 312 U.S. 100 (1941).

¹⁸ *Id.* at 124 (“The amendment states but a truism that all is retained which has not been surrendered.”).

¹⁹ 505 U.S. 144 (1992).

²⁰ 521 U.S. 898 (1997).

²¹ *Id.* at 918.

²² *Id.* at 924.

²³ *Id.* at 914; *New York*, 505 U.S. at 175.

²⁴ *United States v. Morrison*, 529 U.S. 598, 609 (2000); *United States v. Lopez*, 514 U.S. 549, 557 (1995); *see also New York*, 505 U.S. at 166. (“[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . [T]he Commerce Clause, for example, authorizes Congress

Once upon a time, when I was a lad and working as a law clerk for Chief Justice Warren E. Burger, another clerk and I spent much of an afternoon arguing with the Chief about a pending case involving government tort liability for catastrophic disasters at nuclear power plants. We were fresh from legal educations that highly valued the ability to ferret out tensions between decisions, and we concluded that there was an insurmountable obstacle to the Court even reaching the merits in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*²⁵ We thought it clear from the Court's precedents that an environmental group and its members lacked standing to contest the validity of an act that would only become operative if an unlikely event occurred, a catastrophic accident at a nuclear plant. (This was before the sobering lesson of Three Mile Island.) After listening to us carefully and only gently parrying our seemingly irrefutable position, the Chief gave us a bemused look and said: "You boys want too much consistency." He explained that the decision over the constitutionality of the Price-Anderson Act already effectively had been made "in another place," cocking his thumb in the direction of the capitol building. Congress had made the choice, he said, back when we were scarcely out of diapers, to develop nuclear power using private business. Weighing of risks and benefits from nuclear power was the prerogative—and responsibility—of the politicians across the street, in Burger's view. The liability cap reflected Congress' conclusion that without it no company would assume such a risk. As it happened, however, a federal district judge had invalidated the Act on due process and equal protection grounds,²⁶ holdings which struck the Chief as plainly crazy. Dismissing the case for standing would, of course, overturn that result as a matter of law, but nonetheless, the industry could be stifled just by knowing that a federal court had found the liability limit unconstitutional. It was essential, Burger thought, to reach the merits and undo the damage. And so the opinion was written finding standing on a previously unrecognized basis²⁷ and overturning the lower court's judgment on the merits.²⁸ What we clerks had forgotten was that this was the *Supreme* Court, and the justices could make up new rules and stretch venerable doctrines like elastic.

And so it is with the ACA. Whatever the professoriate might think, and regardless of the seeming clarity of existing law, it would be rather

to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.").

²⁵ *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59 (1978).

²⁶ *Carolina Envtl. Study Grp., Inc. v. U.S. Atomic Energy Comm'n*, 431 F. Supp. 203, 222–25 (W.D.N.C. 1977), *rev'd sub nom. Duke Power Co.*, 438 U.S. 59 (1978).

²⁷ *Duke Power Co.*, 438 U.S. at 81; *see also* Daniel A. Farber, *Uncertainty as a Basis for Standing*, 33 HOFSTRA L. REV. 1123, 1124–25 (2005) ("Scholars . . . have tended to view [*Duke Power*] as an example of the manipulation of standing doctrine to obtain a desired outcome.").

²⁸ *Duke Power Co.*, 438 U.S. at 93–94.

simple to write a plausible opinion hollowing out the core of the Act by invalidating the insurance mandate. After all, several federal judges have done just that, including the majority on an Eleventh Circuit panel²⁹—and they did not even have the luxury of overtly changing the rules. Nor should one think that in doing so these judges did not regard themselves as acting lawlessly, but rather thought they were fully justified by *stare decisis*. What follows here, then, is not a prediction, but rather a view of the central issues concerning the constitutionality of the ACA mandate that the Court is confronting as it decides the case. True, the Act should survive with ease, but the same was forecasted about the statutes invalidated in *Lopez* and *Morrison*.

II. THE DILEMMA OF HEALTH INSURANCE IN THE UNITED STATES

For a variety of reasons, the United States has a distressingly inadequate system for providing medical services to its people. Despite the creation of Medicare to guarantee coverage to older Americans, and Medicaid to serve many of the poor, some fifty million Americans lacked any type of medical insurance when the ACA was passed, and the number grows each year.³⁰ The main barrier to accomplishing near-universal insurance has been cost. Unless a person who is ineligible for Medicare or Medicaid works for an employer offering a group insurance plan, the only alternative is the individual market, where policies are unaffordable or unavailable to millions.³¹ Those with preexisting medical conditions often are hit with higher premiums than healthy patients, refused coverage for those conditions, or denied insurance altogether.³² In 2010, more than nine million Americans with preexisting conditions found that they could not obtain coverage on the individual market—at least not without paying substantially higher premiums than healthy enrollees or having their preexisting medical issues excluded from coverage.³³ Sixty percent of

²⁹ *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d 1235, 1311–12 (11th Cir. 2011) (holding that the individual mandate provision of the ACA exceeds Congress’ power under the Commerce Clause).

³⁰ CARMEN DENAVAS-WALT ET AL., INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009 23 tbl.8 (2010), <http://www.census.gov/prod/2010pubs/p60-238.pdf>. In 2010, twenty-eight percent of “working-age adults, an estimated 52 million people, were uninsured for at least some time during 2010, up from 38 million or 24% in 2001.” SARA R. COLLINS ET AL., THE COMMONWEALTH FUND, HELP ON THE HORIZON: HOW THE RECESSION HAS LEFT MILLIONS OF WORKERS WITHOUT HEALTH INSURANCE, AND HOW HEALTH REFORM WILL BRING RELIEF at xi, xii exhibit ES-3 (2011), http://www.commonwealthfund.org/~media/Files/Surveys/2011/1486_Collins_help_on_the_horizon_2010_biennial_survey_report_FINAL_31611.pdf.

³¹ COLLINS ET AL., *supra* note 30, at 1.

³² *Id.* at 4.

³³ *Id.* at xi; see also CONGRESSIONAL BUDGET OFFICE, KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS 80–81 (2008), <http://www.cbo.gov/ftpdocs/99xx/doc9924/12-18-KeyIssues.pdf> (“According to a 2005 study, about 70 percent of applicants for individual coverage are

adults—sixteen million people—who sought “coverage in the individual market found it very difficult or impossible to find a plan they could afford.”³⁴

Nor were there any signs prior to passage of the ACA that the situation would improve if the health insurance industry was left to its own devices. Insurance companies for decades had secured their profits in the individual market by limiting enrollment to predictably healthy people. Moreover, it had been proven unworkable for states to require insurers to offer coverage of those with preexisting conditions on the same terms as healthy patients. Seven states tried to do so, only to find that many people waited until they became seriously ill or suffered an accident requiring expensive care to purchase insurance.³⁵ In all of these states, premiums for health insurance soared or insurers withdrew from the market.³⁶ The individual actions that produced this consequence may have been rational as people calculated that they were better off not obtaining insurance except when their medical expenses exceeded the cost of premiums. Collectively, however, their choices were disastrous to the stability and affordability of the system. The Congressional Budget Office (“CBO”) projected that another four million people would lack insurance by 2019 if reforms were not enacted.³⁷

Those without insurance and unable to pay out of pocket for health services or through a government program such as Medicaid or Medicare have not been entirely unable to obtain care. For humanitarian reasons, health care providers are required by state and federal law to provide essential care to those in a medical emergency or active labor, regardless of whether the patients are insured or otherwise capable of paying their bills.³⁸ The result has been that uninsured or underinsured patients seek

quoted a standard rate based only on their age; about 20 percent are either charged a higher premium (generally not exceeding twice the standard rate for their age group) or are sold a modified package that does not cover treatments for their preexisting health conditions (at least for some period of time); and about 10 percent are denied coverage.”).

³⁴ COLLINS ET AL., *supra* note 30, at x.

³⁵ See Brief for Am. Ass’n of People with Disabilities, et al. as Amici Curiae Supporting Petitioners at 8–9, *U.S. Dept. of Health and Human Servs. v. Florida*, No. 11-398 (Jan. 11, 2012) (“Kentucky, Maine, New Hampshire, New Jersey, New York, Vermont, and Washington enacted legislation that required insurers to guarantee issue to all consumers in the individual market, but did not have a minimum coverage provision. . . . All of these laws had detrimental effects on the insurance markets in those states.”).

³⁶ See *id.* at 9 (“All seven states suffered from skyrocketing insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers.”).

³⁷ KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS, *supra* note 33, at ix (2008) (“CBO estimates that the average number of nonelderly people who are uninsured will rise from at least 45 million in 2009 to about 54 million in 2019.”).

³⁸ See Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (2006) (enacted in 1986, mandating that hospitals offering emergency services accepting Medicare reimbursements must provide stabilizing emergency care to those unable to pay for the services); H.R. REP. NO. 99-241, pt. 3, at 5 (1985) (“[A]t least 22 states have enacted statutes or issued regulations requiring the

treatment at hospital emergency rooms, which are obliged to at least screen them and stabilize their conditions, regardless of inability to pay.³⁹ Apart from emergencies, physicians and hospitals also commonly provide extensive care without first demanding payment, only to find the patient incapable of compensating them. These debts often are uncollectable because the person has inadequate assets or declares bankruptcy.⁴⁰ Congress made a formal finding in the Act that over sixty percent “of all personal bankruptcies are caused in part by medical expenses.”⁴¹ In addition to emergency care, publicly-subsidized “community health centers” exist in every state, providing “a wide range of basic health services to all patients in need, regardless of their ability to pay.”⁴² These centers provide “the medical home to 20 million Americans, 5% of the current U.S. population.”⁴³

When patients cannot pay what frequently are astronomically high bills, the tab often is absorbed by providers, who in turn raise prices for their paying patients to recover the loss.⁴⁴ Insurers then must reimburse providers for these charges, which ultimately are reflected in higher costs for insurance premiums.⁴⁵ In 2008, those without insurance consumed \$119 billion in health care expenses, but providers were stuck with forty-three billion dollars in unpaid medical bills.⁴⁶ Congress found that “[t]his cost-shifting increases family premiums by on average over \$1,000 a

provision of limited medical services whenever an emergency situation exists, and . . . many state court rulings impose a common law duty on doctors and hospitals to provide necessary emergency care . . .”).

³⁹ Reed Abelson, *Uninsured Put a Strain on Hospitals*, N.Y. TIMES, Dec. 9, 2008, at B1.

⁴⁰ See COLLINS ET AL., *supra* note 30, at 10 (“[29 million adults] used all of their savings because of their medical bills. . . . 7 million adults[] reported that medical bills caused them to take out a loan or a mortgage against their home, and another 4 million had to declare bankruptcy.”).

⁴¹ 42 U.S.C.A. § 18091(a)(2)(G) (West 2003 & Supp. 2011). The amount owed by an individual also could be too small to pursue via legal action, even though the sum of uncollected accounts from numerous absconding patients is considerable. See Douglas A. Kahn & Jeffrey H. Kahn, *Free Rider: A Justification for Mandatory Medical Insurance Under Health Care Reform?*, 109 MICH. L. REV. FIRST IMPRESSIONS 78, 81 (2011), <http://www.michiganlawreview.org/assets/fi/109/kahn.pdf>. (“As to why the medical providers sometimes do not enforce collection from those who have the means but do not pay, it is likely that in most cases the amount involved is too small to justify the cost of pursuing collection.”).

⁴² Brief of 104 Health Law Professors as *Amici Curiae* in Support of Petitioners (Minimum Coverage Provision) at 11, *United States Dep’t Health & Human Servs. v. Florida*, No. 11-398 (Jan. 11, 2012).

⁴³ Eli Y. Adashi et al., *Health Care Reform and Primary Care —The Growing Importance of the Community Health Center*, 362 NEW ENG. J. MED. 2047, 2047 (June 3, 2010), <http://www.nejm.org/doi/pdf/10.1056/NEJMp-1003729>.

⁴⁴ FAMILIES USA, HIDDEN HEALTH TAX: AMERICANS PAY A PREMIUM 2 (2009), <http://familiesusa2.org/assets/pdfs/hidden-health-tax.pdf>.

⁴⁵ *Id.*

⁴⁶ 42 U.S.C.A. § 18091(a)(2)(F).

year.”⁴⁷ Without regulatory intervention, the problem will only grow worse because the underlying forces are self-reinforcing: higher premiums make insurance harder to afford, and those forced out of the market in turn incur medical expenses they cannot meet, which then contributes to rising premium rates. The exclusion of preexisting conditions from coverage adds another twist. Once such people drop insurance due to the high cost, it usually is impossible for them to reenter the individual market and procure coverage for their chronic health problems.⁴⁸

Notwithstanding these problems, the system for paying medical costs might be justified if it resulted in decent care for most Americans. The United States spends more for medical services than any other country, and the costs have been increasing inexorably.⁴⁹ In 2010, health care consumed \$2.6 trillion in the United States, a staggering 17.9% of gross domestic product, or \$8402 per person.⁵⁰ This reflected a rise of 3.9% in 2010, which followed a 3.8% rise the year before—and these were the lowest rates of annual growth in over fifty years.⁵¹ Congress estimated that without reform in the system total spending on health care would rise to an astonishing \$4.7 trillion annually by 2019.⁵² The actual results of medical treatment for patients often have been startlingly inferior to those of other countries that spend far less per capita on health care.⁵³ In part, this is due to the way health care is financed in this country. Two out of five adults in 2010, or seventy-five million Americans, reported that “because of the cost, they had not been able to get needed care, including not going to the doctor when they were sick, not filling a prescription, skipping a recommended test, treatment, or follow-up visit, or not getting needed specialist care.”⁵⁴ Those with inadequate insurance coverage are less likely to obtain preventive services and more prone to waiting until their conditions become severe and complicated to treat. They also tend to

⁴⁷ *Id.*

⁴⁸ See *Coverage Denied: How the Current Health Insurance System Leaves Millions Behind*, U.S. DEPT. OF HEALTH & HUMAN SERVS. (Feb. 27, 2012, 8:23 PM), http://www.healthreform.gov/reports/denied_coverage/index.html (“In 45 states across the country, insurance companies can discriminate against people based on their pre-existing conditions when they try to purchase health insurance directly from insurance companies in the individual insurance market.”).

⁴⁹ See Reed Abelson, *While the U.S. Spends Heavily on Health Care, a Study Faults the Quality*, N.Y. TIMES, July 17, 2008, at C3 (stating that the United States has the most expensive medical care in the world but ranks last among industrialized nations in preventing deaths through preventive medicine, while medical costs continue to rise).

⁵⁰ *National Health Expenditures 2010 Highlights*, CTRS. FOR MEDICAID & MEDICARE SERVS., www.cms.gov/NationalHealthExpendData/downloads/highlights.pdf (last visited Feb. 22, 2012).

⁵¹ *Id.*

⁵² 42 U.S.C.A. § 18091(a)(2)(B).

⁵³ See KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS, *supra* note 33, at ix (“[D]espite spending more per capita than other countries, the United States lags behind lower-spending countries on several metrics, including life expectancy and infant mortality.”); *supra* note 49.

⁵⁴ COLLINS ET AL., *supra* note 30, at xiii.

access the system through expensive emergency services, which were not designed to care for patients with chronic conditions.⁵⁵

Any national solution to the shortcomings of the American approach must address all of these issues as part of a comprehensive package: the inadequacy of insurance, the rising costs of health care, and the quality of services. As the experience of the seven states shows, merely mandating that insurers accept all applicants without regard to preexisting conditions leads to a “death spiral” in the individual market.⁵⁶ Allowing people to delay obtaining insurance until they are sick or injured distorts the pool of insured patients. If everyone has insurance, however, the risk population includes healthier, generally younger people who on average will need less care than older people and those with expensive, chronic conditions.

One way to resolve this dilemma would be for Congress to create a national single-payer system, financed by mandatory tax assessments. In short, it would expand Medicare to all Americans by using Congress’ powers under Article I to tax and spend for the national welfare. Congress also could use the Commerce Clause to mandate that providers accept reimbursement through the system as payment in full for services. Neither of these steps would be unconstitutional. Health care involves the delivery of services for compensation, a form of commerce, and does so through the channels of interstate commerce using the instrumentalities of commerce. For obvious political reasons, however, these solutions are foreclosed. Congress realized that reforms would have to be built on the existing system of private insurance and providers who are free to refuse patients unable to pay.

III. A SUMMARY OF THE AFFORDABLE CARE ACT

The Act pursues a variety of means to expand coverage to more Americans while lowering the cost of insurance. One way it accomplishes this end is by broadening Medicaid to cover those with incomes up to 133% of the federally-defined poverty line, which obliges the states as “partners” in the program to spend billions more to pay for the expanded rolls.⁵⁷ The Act also calls for creating government-sponsored health insurance “exchanges” that would allow individuals to pool together with

⁵⁵ See Nicholas Bagley & Jill R. Horwitz, Commentary, *Why It's Called the Affordable Care Act*, 110 MICH. L. REV. FIRST IMPRESSIONS 1, 4–5 (2011), <http://www.michiganlawreview.org/assets/fi/110/bagleyhorwitz.pdf> (noting that the uninsured tend to receive acute medical care in the emergency room, rather than through more cost effective mechanisms).

⁵⁶ See *Making Health Care Work for American Families: Hearing Before the H. Subcomm. on Health of the House Comm. on Energy & Commerce*, 111th Cong. 10 (2009) (“It is well known that community-rating and guaranteed issue coupled with voluntary insurance tends to lead to a death spiral of individual insurance.”).

⁵⁷ 42 U.S.C.A. § 1396a(a)(10)(A)(i)(VIII) (West 2003 & Supp. 2011).

others to secure rates more in line with employer-based plans.⁵⁸ Those whose household incomes are under 400% of the poverty line will be eligible for tax credits toward purchasing insurance via these exchanges.⁵⁹ Small businesses likewise are offered tax credits and access to insurance exchanges to encourage them to provide employees with coverage.⁶⁰ Large companies, on the other hand, will be hit with greater tax liability if they fail to offer policies deemed adequate by Congress.⁶¹

The insurance market itself will be regulated much more extensively by the ACA. Insurers are no longer allowed to impose lifetime ceilings on insurance reimbursements.⁶² Starting in 2014, they will be unable to deny coverage to persons with preexisting medical conditions, or charge higher rates to reflect the relative medical costs of such individuals.⁶³ Insurance cannot be terminated for any reason other than fraud or misrepresentation.⁶⁴ Plans offered to families must continue to cover children until age twenty-six if requested.⁶⁵ To help reduce costs, insurers will be required to limit their profits and administrative expenses in order to spend prescribed percentages of premium income on medical care.⁶⁶ The Act also promises to greatly reduce the administrative costs of insurers in the individual and small group markets through economies of scale achieved by pooling insurance purchasers in the exchanges and eliminating the need to investigate whether their insureds have preexisting conditions.⁶⁷

Aside from the Medicaid expansion, the ACA provision that has generated the most opposition on constitutional grounds is the requirement that after 2013 most Americans who are not eligible for health care under a government program must obtain an insurance policy with an "essential health benefits package," or pay a tax "penalty" that is calculated according to a complicated formula.⁶⁸ Following a phase-in period, the penalty will "reach \$695 per person or 2.5 percent of household income, whichever is greater," capped by an amount equal to the average national

⁵⁸ *Id.* §§ 18031–44.

⁵⁹ 26 U.S.C.A. § 36B (West 2003 & Supp. 2011).

⁶⁰ *Id.* § 45R.

⁶¹ *Id.* § 4980H(a).

⁶² 42 U.S.C.A. § 300gg-11(a)(1).

⁶³ *Id.* § 300gg-3(a) (no denial of coverage for preexisting conditions); *id.* § 300gg(a) (insurance rates may only vary by factors unrelated to preexisting conditions). Insurance rates may vary by four factors: whether the plan covers and individual or family; the "rating areas" established by each state; age, with a three to one ceiling; and tobacco use, with a 1.5 to one ceiling).

⁶⁴ *Id.* §§ 300gg-2(a), 300gg-12.

⁶⁵ *Id.* § 300gg-14.

⁶⁶ *Id.* 300gg-18(b).

⁶⁷ See *id.* § 18091(a)(2)(J) ("Administrative costs for private health insurance, which were \$90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets.").

⁶⁸ 26 U.S.C.A. § 5000A(b)–(c)(1) (West 2003 & Supp. 2011). On the services required of an "essential health benefits package," see *infra* 248 and accompanying text.

cost of purchasing a basic plan.⁶⁹ The penalty will be exacted through a person's federal income tax return.⁷⁰ Otherwise, there is no criminal or civil liability for failing to obtain insurance; neither liens nor levies on property may be used to exact payment.⁷¹ Various groups of people also are exempt from this requirement, including those eligible for Medicaid and Medicare or whose premiums would be greater than eight percent of their household earnings.⁷² Many other Americans will satisfy the requirement through employer-based group policies. Those with religious objections to insuring are exempted from the mandate,⁷³ along with undocumented residents, prison inmates,⁷⁴ and members of Indian tribes.⁷⁵

IV. THE CONSTITUTIONALITY OF THE INSURANCE MANDATE

A. *The Health Insurance Mandate and the Commerce Clause*

Stripped to their essences, both the arguments for and against Congress' power to impose the mandate under Article I are simple. To proponents of the health care mandate, the requirement is easily justified under the Commerce Clause,⁷⁶ either alone or as augmented by the Necessary and Proper Clause.⁷⁷ Alternatively, they claim that the penalty for not insuring amounts to a tax authorized by Congress' power to tax for the general welfare.⁷⁸

The mandate is key to accomplishing the ACA's health insurance reforms. As noted, Congress set out to assure that nearly all Americans were insured at affordable rates. But achieving this end required eliminating the current policy in the industry of discriminating against those with preexisting health conditions. Simply requiring that insurers offer policies without regard to an individual's health status would not work. Many healthy people would wait to purchase insurance until after they were seriously ill or injured. Insurers would either abandon the business or raise premiums to levels beyond the financial reach of millions.⁷⁹ By mandating that relatively healthy people purchase policies, insurers are guaranteed a pool of enrollees who on average will spend less

⁶⁹ Sallie Sanford, *Understanding the Health Care Reform Litigation*, JURIST, Feb. 16, 2012, <http://jurist.org/forum/2012/02/sallie-sanford-health-care.php>.

⁷⁰ 26 U.S.C.A. § 5000A(b).

⁷¹ *Id.* § 5000A(g)(2)(B).

⁷² *Id.* § 5000A(e).

⁷³ *Id.* § 5000A(d)(2).

⁷⁴ *Id.* § 5000A(d)(4).

⁷⁵ *Id.* § 5000A(e)(3).

⁷⁶ U.S. CONST. art. I, § 8, cl. 3.

⁷⁷ *Id.* cl. 18.

⁷⁸ *See id.* cl. 1.

⁷⁹ *See Kahn & Kahn, supra* note 41, at 79.

on health care than their premiums, thus enabling the companies to build sufficient reserves to pay the bills of those who consume services in excess of what they paid for insurance. In theory, this should stabilize the market. Younger Americans will offset the higher costs of older people who account for a disproportionate portion of health care expenses.⁸⁰ Of course, this works by averaging. Inevitably, a significant number of young people will require expensive care that exceeds the premiums they have paid.⁸¹

In *United States v. Lopez*, the Supreme Court described three broad “categories of activity” in which it has approved of congressional action under the Commerce Clause.⁸² “First, Congress may regulate the use of the channels of interstate commerce.”⁸³ To illustrate the type of laws covered by this classification, the Court mentioned two cases with very dissimilar facts. One was *United States v. Darby*, which upheld the regulation of wages and hours for employees of businesses selling products across state lines.⁸⁴ The other was *Heart of Atlanta Motel, Inc. v. United States*,⁸⁵ which sustained the ban on racial discrimination as applied to hotels and motels that offered services for interstate customers. *Lopez* quoted a line from that case approving “[t]he authority of Congress to keep

⁸⁰ See *id.* at 79–80.

⁸¹ See Mark W. Stanton, *The High Concentration of U.S. Health Care Expenditures*, RES. IN ACTION (AHRQ, Rockville, Md.), June 2006, at 5, <http://www.ahrq.gov/research/ria19/pendria.pdf> (presenting a study of Medicare enrollees that found that “8 percent of health care expenses occurred during childhood (under age 20) [and] 13 percent during young adulthood (20–39 years) . . .”).

⁸² *United States v. Lopez*, 514 U.S. 549, 558 (1995) (following the classification scheme set forth in *Perez v. United States*, 402 U.S. 146, 150 (1971)).

⁸³ *Id.*

⁸⁴ *United States v. Darby*, 312 U.S. 100, 111 (1941). Two different mechanisms were employed by Congress in justifying the law in question, the Fair Labor Standards Act of 1938, both of which the Court endorsed. First, the Court found that Congress had properly used the commerce-blocking technique by banning “the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum . . .” *Id.* at 108. Second, it approved the power to regulate directly the wages and hours “of workmen in the production of goods ‘for interstate commerce’ at other than prescribed wages and hours.” *Id.* The theory here was that in addition to stopping the movement in interstate commerce of articles made by workers whose wages and hours were declared substandard by the act, Congress could “stop the initial step toward transportation, production with the purpose of so transporting it.” *Id.* at 117. This justification actually better fits *Lopez*’s third category of permissible laws, those that regulate intrastate “activities that substantially affect interstate commerce.” *Lopez*, 514 U.S. at 559; see also *Darby*, 312 U.S. at 118 (stating that Congress’ commerce power “extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce”). Congress determined that paying substandard wages to workers producing goods that shipped in interstate commerce resulted in “the spread of substandard labor conditions . . . and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce.” *Id.* at 122.

⁸⁵ 379 U.S. 241, 261–62 (1964).

the channels of interstate commerce free from immoral and injurious uses”⁸⁶ An earlier case, *Perez v. United States*, gave two other examples in which Congress acted to keep interstate channels from being “misused”: laws against “the shipment of stolen goods” in interstate commerce or transporting “persons who have been kidnap[p]ed” across state lines.⁸⁷

The second *Lopez* category also combined two different kinds of laws under one rubric: “Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”⁸⁸ Here the Court cited the *Shreveport Rate Cases*,⁸⁹ which upheld federal ratemaking for railway runs entirely within one state by a carrier that also had interstate traffic, reasoning that its rates were “unreasonably discriminating against interstate traffic over its line” and thus interfered with the Interstate Commerce Commission’s regulation of interstate traffic.⁹⁰ The intrastate rates thus had “a close and substantial relation to interstate traffic.”⁹¹ A second case also involved interstate railroads, with the Court sustaining the federal Safety Appliance Act as applied to train cars used on both interstate and intrastate railroads. There was “a close or direct relation or connection between the two classes of traffic”⁹² because the cars were generally “used interchangeably in moving both,”⁹³ and consequently “whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains.”⁹⁴ Other examples given by *Lopez* of laws protecting instrumentalities were those proscribing the destruction of aircraft and stealing from interstate shipments.⁹⁵

A third kind of commerce case detailed by *Lopez* involved laws regulating “activities that substantially affect interstate commerce,” even if

⁸⁶ *Lopez*, 514 U.S. at 558 (quoting *Heart of Atlanta*, 379 U.S. at 256) (internal quotation marks omitted).

⁸⁷ 402 U.S. 146, 150 (1971) (citing 18 U.S.C. §§ 2312–15 (2006) (proscribing the shipment of various types of stolen goods in interstate or foreign commerce) and 18 U.S.C. § 1201(a)(1) (2006) (outlawing transportation of kidnapped persons across state lines and traveling in interstate or foreign commerce or using the mail or any means, facility, or instrumentality of interstate or foreign commerce” to carry out a kidnapping)).

⁸⁸ *Lopez*, 514 U.S. at 558.

⁸⁹ 234 U.S. 342 (1914).

⁹⁰ *Id.* at 354.

⁹¹ *Id.* at 351.

⁹² *S. Ry. Co. v. United States*, 222 U.S. 20, 26 (1911).

⁹³ *Id.* at 27.

⁹⁴ *Id.*

⁹⁵ *Lopez*, 514 U.S. at 558 (citing 18 U.S.C. § 32 (2006) (proscribing destruction of aircrafts) and § 659 (prohibiting thefts from interstate shipments)).

the regulated activities are themselves intrastate in character.⁹⁶ The Court cited two cases as support. In *NLRB v. Jones & Laughlin Steel Corp.*, the Court validated the provisions of the National Labor Relations Act protecting the formation of labor unions for the purpose of engaging in collective bargaining, as applied to a steel plant that used materials shipped in interstate commerce to manufacture products predominately destined for sale out of state.⁹⁷ A long line of cases had held that manufacturing was not commerce, which was confined to “trade, traffic, commerce, transportation, or communication” across either state or international borders.⁹⁸ If “separately viewed,” the “productive industry” was a “local” activity,⁹⁹ but this was not dispositive because there was a “close and intimate relation”¹⁰⁰ between the manufacturing of steel and interstate commerce.¹⁰¹ The refusal of employers “to confer and negotiate” with unions “has been one of the most prolific causes of strife” in industry.¹⁰² A disruption in manufacturing operations caused by “industrial strife” would have “paralyzing consequences” for interstate commerce because strikes in production facilities would disrupt the commercial chain; thus affecting the mining of raw materials and the transportation of them to factories, as well as the subsequent sale of the products across the country and abroad.¹⁰³ Another example cited by *Lopez* was *Maryland v. Wirtz*, which approved an amendment to the Fair Labor Standards Act of 1938.¹⁰⁴ That case extended the minimum wage guarantees beyond employees “engaged in

⁹⁶ *Id.* at 558–59 (citing *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968)). There is a theoretical question as to whether the “substantial effects” prong is justified by the Necessary & Proper Clause acting in tandem with the Commerce Clause. See Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 593 (2010); Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 619 (2002). It is plausible at least that regulating local acts that have substantial effects on interstate commerce is one of those instances suggested by *McCulloch v. Maryland*, in which “the powers given to the government imply the ordinary means of execution,” regardless of whether there was a Necessary and Proper Clause. 17 U.S. (4 Wheat.) 316, 409 (1819). But the issue is of no practical importance.

⁹⁷ 301 U.S. 1, 15–16 (1937).

⁹⁸ *Id.* at 31.

⁹⁹ *Id.* at 38.

¹⁰⁰ *Id.* at 37.

¹⁰¹ *Id.* at 38.

¹⁰² *Id.* at 42.

¹⁰³ *Id.* at 41; see also *id.* at 42 (“And of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported!”). This was particularly true of *Jones & Laughlin Steel*, which was considered a “highly integrated” business, *id.* at 27, that owned and/or operated everything from the mines that produced the raw materials for steel, the shipping facilities to transport them to the plant, and the entire distribution network for shipping and selling the products around the country and in Canada, see *id.* at 26–28. “When industries organize themselves on a national scale, . . . their relation to interstate commerce [is] the dominant factor in their activities.” *Id.* at 41.

¹⁰⁴ *Maryland v. Wirtz*, 392 U.S. 183, 187–88 (1968).

commerce or in the production of goods in commerce,” to encompass all employees in an enterprise “engaged in commerce or in the production of goods for commerce,” including those employed by state governments.¹⁰⁵

These three categories of Commerce Clause-based legislation are not hermetically distinct from one another. In *Heart of Atlanta*, the Court approved two different bases for Congress’ use of the Commerce Clause powers to enact the public accommodations provisions of the Civil Rights Act of 1964. First, Congress was eliminating an “immoral and injurious” use of the channels of interstate commerce.¹⁰⁶ Second, the law was separately justified as ending a practice that had “substantial and harmful effect[s]”¹⁰⁷ on interstate commerce by “discouraging travel on the part of a substantial portion of the Negro community.”¹⁰⁸ Similarly, in *Katzenbach v. McClung*, the companion case to *Heart of Atlanta*, the Court upheld the Civil Rights Act as applied to Ollie’s Barbecue, an Alabama eatery situated eleven blocks from the interstate highway that refused to serve blacks inside the restaurant, as a regulation removing injurious uses of interstate commerce.¹⁰⁹ Echoing *Heart of Atlanta*, the Court held that racial discrimination in food service “had a direct and highly restrictive effect upon interstate travel by Negroes.”¹¹⁰ Consequently, these kinds of segregated restaurants resulted in “less interstate goods because of the discrimination.”¹¹¹ In *Katzenbach*, “a substantial portion of the food served by the restaurant had moved in interstate commerce.”¹¹² Presumably the volume of such purchases would increase without discrimination. Restaurants also were essential to travel, and they catered to customers who were traveling on interstate journeys. Discrimination by restaurants “obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating.”¹¹³

By itself, Ollie’s had a trivial effect on interstate commerce, but as in *Wickard v. Filburn*, its “contribution, taken together with that of many others similarly situated, is far from trivial.”¹¹⁴ Like the loan shark in *Perez*, Ollie’s was “representative of many others throughout the country, the total incidence of which if left unchecked may well become far-

¹⁰⁵ *Id.* at 185–86 (citing 52 U.S.C. §§ 206(a), 207(a)).

¹⁰⁶ *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 256 (1964) (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917)).

¹⁰⁷ *Id.* at 258.

¹⁰⁸ *Id.* at 253.

¹⁰⁹ 379 U.S. 294, 296 (1964).

¹¹⁰ *Id.* at 300.

¹¹¹ *Id.*

¹¹² *Id.* at 296–97.

¹¹³ *Id.* at 300.

¹¹⁴ *Id.* at 301 (quoting *Wickard v. Filburn*, 317 U.S. 111, 128 (1942)).

reaching in its harm to commerce.”¹¹⁵ Congress also considered evidence showing that this “discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there.”¹¹⁶

Another instance in which there were two separate grounds for applying the Commerce Clause was *Pierce County v. Guillen*.¹¹⁷ The Court approved a provision in a federal highway-funding act that gave money to states for improving dangerous road condition, but required them to undertake “a thorough evaluation of its public roads.”¹¹⁸ Congress excluded the admission of these studies in litigation suits, as they were concerned that the states would be reluctant to undertake candid studies of road conditions out of fear that the information could be used against them in tort actions arising from accidents on roads deemed hazardous.¹¹⁹ The Court agreed with the government that the law was justified under the first two *Lopez* categories because it both “aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce.”¹²⁰

With regard to the ACA, either the first or third bases for Commerce Clause regulation can support the provisions banning consideration of preexisting conditions and imposing lifetime limits on coverage. As to regulating the channels of interstate commerce, Congress found that health insurance was mostly “sold by national or regional health insurance companies . . . in interstate commerce and claims payments flow through interstate commerce.”¹²¹ Insurance itself is a form of commerce, the Court held in the 1944 case, *United States v. South-Eastern Underwriters Ass’n*,¹²² which Congress cited to justify using its commerce powers to enact the mandate.¹²³ Both the sale of health insurance and the payments insurers make to beneficiaries utilize “the channels of interstate commerce.”¹²⁴ Moreover, health insurance “pays for medical supplies, drugs, and equipment that are shipped in interstate commerce,” to the tune of about \$854 billion in 2009. A large number of Americans also travel to

¹¹⁵ *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) (quoting Polish Nat’l Alliance of the U.S. v. Nat’l Labor Relations Bd., 322 U.S. 643, 648 (1944)) (internal quotation marks omitted).

¹¹⁶ *Id.* at 300.

¹¹⁷ 537 U.S. 129 (2003).

¹¹⁸ 537 U.S. at 129.

¹¹⁹ *See id.* at 133–34 (describing the reasoning behind Congress’ adoption of 23 U.S.C. § 409 and the various concerns expressed by the states surrounding the possible misuse of these studies for litigious purposes).

¹²⁰ *Id.* at 147.

¹²¹ 42 U.S.C. § 18091(2)(B) (West 2003 & Supp. 2011).

¹²² 322 U.S. 533, 552–53 (1944); *see* Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825, 1834 (2011).

¹²³ 322 U.S. 533 (1944).

¹²⁴ *United States v. Lopez*, 514 U.S. 549, 558 (1995).

other states and foreign countries to receive medical care, which in the case of American-provided services typically is paid for by insurance or public benefit programs.¹²⁵ The common practices of insurance companies discriminating against persons with preexisting conditions and imposing lifetime caps on claims can be said to constitute “injurious uses” of interstate commerce like those identified in *Heart of Atlanta Motel* and *Katzenbach v. McClung*. Race discrimination in lodging had “qualitative as well as quantitative effect on interstate travel by Negroes.”¹²⁶ The “pleasure and convenience” of black travelers were adversely affected because they were “continually . . . uncertain of finding lodging.”¹²⁷ Travel itself was hindered, as Congress found that “this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community.”¹²⁸

These insurance reforms also address conditions that have a substantial effect on interstate commerce.¹²⁹ Expanding the number of people with insurance unquestionably will result in greater spending on health care. The discrimination against preexisting conditions and the ceilings on insurance coverage prevent millions of Americans from obtaining coverage—and, effectively, from spending money on health care—which unquestionably has a substantial effect on interstate commerce.¹³⁰ Those who received billions of dollars annually in uncompensated care also passed on their costs to providers and insured people, thus making coverage increasingly unaffordable and creating a self-perpetuating

¹²⁵ 42 U.S.C. § 18091(A)(2)(b); PIERRE L. YOUNG & LEIGHANNE OLSEN, THE HEALTHCARE IMPERATIVE: LOWERING COSTS AND IMPROVING OUTCOMES: WORKSHOP SERIES SUMMARY 145–46 (2010), available at <http://www.ncbi.nlm.nih.gov/books/NBK53920/pdf/TOC.pdf> (estimating the overall Billing and Insurance-Related (BIR) costs in the U.S. Healthcare System in 2009 to be \$105 billion); see also Anne B. Martin et al., *Health Spending by State of Residence, 1991–2004*, 26 HEALTH AFF. 651, 658–70 (2007) (estimating out-of-state health care within the United States).

¹²⁶ *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 253 (1964).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Congress found that “The individual responsibility requirement” itself “is commercial and economic in nature, and substantially affects interstate commerce.” 42 U.S.C.A. § 18091(a)(1). That may be true, and bolsters the idea that the mandate is a “proper” regulation for purposes of the Necessary and Proper Clause, but is not the test for whether a law can be justified on “substantial effects” grounds. The question is not whether the regulation has a substantial effect on interstate commerce, but whether it regulates “activities that substantially affect interstate commerce.” *Lopez*, 514 U.S. at 558–59.

¹³⁰ “According to several studies and CBO’s own analysis of the nonelderly population, the uninsured use about 50 percent to 70 percent as many health care services as the insured.” CBO, *supra* note 33, at 71. The CBO also determined that “extending insurance coverage to the uninsured would increase the number of physicians’ visits by 30 percent to 50 percent for children and by 60 percent to 100 percent for adults.” *Id.* at 75. The exact increase in spending that will occur from the ACA cannot be predicted, as it depends on variables such as the types of plans people purchase, but overall, “the increase in use of services by previously uninsured individuals would also yield a corresponding increase in health care spending.” *Id.* at 76.

economic cycle that threatened the viability of an insurance industry consisting of nationally-operating firms.¹³¹ Moreover, the average cost-shifting of \$1000 per family that the ACA prevents will likely affect patterns of spending.¹³² Lowering administrative costs for insurance could also put more money in the pockets of consumers.¹³³ Furthermore, health insurers are dependent on resources obtained via interstate commerce as well as communications across state lines. In addition, the medical services that they fund involve a massive consumption of goods and services purchased in interstate commerce as well as compensation for providers of the care.

ACA reforms also promise to create a healthier population, which will have substantial economic effects. Those with insurance are more likely to obtain preventive care as well as treatment in an appropriate facility (a doctor's clinic rather than an ER), which, in turn, saves money.¹³⁴ Furthermore, preventing diseases produces a healthier and more productive population.¹³⁵ There also will be major consequences for employment, not only from the elimination of preexisting conditions, but also from tax credits to encourage businesses to provide insurance. The CBO found that these reforms could "affect people's incentives to enter the labor force, work fewer or more hours, retire, change jobs, or even prefer certain types of firms or jobs."¹³⁶ For example, employees with current medical conditions often find themselves locked into their jobs, or their choices of

¹³¹ See *supra* text accompanying notes 44–48.

¹³² See *supra* text accompanying note 47.

¹³³ See SARA R. COLLINS ET AL., ISSUE BRIEF: HOW HEALTH CARE REFORM CAN LOWER THE COSTS OF INSURANCE ADMINISTRATION 10 (2009), available at http://www.commonwealth-fund.org/~media/Files/Publications/Issue%20Brief/2009/Jul/Admin%20Costs/1299_Collins_how_hlt_care_reform_can_lower_costs_ins_admin_v2.pdf (stating that administrative costs affect premium costs, which come out of the pockets of employees and employers).

¹³⁴ The savings from increased preventive care vary significantly by the types of services provided. "Certain types of preventive services have been found to yield substantial net savings, largely because the initial costs are low and the long-term benefits are large." CBO, *supra* note 33, at 138 (citing as an example that "physicians can quickly explain the benefits and harms of daily aspirin use for the prevention of cardiovascular events for middle-aged patients . . ."). However, the use of other preventive services may offset the financial benefits, as additional spending will occur from the direct cost of the care (including follow-up testing and treatment) as well as treating adverse reactions and caring for other diseases that may occur as a result of extending the life span of patients. *Id.* at 137–38. To the extent this actually occurs, it merely proves that the ACA reforms will inject more money into health-related services.

¹³⁵ See *id.* at 167 ("Studies have found that healthier workers work more hours and earn higher wages than those who are less healthy. That relationship suggests that changes to the health insurance market that lead to better health outcomes could both increase the labor supply and raise productivity (presumably, workers earn higher wages when they are healthy because they are more productive).").

¹³⁶ *Id.* at 162.

new employment are limited.¹³⁷ As will be explained more fully below, federal law already provides for the portability of insurance from employment offering group-based policies to other companies with similar coverage.¹³⁸ However, workers with preexisting conditions who might otherwise take jobs with employers not offering group plans or start their own businesses will not do so if the only option for health insurance in those positions excludes their preexisting conditions or is altogether unobtainable or unaffordable.¹³⁹ The effect on productivity is obvious even if precisely unquantifiable. As the CBO determined, “workers may . . . choose to stay in their current positions solely to retain their current health coverage rather than move to other jobs in which they could be more productive.”¹⁴⁰

To be sure, health insurance is regulated primarily by the states, which typically forbid consumers from purchasing insurance in other jurisdictions.¹⁴¹ That feature of the insurance market has led some commentators who are skeptical of the Act’s constitutionality to conclude that “there is little or no interstate *trade* in insurance.”¹⁴² What this neglects is that the predominant state role is a consequence of the McCarran-Ferguson Act of 1945, which was enacted in response to *South-Eastern Underwriters*.¹⁴³ In determining that insurance was a form of commerce, the Court had overturned a longstanding contrary decision that it was not a type of commerce and hence could be regulated by the states without running afoul of the Dormant Commerce Clause.¹⁴⁴ Although *South-Eastern Underwriters* upheld application of the Sherman Anti-Trust Act to price-fixing of fire insurance premium rates in six states by an association of insurers, the ruling had implications for state power under the Dormant Commerce Clause. Under that doctrine, the states were

¹³⁷ See *id.* at 164–65 (discussing in greater detail the phenomenon of “job lock,” in which employees remain in jobs that provide health insurance covering preexisting conditions instead of pursuing other potentially better employment opportunities).

¹³⁸ See *infra* notes 152–56. and accompanying text (discussing the Health Insurance Portability and Accountability Act).

¹³⁹ See note 136 and accompanying text.

¹⁴⁰ CBO, *supra* note 33, at 165. The CBO also found, however, that companies “may have a greater incentive to invest in their workers (by providing training or increasing their skills or knowledge) if the probability of retaining those workers is increased” because of their impaired mobility due to the employment-based insurance structure. *Id.*

¹⁴¹ Stephanie Kanwit, *The Purchase of Insurance Across State Lines in the Individual Market*, 37 J.L. MED. & ETHICS 150, 150 (2009) (“Health insurers have traditionally been allowed to sell a policy only within the state that approved and regulates that particular policy.”).

¹⁴² E.g., Claeys, *supra* note 1, at 59.

¹⁴³ 322 U.S. 533 (1944); see generally Steven J. Williams, *Distinguishing “Insurance” from Investment Products Under the McCarran-Ferguson Act: Crafting a Rule of Decision*, 98 COLUM. L. REV. 1996, 2006 (1998).

¹⁴⁴ See *Paul v. Virginia*, 75 U.S. 168, 183 (1868) (“Issuing a policy of insurance is not a transaction of commerce.”).

constrained in regulating interstate commerce, and that would include insurance sold through interstate markets.¹⁴⁵ *Southeastern Underwriters* thus threatened to deprive states of their longstanding regulatory powers over insurance. The McCarran-Ferguson Act prevented that result by providing that no federal statute shall preempt any state law dealing with the “regulation and taxation . . . of the business of insurance”¹⁴⁶ If McCarran-Ferguson was not in effect, health insurance undoubtedly would be sold across state lines by national companies. It is thus disingenuous to suggest that state dominance of insurance regulation is a consequence of it not being a form of interstate commerce. The states have had the primary role because Congress so dictated.

The Act unquestionably regulates the commercial activity of buying and selling health insurance. It dictates the terms under which policies can be offered by prohibiting insurers from excluding applicants or charging them higher rates for preexisting conditions¹⁴⁷ and removing lifetime caps on coverage.¹⁴⁸ “The power to regulate commerce is the power ‘to prescribe the rule by which commerce is to be governed.’ It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it.”¹⁴⁹ Over the years, Congress has used its commerce power to enact several important measures regulating health insurance,¹⁵⁰ principally the Employee Retirement Income Security Act of 1974 (“ERISA”)¹⁵¹ and Health Insurance Portability and Accountability Act (“HIPAA”).¹⁵² For group policies obtained in connection with employee benefits, insurers may not charge different rates for covered employees based on their health status.¹⁵³ HIPAA provides that insurers offering policies to businesses that have fewer than fifty employees must accept all applicants.¹⁵⁴ Further, it requires insurers in both group and individual markets to renew coverage without regard to health conditions.¹⁵⁵ Moreover, as its name implies, HIPAA also mandates portability of health insurance, allowing a person with a group policy through an employer to continue coverage after leaving the employment, either through a plan offered in a new job or on the individual market,

¹⁴⁵ See *United States v. Se. Underwriters Ass’n*, 322 U.S. 533, 539, 553(1944).

¹⁴⁶ 15 U.S.C. § 1011 (2006).

¹⁴⁷ See *supra* note 63 and accompanying text.

¹⁴⁸ See *supra* note 62 and accompanying text.

¹⁴⁹ *United States v. Darby*, 312 U.S. 100, 113 (1941) (internal citation omitted).

¹⁵⁰ See CBO, *supra* note 33, at 80 (summarizing federal laws).

¹⁵¹ 29 U.S.C. §§ 1001–1461 (2006).

¹⁵² Health Insurance Portability and Accountability Act of 1996, 29 U.S.C. §§ 1181–1191c (2006).

¹⁵³ 29 U.S.C.A. § 1182 (West 2003 & Supp. 2011); 42 U.S.C. § 300gg-1 (West 2003 & Supp. 2011).

¹⁵⁴ 42 U.S.C.A. § 300gg-11(a)(1)(A) (West 2003 & Supp. 2011).

¹⁵⁵ *Id.* § 300gg-42(a).

without regard for preexisting conditions (although the insurer can charge higher rates for new individual policies).¹⁵⁶ Similarly, there are scores of federal laws and accompanying regulations controlling the terms of consumer contracts, such as the various statutes banning false or misleading statements in agreements.¹⁵⁷

Opponents of the insurance mandate cannot seriously argue that the direct regulation of insurance policy terms is beyond the scope of the Commerce Clause. Rather, they urge that the mandate itself does not regulate the provisions of policies. Forcing people to buy insurance, so the argument goes, is not a regulation of commerce. Rather than controlling existing commercial activities, the mandate requires people to enter commerce or pay a penalty for failing to do so.¹⁵⁸ As the Eleventh Circuit pointed out in holding the mandate to be unauthorized by the Commerce Clause, “to the extent the uninsured can be said to be ‘active,’ their activity consists of the *absence* of such behavior, at least with respect to health insurance.”¹⁵⁹ The court quoted the Supreme Court’s statement in 2010, that “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”¹⁶⁰ There are only two cases since 1937 in which the Court has struck down attempts to use the Commerce Clause as the basis of legislation, and both involved laws that criminalized noneconomic behavior. *United States v. Lopez* overturned the Gun Free School Zones Act on the ground that the conduct it prohibited, possession of a firearm near a school, had “nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”¹⁶¹ The other

¹⁵⁶ *Id.* § 300gg-41.

¹⁵⁷ See, e.g., *SEC v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008) (“Since their inception, it has been unlawful [under federal securities laws] to offer or sell a securities using a false or misleading statement.”).

¹⁵⁸ See, e.g., *Claeys*, *supra* note 1, at 62, 67 (“Obamacare’s individual mandate . . . applies insurance regulation to people who have done nothing—and want to do nothing—to obtain any insurance [T]he government would not be ‘regulating’ commerce between voluntary parties if it compelled one party to buy a service from another under protest.”); *Cuccinelli et al.*, *supra* note 2, at 295–96 (“Because this domain of inactivity is not protected by any of the other checks and balances, permitting regulation of inactivity under the Commerce Clause would subject the entire person to federal control in a way that would be deemed intolerable by citizens who value individualism above the meliorist programs of government.”).

¹⁵⁹ *Florida ex rel. Att’y Gen. v. U.S. Dep’t Health & Hum. Servs.*, 648 F.3d 1235, 1287 (11th Cir. 2011), *cert. granted in part* 132 S. Ct. 604 (2011).

¹⁶⁰ *Id.* at 1286 (quoting *United States v. Morrison*, 529 U.S. 598, 613 (2000) (internal quotation marks omitted)). All of the laws approved by the Court under the Commerce Clause “cases involve *activity*, not *inactivity*. In none of these cases did the government mandate that citizens engage in economic activity by entering into a contract with a private company.” Barnett, *supra* note 96, at 605.

¹⁶¹ *United States v. Lopez*, 514 U.S. 549, 561 (1995). “The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.” *Id.* at 567.

decision, *United States v. Morrison*, invalidated the criminalization of gender-motivated violence in the Violence Against Women Act, which, like gun possession, was “not, in any sense of the phrase, economic activity.”¹⁶²

It is true that when the Supreme Court has sustained legislation under the Commerce Clause, it invariably has “involved attempts by Congress to regulate preexisting, freely chosen classes of activities.”¹⁶³ On this basis, the Eleventh Circuit reasoned that by “choosing not to purchase health insurance, the individuals regulated by the individual mandate are hardly involved in the ‘production, distribution, and consumption of commodities,’ which was the broad definition of economics” given by the Court as recently as 2005.¹⁶⁴ “Rather, to the extent the uninsured can be said to be ‘active,’ their activity consists of the *absence* of such behavior, at least with respect to health insurance.”¹⁶⁵

Undeniably, the cases approving use of the Commerce Clause to reach intrastate activities on the ground that they substantially effect interstate commerce have concerned regulation of an “already existing or ongoing activity.”¹⁶⁶ By contrast, when Congress blocks interstate movement, it prevents activity, and the motivation for the ban need not be economic.¹⁶⁷ In *Wickard v. Filburn*,¹⁶⁸ for example, the Court upheld a requirement of the Agricultural Adjustment Act that forced a farmer named Roscoe Filburn to pay a penalty because he grew and consumed wheat on his farm in excess of his government-determined market quota. When the wheat that Filburn grew and consumed was taken into account, he had exceeded the established limit. The Act thus “extend[ed] federal regulation to production not intended in any part for commerce but wholly for consumption on the farm.”¹⁶⁹ In effect, the farmer was forced to buy wheat for home use on the market, requiring him to enter commerce against his will. Still, as the Eleventh Circuit emphasized, “Filburn was a commercial farmer and thus far more amenable to Congress’s commerce power than an

¹⁶² *Morrison*, 529 U.S. at 613.

¹⁶³ *Florida*, 648 F.3d at 1286; see also *id.* at 1291–92 (“Individuals subjected to this economic mandate have not made a voluntary choice to enter the stream of commerce, but instead are having that choice imposed upon them by the federal government. This suggests that they are removed from the traditional subjects of Congress’s commerce authority, in the same manner that the regulated actors in *Lopez* and *Morrison* were removed from the traditional subjects of Congress’s commerce authority by virtue of the noneconomic cast of their activity.”).

¹⁶⁴ *Id.* at 1286 (quoting *Gonzales v. Raich*, 545 U.S. 1, 25 (2005)).

¹⁶⁵ *Id.* at 1287.

¹⁶⁶ *Id.* at 1285.

¹⁶⁷ For example, federal law criminalizes interstate flight of fugitives regardless of whether their crimes are commercial or economic in nature. Fugitive Felon Act, 18 U.S.C. § 1073 (2006).

¹⁶⁸ 317 U.S. 111 (1942).

¹⁶⁹ *Id.* at 118.

ordinary citizen.”¹⁷⁰ Filburn “could have decided to make do with the amount of wheat he was allowed to grow. He could have redirected his efforts to agricultural endeavors that required less wheat. He could have even ceased part of his farming operations.”¹⁷¹ Similarly, in *Heart of Atlanta* and *Katzenbach*, the businesses in question were forced to do something against their will, but they already were operating commercial enterprises.¹⁷² The same could be said of any regulatory requirement that obliges businesses or individuals to take some action or refrain from doing so.

The Supreme Court has been skeptical of arguments for congressional action under the Commerce Clause that have no logical stopping point to limit national legislative power. Both *Lopez* and *Morrison* rejected the argument that federal punishment of gun possession near schools or sexual assault on women could be justified because they have ramifications for the national economy. If Congress were allowed to punish criminal activity merely because in the aggregate the “costs of crime” have substantial effects on national productivity, then it likewise “could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.”¹⁷³ There would be no limit “on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”¹⁷⁴

Anticipating this objection, Congress asserted in the ACA that the activities the law regulates are “economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.”¹⁷⁵ These consumer choices are “commercial and economic in nature” because without the mandate “some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure”¹⁷⁶ Likewise, the government has argued in its brief on the mandate to the Supreme Court that the act “regulates economic conduct with a substantial effect on interstate commerce, namely the way

¹⁷⁰ *Florida*, 648 F.3d at 1291 (citation omitted).

¹⁷¹ *Id.*

¹⁷² See *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261–62 (1964) (holding that Congress has the power under Constitution to require motels to end discriminatory practices); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (holding that Congress has the power under the Constitution to require restaurants to end discriminatory practices).

¹⁷³ *United States v. Lopez*, 514 U.S. 549, 564 (1995).

¹⁷⁴ *Id.*; see also *United States v. Morrison*, 529 U.S. 598, 612–13 (2000) (adopting the reasoning established in *Lopez*).

¹⁷⁵ 42 U.S.C. § 18091(a)(2)(A) (West 2003 & Supp. 2011).

¹⁷⁶ *Id.*

in which individuals finance their participation in the health care market.”¹⁷⁷ These “are quintessentially economic” acts regulated as part of a complex legislative package intended to treat an economic problem of the first magnitude.¹⁷⁸ Virtually everyone needs medical treatments at some point, the exact timing and cost of which frequently cannot be predicted. People do not schedule their heart attacks or cancers any more than they do injury-causing accidents. As the government aptly characterizes the behavior of uninsured people, they “externalize the risks and costs of much of their health care; the minimum coverage provision will require that they internalize them (or pay a tax penalty). This is classic economic regulation of economic conduct.”¹⁷⁹ By contrast, the laws invalidated in *Lopez* and *Morrison* were “single-subject statute[s]” that regulated criminal behavior without regard to whether the acts had “any connection to past interstate activity or a predictable impact on future commercial activity.”¹⁸⁰

Each individual decision not to insure has a de minimis effect on the economy. However, when Congress employs the third basis for invoking the Commerce Clause (substantial effects), it may consider the aggregate consequences of those choices by millions of Americans. By that token, Roscoe Filburn’s consumption of home-grown wheat may have been “trivial by itself,” but that did “not . . . remove him from the scope of federal regulation” because his action, “taken together with that of many others similarly situated, [was] far from trivial.”¹⁸¹ Considered as a whole, “consumption of homegrown wheat on interstate commerce . . . constitute[d] the most variable factor in the disappearance of the wheat crop.”¹⁸² Just as “[h]ome grown wheat in this sense competes with wheat in commerce,” those who self-insure compete with people who have policies, producing a major economic effect on them as well as taxpayers.¹⁸³

Not everyone will consume medical care that costs more than the person can afford to pay out of pocket. This merely shows that the law is over-inclusive. But that does not render it irrational or otherwise constitutionally suspect. Provided that Congress is attempting to regulate interstate commerce, it may reach actors who otherwise would fall outside the commerce power. The loan shark in *Perez v. United States* was punished under a federal law banning extortionate credit transactions on

¹⁷⁷ Brief for the Petitioners, *supra* note 7, at 18.

¹⁷⁸ *Gonzales v. Raich*, 541 U.S. 1, 25 (2009).

¹⁷⁹ Brief for the Petitioners, *supra* note 7, at 19.

¹⁸⁰ *Gonzales*, 545 U.S. at 23 (characterizing *Lopez* and *Morrison*).

¹⁸¹ *Wickard v. Filburn*, 317 U.S. 111, 127 (1942); *see also* *United States v. Darby*, 312 U.S. 100, 123 (1941) (“It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great.”).

¹⁸² *Wickard*, 317 U.S. at 127.

¹⁸³ *Id.* at 128.

the theory that loansharking was “in large part under the control of ‘organized crime,’”¹⁸⁴ which was “interstate and international in character.”¹⁸⁵ It made no difference whether the defendant was working for the mafia or a freelancing hoodlum, for he was “one of the species commonly known as ‘loan sharks.’”¹⁸⁶ Congress was entitled to regulate the entire “class of activities . . . without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce.”¹⁸⁷

Like the loan shark, uninsured Americans belong to a class of people who cause interstate effects even though it is not possible for Congress to know who in particular will wind up shifting costs. The government has highlighted the personal situation of one of the original plaintiffs in the Florida litigation, Mary Brown, who claimed that she did “not believe that the cost of health insurance coverage [was] a wise or acceptable use of [her] financial resources.”¹⁸⁸ She and her husband have since filed for bankruptcy, listing “among their liabilities thousands of dollars in unpaid medical bills, including bills from out-of-state providers. . . . Those liabilities are uncompensated care that will ultimately be paid for by other market participants.”¹⁸⁹ Anyone could suffer from such overconfidence in their fortunes, aside from the relatively small number of Americans who can afford to wear diamonds on the soles of their shoes.¹⁹⁰ And the existence of a certain number who are too-rich-to fail is irrelevant to the constitutionality of the mandate. “Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise, as trivial, individual instances’ of the class.”¹⁹¹

Critics of the mandate have responded to the claim that the decision not to insure has a major economic effect on the insurance market by arguing that it proves too much because it assumes that inactivity constitutes economic activity, leading to a slippery doctrinal slope that

¹⁸⁴ *Perez v. United States*, 402 U.S. 146, 147 (1971).

¹⁸⁵ *Id.* at 147 n.1.

¹⁸⁶ *Id.* at 147.

¹⁸⁷ *Id.* at 152 (citing *United States v. Darby*, 312 U.S. 100 (1941)).

¹⁸⁸ Brief for the Petitioners, *supra* note 7, at 44.

¹⁸⁹ *Id.*; see also David G. Savage, *Plaintiff Challenging Healthcare Law Went Bankrupt—With Unpaid Medical Bills*, L.A. TIMES, Mar. 8, 2012.

¹⁹⁰ See PAUL SIMON & JOSEPH SHABALALA, *Diamonds on the Soles of Her Shoes*, on GRACELAND (Warner Bros. Records 1986).

¹⁹¹ *Perez*, 402 U.S. at 154 (citing *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968) (emphasis omitted)). Brown also had \$55,000 in other types of debts, such as those owed to retailers. Savage, *supra* note 189. According to her attorneys, “the Government’s reasoning would allow Congress to compel the purchase of insurance (or other products) that would have reduced the ‘cost-shifting’ facilitated by bankruptcy laws and other government benefits for the needy.” Brief for Private Respondents on the Individual Mandate at 55, *United States Dep’t Health & Human Servs. v. Florida*, No. 11-398, (Feb. 6, 2012). This ignores the uniqueness of health care. Unlike Brown’s other purchases, health care was the one she could neither predict with accuracy nor avoid once it inevitably was needed.

would destroy the most basic constitutional limitation on national legislation—that Congress must justify its products as falling under one of the Constitution’s enumerated powers. According to the Eleventh Circuit majority, “[f]ew powers, if any, could be more attractive to Congress than compelling the purchase of certain products.”¹⁹² Randy Barnett has written that

the [ACA] speciously tries to convert inactivity into the ‘activity’ of making a “decision.” By this reasoning, a ‘decision’ *not* to take a job or *not* to sell your house or *not* to buy a Chevrolet is an ‘activity that is commercial and economic in nature’ that can be mandated by Congress.¹⁹³

The district court judge in the Florida litigation seized on this point, concluding that

because virtually no one can be divorced from the transportation market, Congress could require that everyone above a certain income threshold buy a General Motors automobile—now partially government-owned—because those who do not buy GM cars (or those who buy foreign cars) are adversely impacting commerce and a taxpayer-subsidized business.¹⁹⁴

For that matter,

Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system.¹⁹⁵

Others have suggested that the same rationale for mandating insurance purchases would justify Congress compelling people to join health clubs due to the well-documented connection between exercise and health.¹⁹⁶

¹⁹² *Florida*, 648 F.3d at 1289.

¹⁹³ Barnett, *supra* note 96, at 605.

¹⁹⁴ *Florida ex rel. Bondi v. United States Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011), *aff’d in part, rev’d in part* 648 F.3d 1235 (2011), *cert. granted in part* 132 S. Ct. 604 (2011).

¹⁹⁵ *Id.*

¹⁹⁶ “Yet if the federal government can require people to buy insurance in order to keep premiums affordable, could it also require people to buy baby aspirin or a gym membership to keep those

There are critical differences between these examples of potential overreaching by Congress and the health care mandate. Unlike medical care, no one literally needs an automobile, much less a Chevy. The force of that rebuttal admittedly withers somewhat when one considers the Eleventh Circuit's that there are other situations where Congress might find it beneficial to the economy to compel people to insure or buy some other product. "Few powers, if any, could be more attractive to Congress than compelling the purchase of certain products."¹⁹⁷ Consider flood insurance, which the Eleventh Circuit highlighted. A large percentage of Americans with property in flood-prone areas fail to insure themselves against inevitable but uncertain inundation, knowing that the government likely will step forward with relief. The massive cost of recovery is thereby shifted to others.¹⁹⁸ If the health insurance mandate is constitutional as a means to deal with cost-shifting, the court reasoned, so too is compulsory flood insurance. By the same token, Congress could dictate that all auto drivers carry a minimum of liability insurance to pay for the harms they cause to others in accidents. That the states already impose such a requirement might not satisfy Congress. Perhaps it concluded that the states require too little insurance or that it is preferable to have a uniform policy, which might facilitate interstate travel in a manner not unlike federally mandated safety equipment on vehicles. But these examples are missing critical elements present with health insurance. Just as no one really needs to drive, living near a flood plain is a choice. Furthermore, the uninsured homeowners in that situation are rolling the dice, for there is no guarantee that the government will come forward with aid in sufficient amounts, as many of the victims of Hurricane Katrina and other natural disasters can attest.

Dealing with cost-shifting is not, by itself, sufficient to sustain legislation under the Commerce Clause, or at least it is very unlikely that the Supreme Court would accept such a rationale. Social ills often involve cost-shifting. A thief, for example, appropriates the wealth of others, and when the individual losses from all larcenies nationwide are totaled, the economic effect is significant. People who carry firearms arguably may benefit themselves by increasing their personal security (or at least their sense of security), yet predictably doing so will harm others in some instances. The student in *Lopez* who brought a gun to school, for example, may have felt more secure or gained some other psychic advantage from doing so, but acts like his have economic effects on others (such as the

premiums affordable, on the theory that using these products reduces the use of health care services and thus insurance costs?" Wendy K. Mariner et al., *Can Congress Make You Buy Broccoli? And Why That's a Hard Question*, 364 NEW ENG. J. MED. 201, 202 (2011).

¹⁹⁷ *Florida*, 648 F.3d at 1289.

¹⁹⁸ *Id.* at 1289–90.

medical bills of other students who are victims of an accidental discharge or caught in a cross-fire). The rapists in *Morrison* gratified themselves at the expense of their victim.

For the same reason, Congress should not be authorized to use its commerce powers simply to elude the political obligation of having to make transfer payments to those in need, as in the flood insurance example. That justification would have no logical stopping point. Government almost never is constitutionally compelled to render aid to people, putting aside its obligations to those who are incarcerated or civilly committed.¹⁹⁹ Yet for political and humanitarian reasons, Congress frequently helps people voluntarily. For example, the victims of crime often require the assistance of others to recover and the aid not uncommonly comes from the federal government, as when people covered by Medicare or Medicaid suffer injuries from criminal acts. Similarly, a parent who fails to make support payments for his or her children not only shifts the obligations to the other parent but predictably impacts the public fisc because government probably will wind up assuring that needs are met. But avoiding such political pressures should not be enough in itself to command individuals to help others in the name of the Commerce Clause.

It also should not be possible for Congress to command private spending under the auspices of the Commerce Clause merely to increase consumption of a service or product, even though doing so will help the economy. That smacks too much of the efforts to justify the laws in *Lopez* and *Morrison* on the ground that the crimes had economic consequences for the nation. Of course, Congress may pursue these ends by using its taxing and spending powers. In theory, it could purchase a fleet of Chevys from GM at taxpayer expense and then offer them for “free” to all Americans, an offer that most would not refuse. Or it might offer generous tax credits for purchasers of American autos, as it has done for people who buy hybrid vehicles. It could give a tax credit for buying a car from a manufacturer partly owned by the United States, which is true of GM at the moment. The Court has imposed essentially no limits on the objects of congressional spending, save the meaningless restriction that “the exercise of the spending power must be in pursuit of ‘the general welfare.’”²⁰⁰ The only restraints on congressional extravagance in taxing and spending are political.²⁰¹ “The remedy for excessive taxation is in the hands of

¹⁹⁹ See *DeShaney v. Winnebago Cnty. Dep’t Soc. Servs.*, 489 U.S. 189, 196 (1989) (“[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”).

²⁰⁰ *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citation omitted).

²⁰¹ In *United States v. Butler*, the Court agreed with Alexander Hamilton’s interpretation of the Taxing and Spending Clause, holding that it “confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a

Congress, not the courts.”²⁰²

That the limits on the fiscal powers of Congress are primarily political is a feature of the Taxing and Spending Clause.²⁰³ Spending can always be rationalized as in the national interest, if for no other reason than it stimulates the economy through job creation or redistributes wealth. However, the fact that Congress could in effect impose insurance mandates through taxing and spending—by levying a tax for the purpose of enrolling everyone in a health plan—also is irrelevant to the Commerce Clause question. It is a familiar principle that the separate grants of legislative power in the Constitution must stand on their own feet.

For Congress to invoke the commerce power, the Court has always demanded some relationship between the regulation imposed by Congress and “commerce.” Yet this requirement could not be more modest—Congress need only show that “a ‘rational basis’ exists for . . . concluding”²⁰⁴ that the ultimate purpose of the law is to stimulate or discourage “trade, traffic, commerce, transportation, or communication” occurring across state and national borders.²⁰⁵ Whether Congress’ assumptions are factually accurate is beside the point. In an Article I case, the Court will not examine the validity of congressional factfinding, including whether a given regulation actually will turn out to benefit the economy, since “by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it.”²⁰⁶

Curbing cost-shifting or avoiding the political necessity for government spending may not alone be sufficient to invoke the Commerce Clause, but that does not mean they are illegitimate purposes or irrelevant

substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.” 297 U.S. 1, 65–66 (1936).

²⁰² *United States v. Kahriger*, 345 U.S. 22, 28 (1953), *overruled in part* *Marchetti v. United States*, 390 U.S. 39 (1968).

²⁰³ In *Helvering v. Davis*, the Court observed that Art. I, § 8, cl. 1 draws a line “between one welfare and another, between particular and general,” but “[w]here this shall be placed cannot be known through a formula in advance of the event.” 301 U.S. 619, 640 (1937). This is because “the concept of the general welfare [is not] static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times.” *Id.* at 641. Consequently, “[t]he discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment,” and that would require a “‘showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.’” *Id.* at 640–41 (quoting *Butler*, 297 U.S. at 67).

²⁰⁴ *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

²⁰⁵ *Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937).

²⁰⁶ *United States v. Carolene Prods.*, 304 U.S. 144, 154 (1938) (upholding a federal ban on “filled milk,” finding that it was “at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.”).

to whether the commerce power is being wielded constitutionally. Controlling externalities from private behavior and saving the government money often are cited as appropriate reasons to invoke the commerce power.²⁰⁷ The externalities that Commerce Clause-based statutes target often *are* impairments of commerce. This was true, for example, of Filburn's wheat consumption, the union-busting actions of Jones & Laughlin Steel, the lack of safety devices on trains, and thefts from interstate shipments. So long as Congress is properly invoking its commerce powers, as stated in *U.S. v. Darby*, "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control."²⁰⁸ In *Darby*, the imposition of federal minimum wages on businesses was justified as a means to achieve the "public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions"²⁰⁹ It was no secret that the ultimate goal of the law was to achieve what Congress thought to be a more reasonable distribution of wealth than the free market.

In the case of mandating health insurance, Congress could rationally conclude that it was addressing practices with substantial effects on interstate commerce. The refusal of insurers to ignore preexisting conditions or to cap lifetime benefits are impediments to interstate commerce in that they retard consumption of medical goods and services. Even if this was not so, insurance itself is a form of commerce, and Congress need not explain why it wants to regulate it. For whatever reason, it will not permit insurers to offer contracts that exclude preexisting conditions or fix ceilings on total insurance benefits.

In Congress only imposed these reforms on the insurance market, it would have solved one problem at the expense of creating others in the form of exploding rates and withdrawal of insurers from the market. The mandate is a way of reducing the adverse side-effects of the restrictions Congress wishes to impose on insurance contracts. It is not a "brief, single-subject statute" like the laws at issue in *Lopez* and *Morrison*. Rather, it fits *Lopez*'s approval of laws that are "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."²¹⁰ The

²⁰⁷ In *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264 (1981), the Court held that there was a rational basis for federal controls on strip mining because they were "counteracting governmental programs and efforts to conserve soil, water, and other natural resources." *Id.* at 277.

²⁰⁸ *Darby*, 312 U.S. at 115.

²⁰⁹ *Id.*

²¹⁰ *United States v. Lopez*, 514 U.S. 549, 561 (1995).

choice of means for accomplishing this result is left to the discretion of Congress, for the power to regulate commerce is the power “to prescribe the rule by which commerce is to be governed.”²¹¹ Congress “may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities.”²¹² There is no requirement that “the means chosen” be “themselves within the granted power,” so long as they are “appropriate aids to the accomplishment of some purpose within an admitted power of the national government.”²¹³ In *Gonzales v. Raich*, for example, the proscription at immediate issue was growing and possessing marijuana for personal consumption. Neither was a commercial act as no sales occurred, but nonetheless the prohibition was “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”²¹⁴ For whatever reason, Congress wished to curb the interstate market in marijuana, and “[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.”²¹⁵

Whatever else the mandate may be, it surely is a “regulation,” even under an eighteenth-century sense of that word. In upholding the requirement, the D.C. Circuit referred to Samuel Johnson’s definition of “regulate” as “[t]o adjust by rule or method,” as well as “[t]o direct.” To “direct,” in turn, included “[t]o prescribe certain measure[s]; to mark out a certain course,” and “[t]o order; to command.”²¹⁶ The mandate commands behavior—purchasing insurance—in order to enable it to regulate the terms of health insurance contracts. Even if “regulate Commerce” in Article I is restricted to influencing existing activity, the ACA does exactly that: the existing activity can either be thought of as the act of participating in the health care market without insurance or the practices of insurers in offering insurance with conditions Congress wishes to eliminate from interstate commerce.²¹⁷

Whether the ultimate purpose of the mandate is relieving human suffering by making access to care more affordable, preventing financial

²¹¹ *Id.* at 553 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)).

²¹² *Darby*, 312 U.S. at 113 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 196). Congress “has, all will agree, a large discretion as to the means to be employed in the exercise of any power granted to it.” *N. Sec. Co. v. United States*, 193 U.S. 197, 343 (1904).

²¹³ *Id.* at 121.

²¹⁴ *Gonzales v. Raich*, 545 U.S. 1, 24 (2004) (quoting *Lopez*, 514 U.S. at 561); *id.* at 36 (Scalia, J., concurring) (“Congress’s authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce.”).

²¹⁵ *Gonzales*, 545 U.S. at 26.

²¹⁶ *Seven-Sky v. Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011) (quoting 2 SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (4th ed. 1773) (entry for “regulate”)).

²¹⁷ U.S. CONST. art. I, § 8, cl. 3.

devastation from ruinously high medical bills, or assuring the financial condition of the health care and insurance industries, the result is the same. In the familiar words of *McCulloch v. Maryland*, “[i]f the end be legitimate, and within the scope of the constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect.”²¹⁸

It may be a new use of the commerce power to command action from people merely because they are alive and living lawfully in America. A mandate to purchase insurance is unprecedented in one sense identified by the Eleventh Circuit: Congress has never used its commerce powers to “require[] people to buy any good or service as a condition of lawful residence in the United States,” noting that economic “mandates typically apply to people as parties to economic transactions, rather than as members of society.”²¹⁹ If sheer novelty were enough to scuttle a use of the commerce power, much legislation would be unconstitutional. Chartering the Bank of the United States during the Washington administration would have been illegal because Congress had never done so previously. The Interstate Commerce Commission would have been rejected as unprecedented when it was created in 1887. This is so with any new regulatory strategy. The Court has said that the “[l]ack of historical precedent can indicate a constitutional infirmity.”²²⁰ Novelty may reflect “past constitutional doubts,”²²¹ especially when “earlier Congresses avoided use of this highly attractive power.”²²² But, not necessarily. The newness of an innovative legislative scheme may indicate nothing more than that there has not previously been a reason for Congress to enact it.²²³ There was no need for an agency to control interstate rail traffic until such traffic existed. The framing generation did not have to concern themselves with the economic problems surrounding a \$2.6 trillion dollar industry. Furthermore, the unusual nature of the mandate counsels that similar measures will not be pursued often. The ACA was enacted only because of a rare confluence of political factors, namely that the Democrats occupied the White House and were a majority in both houses of Congress, including enough of a majority in the Senate to overcome a Republican

²¹⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

²¹⁹ CONGRESSIONAL BUDGET OFFICE, THE BUDGETARY TREATMENT OF AN INDIVIDUAL MANDATE TO BUY HEALTH INSURANCE 1–2 (1994), *quoted in* *Florida v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d 1235, 1288 (11th Cir. 2011).

²²⁰ *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1641 (2011), *quoted in* *Florida*, 648 F.3d at 1289.

²²¹ *Id.* at 1642.

²²² *Printz v. United States*, 521 U.S. 898, 905 (1997), *quoted in* *Florida*, 648 F.3d at 1289.

²²³ *Va. Office Prot. & Advocacy*, 131 S. Ct. at 1642 (“We are unaware that the necessary conditions have ever presented themselves” to justify the application of *Ex Parte Young*, 209 U.S. 123 (1908), in the type of case under review).

filibuster.²²⁴ Judging from the skepticism with which Americans have greeted the mandate, and considering the general unpopularity of measures that oblige people to spend money, mandates are unlikely to be imposed by Congress on a regular basis.

Mandating that Americans buy something or act in ways that cost them money actually has many precedents, including measures that were enacted in the early Congress. As several commentators have mentioned, one of the militia acts passed in 1792 required almost “every free able-bodied . . . male citizen” between the ages eighteen and forty-five to both enroll in a state militia and provide their own firearms capable of shooting a specified shot weight, a supply of ammunition, bayonets (and swords, in the case of officers), and related equipment.²²⁵ Most of these items would have to be purchased. That this requirement was imposed under the auspices of the Militia Clause does not deny its relevance to a mandate enacted under the Commerce Clause. Congress evidently thought that obliging Americans to arm themselves was a “necessary and proper” means for carrying out an enumerated power.²²⁶ The concurring judge on the Sixth Circuit panel upholding the mandate nevertheless thought that the militia example gave “analogy a bad name,” as he perceived an obvious difference between being required to “to defend the country’s borders” and being forced to take measures “to improve the availability of medical care.”²²⁷ This is a curious argument as it rests on the assumption that there is something special about the Militia Clause that supports a mandate to arm. The Eleventh Circuit said as much, although it did not refer to the Militia Act. According to its reasoning, there are have only been “a limited set of personal mandates” imposed on Americans, namely “serving on juries, registering for the draft, filing tax returns, and responding to the census.” These were said to be “duties owed to the government attendant to citizenship, and they contain clear foundations in the constitutional text.”²²⁸

This answer merely begs the question of what obligations are attendant to citizenship, or more accurately, lawful residence in the United States.

²²⁴ Cf. *Virginia Office of Prot. & Advocacy*, 131 S. Ct. at 1642 (downplaying the novelty of a law because the “conditions will rarely coincide” to justify using it).

²²⁵ Act of May 8, 1792, § 1, 1 Stat. 271; see also Hall, *supra* note 122, at 1855–56; Akhil Amar, *The Lawfulness of Health-Care Reform* 17–18 (Yale Law School, Research Paper # 228), available at <http://ssrn.com/abstract=1856506>.

²²⁶ The CBO was simply wrong in asserting that “[t]he government has never required people to buy any good or service as a condition of lawful residence in the United States.” CBO, *THE BUDGETARY TREATMENT OF AN INDIVIDUAL MANDATE TO BUY HEALTH INSURANCE* 1 (1994), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/48xx/doc4816/doc38.pdf>. That is precisely what the Militia Act demanded.

²²⁷ *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 559 (6th Cir. 2011) (Sutton, J., concurring in part).

²²⁸ *Florida ex rel. Att’y Gen. v. United States Dep’t Health & Human Servs.*, 648 F.3d 1235, 1290 (11th Cir. 2011), *cert. granted in part* 132 S. Ct. 604 (2011).

The military draft, for example, applies to lawfully-resident aliens, who also are obliged to file tax returns; further, there is no constitutional reason why aliens could not be summoned as jurors. The text of the Constitution provides little help. The Constitution does not mention a military draft, and the militia was only authorized, not required, by the Militia Clause. Requiring men to muster out with their own weapons was a way of financing the militias. If Congress or the states had been richer, they could have paid for this equipment from taxes. Likewise, it is reasonable to request jury service of citizens in order to meet the constitutional obligation to provide trial by jury, but this does not necessarily entail that the unwilling be coerced to serve. Compensate them enough and there will be more than enough volunteers. Similarly, it is reasonable to insist that people file tax returns to facilitate revenue collection, but there is no constitutional requirement that taxes be assessed in this manner—sales taxes and customs duties, for example, require no returns, and these were the prevalent forms of national taxation in the early republic. No doubt it is helpful to require people to respond to census questions in order to obtain an accurate enumeration, but strictly speaking the government could count the people without such cooperation. It would just be much more difficult, which is why the obligation is a “necessary and proper” means of implementing the Census Clause. The same can be said of every obligation mentioned in this paragraph.

The same line of reasoning supports an insurance mandate for Americans who live in this country and thus can be expected to access medical services here. There is a definite relationship between the obligation to procure insurance and the status of being alive and living lawfully in the United States. Unlike voluntary activities such as driving a car or operating a restaurant, the need for medical care is a consequence of being alive. Not only will most people seek care to relieve their suffering, but it may be rendered to them involuntarily, as when an unconscious person is brought into an ER and the staff dispenses care without obtaining explicit permission. As a society, Americans have decided through their elected representatives in Congress and state legislatures to assure people that they will receive emergency treatment regardless of whether they can pay. Most Americans do not wish to live in a country where people with life-threatening or painful conditions that can be treated are turned away from hospitals for lack of funds. It may be, as the dissenting judge in the Sixth Circuit litigation on the Act opined, that Congress is therefore partly responsible for the conditions that have made insurance health care unaffordable to millions. “The free-riding problem is substantially one of Congress’s own creation,” he reasoned, because the national legislature has used its constitutional powers to assure treatment even if cost-shifting will

result.²²⁹ Putting aside that other reasons contribute to cost-shifting besides the federally-imposed obligation to render emergency care, there is nothing constitutionally suspicious about Congress wielding its commerce powers to counteract the ill effects of other constitutionally-justified laws. This is a standard use of the Necessary and Proper Clause. Again, the motives for enactment of a law are irrelevant so long as its ultimate object is commercial regulation.

B. *The Constitutionality of the Mandate as a Tax Measure*

1. *The General Welfare Clause as a Basis for Regulation*

The government claims that there is an independent basis for congressional power: the mandate's assessment is authorized as tax justified under the General Welfare Clause.²³⁰ The penalty provision certainly has one of the characteristics of a tax: it will extract billions of dollars annually from taxpayers who pay the penalty because it is less than the cost of insuring.²³¹ So far no circuit court has agreed that it constitutes a tax. The Sixth Circuit evaded the issue by finding sufficient legislative power under the Commerce Clause, although it held that the mandate was not a "tax" for purposes of the Anti-Injunction Act.²³² The Fourth Circuit, while not reaching the merits of whether the mandate is a tax authorized by the General Welfare Clause, nonetheless concluded that the lawsuit was barred by the Anti-Injunction Act as "a pre-enforcement action seeking to

²²⁹ *Thomas More Law Ctr.*, 651 F.3d at 572 n.3 (Graham, J., concurring in part and dissenting in part); see *id.* at 563 (Sutton, J., concurring in part) ("When Congress guarantees a benefit for all (by securing certain types of medical care), it may regulate that benefit (by requiring some to pay for it).")

²³⁰ U.S. CONST. art. I, § 8, cl. 1.

²³¹ The Congressional Budget Office and the congressional Joint Committee on Taxation "estimate that total collections from those penalties will be about \$4 billion per year over the 2017–2019 period." CONGRESSIONAL BUDGET OFFICE, PAYMENTS OF PENALTIES FOR BEING UNINSURED UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 1 (Apr. 22, 2010), available at http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11355/individual_mandate_penalties-04-22.pdf. See *Thomas More Law Center v. Obama*, 651 F.3d at 539–40 (Sutton, J., concurring) (stating that during "the first several years of the Act, if not throughout its existence," the penalty "normally will cost less than medical insurance."). Justice Ginsburg thus was incorrect in asserting during oral argument that "this is not a revenue-raising measure because, if it's successful, . . . nobody will pay the penalty, and there will be no revenue to raise."). Transcript of Oral Argument, *United States Dep't Health & Human Servs. v. Florida*, No. 11-398, at 19 (March 26, 2012) (statement of Ginsburg, J.), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Monday.pdf

²³² *Thomas More Law Ctr.*, 651 F.3d at 539–40 (holding that the mandate is a "penalty" for purposes of the Anti-Injunction Act), *aff'd* 720 F. Supp. 2d 882, 895 (E.D. Mich. 2010) (declining to reach whether mandate was a valid tax). Even if the mandate penalty is not a "tax" for purposes of the Anti-Injunction Act, it still could be a "tax" for purposes of the General Welfare Clause, because the Act does not apply to every tax, duty, impost or excise authorized by that clause. See 26 U.S.C. § 7421(a) (2000) (listing exceptions).

restrain the assessment of a tax.”²³³

The Eleventh Circuit is the only appeals court to reach the merits of this issue, and the majority concluded “that the individual mandate is not a tax, but rather a penalty,” and hence not an independent basis for congressional action.²³⁴ By its account, the mandate was not adopted “to raise revenue for the public fisc, but rather to, among other things, reduce the number of the uninsured and to create what Congress perceived to be effective health insurance markets that make health insurance more widely available.”²³⁵ Consequently, it “appears in every important respect to be ‘punishment for an unlawful Act or omission,’ which defines the very ‘concept of penalty.’”²³⁶ The court was impressed that Congress “carefully selected” the word “penalty”²³⁷ to describe the mandate, instead of “tax,” a term employed elsewhere in the Act to describe monetary extractions and which early versions of the ACA bill had used to depict the mandate.²³⁸ True, the mandate is located in the IRS Code, but not every exaction in the code is a “tax” enacted by virtue of the General Welfare Clause, and the IRS Code itself warns not to draw any “inference, implication, or presumption of legislative construction” by the fact that a requirement is placed under that title.²³⁹ The tax code “contains all sorts of provisions for payment of interest and penalties that are not taxes.”²⁴⁰

The plaintiffs in the case pending before the Court on the ACA argue that the mandate cannot “*itself* be upheld as a tax,”²⁴¹ inasmuch as it is a “legal ‘[r]equirement’ that covered individuals ‘shall’ obtain insurance.”²⁴²

²³³ *Liberty Univ. v. Geithner*, 671 F.3d 391, 397–98 (4th Cir. 2011), *vacating* 753 F. Supp. 2d 611, 629 (W.D. Va. 2010) (for purposes of Anti-Injunction Act, “exactions imposed under the Act for violations of the employer and individual coverage provisions is that of regulatory penalties, not taxes”); *see also* *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010) (holding that for purpose of the Anti-Injunction Act the mandate “in form and substance,” is “a penalty as opposed to a tax.”), *vacated* 656 F.3d 253, 269 (4th Cir. 2011) (holding that Virginia lacked standing to challenge individual mandate). However, “the fact that the Anti-Injunction Act applies does not necessarily mean the tax penalty is permissible under the Taxing Clause.” *Seven-Sky v. Holder*, 661 F.3d 1, 48 n.36 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

²³⁴ *Florida ex rel. Att’y Gen. v. United States Dep’t Health & Human Servs.*, 648 F.3d 1235, 1290 (11th Cir. 2011), *cert. granted in part* 132 S. Ct. 604 (2011).

²³⁵ *Id.* at 1316–17.

²³⁶ *Id.* at 1319 (quoting *United States v. Reorganized CF & I Fabricators of Utah*, 518 U.S. 213, 224 (1996)).

²³⁷ *Id.* at 1315.

²³⁸ *See id.* at 1316–20 (discussing the designation of other provisions in the Affordable Care Act as taxes and detailing the legislative history of the individual mandate).

²³⁹ *Id.* at 1319 (quoting 26 U.S.C. § 7806(b)); *see also id.* at 1320 (“[O]ther chapters of the Internal Revenue Code include *penalty* provisions as well.”).

²⁴⁰ Erik M. Jensen, *The Individual Mandate and the Taxing Power*, TAX NOTES TODAY, Jan. 4, 2012, at 98.

²⁴¹ Brief for Private Respondents *supra* note 191, at 63 (quoting 26 U.S.C. § 5000A(a)) (emphasis added).

²⁴² *Id.* (quoting 26 U.S.C. § 5000A(a)).

Americans may not “ignore that requirement” by “pay[ing] the non-compliance sanction.”²⁴³ But they certainly can do exactly that. There are no other consequences. Those who choose to incur the penalty rather than insure will be justified in thinking they have met their obligation to fellow Americans. They have compensated society for the risk they present.

Commentators similarly contend that the mandate’s “penalty” amounts to a fee for self-insuring by doing nothing.²⁴⁴ This is a variation of the argument against basing the mandate on the Commerce Clause because it supposedly regulates inactivity. The answer is similar in both contexts: the ones being regulated or taxed *are* doing something: living in the United States without insurance and usually without sufficient assets to bear significant medical expenses. Every one of these self-insurers presents an actuarial risk that will be borne by others; predictably, some will incur more medical debt than they can afford.²⁴⁵ With good reason, the penalty is characterized by the act as a “shared responsibility payment,” imposed on the entire group to account for risk they present to society.²⁴⁶

At the oral argument before the Court on the constitutionality of the mandate, the attorney for the states maintained vociferously that the minimum insurance policy required by the ACA includes coverage that far exceeds the cost shifting that the uninsured produce. The minimum plan was not limited to “emergency care and catastrophic insurance coverage. But it covers everything, soup to nuts, and all sorts of other things.”²⁴⁷ There is a germ of truth in his statement: the “essential health benefits” that insurance plans must cover include emergency care, hospitalization, maternity and newborn care, mental health and drug treatment, prescription drugs, rehabilitative and habilitative services and devices, lab services, preventive and wellness services, chronic disease management, and pediatric care (including dental and vision care).²⁴⁸ The flaw in this position is the erroneous assumption that cost-shifting is only the result of catastrophic costs. Given the financial difficulties of many American families, much smaller medical bills can be beyond their ability to pay. The erstwhile plaintiff in the Florida litigation, Mary Brown, defaulted on

²⁴³ *Id.* at 11.

²⁴⁴ Steven J. Willis & Nakku Chung, *Oy Yes, The Healthcare Penalty is Unconstitutional*, 129 TAX NOTES 725, 727 (2010) (arguing that a tax cannot be based on doing “nothing”).

²⁴⁵ See Transcript of Oral Argument, *Dep’t Health & Human Servs. v. Florida*, No. 11-398, at 56–57 (Mar. 27, 2012) (statement of Kennedy, J.), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf (“It is true that the noninsured young adult is, in fact, an actuarial reality insofar as our allocation of health services, insofar as the way health insurance companies figure risks.”).

²⁴⁶ 26 U.S.C. § 5000A (b) (2010).

²⁴⁷ Transcript of Oral Argument at 75, *Dep’t Health & Human Servs. v. Florida*, (No. 11-398), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Tuesday.pdf.

²⁴⁸ See 42 U.S.C.A. §§ 300gg-6, 18022(b)(1) (West 2003 & Supp. 2011).

only \$4500 in health care costs.²⁴⁹ Congress could rationally conclude that cost-shifting is a phenomenon not limited to extraordinary expenses. In any event, it is not limited to imposing taxes that precisely correlate with the social costs created by individual taxpayers.

Congress could have achieved the same result by raising the general income tax rate for all taxpayers, and giving a credit to them if they have obtained a minimum level of insurance. Since that unquestionably would be constitutional, it should be possible to accomplish the same result by taxing the uninsured directly. The federal tax code is loaded with exemptions and credits that encourage or discourage specific actions or inactions. Buy a home and the mortgage interest is deductible. Invest in a qualified IRA and defer taxation on the funds until they are withdrawn, *unless* this occurs before age fifty-nine and a half, in which case there is a ten percent penalty.²⁵⁰ This encourages saving for retirement, and it does so by requiring a person to purchase and hold investments. A person may also shelter retirement income in a qualified return plan, *provided* the plan requires the individual to start receiving distributions at age seventy and a half, thus forcing behavior the taxpayer might want to avoid.²⁵¹ One could go on with similar examples for pages, as it is the nature of the current tax code to grant credits and deductions for specified actions or inactions. These allowances often are beneath the public radar, and they remain in effect long after the issue has faded from popular notice. The reasons for granting these allowances are regarded as political considerations by the Court, having no bearing on constitutionality.²⁵² "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."²⁵³ The Court long ago declared in *Sonzinsky v. United States* that "a tax is not any the less a tax because it has a regulatory effect"²⁵⁴ It refuses to look "into the hidden motives" of Congress and inquire whether the tax in reality was "a regulation of behavior enacted 'under the guise of taxation.'"²⁵⁵

Over the years, the Supreme Court has sustained numerous laws as "taxes" under the General Welfare Clause even when their primary purpose obviously was "to curtail and hinder" some type of action rather

²⁴⁹ See *Savage*, *supra* note 189.

²⁵⁰ 26 U.S.C. § 72(t) (2006).

²⁵¹ *Id.* § 401(a)(9)(C).

²⁵² See *Madden v. Kentucky*, 309 U.S. 83, 87–88 (1940) (footnotes omitted) ("[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification" for purposes of applying the Fourteenth Amendment.).

²⁵³ *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547 (1983) (upholding a tax subsidy for certain types of lobbying, rejecting First Amendment objections).

²⁵⁴ *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937).

²⁵⁵ *Id.* at 514.

than to raise revenues.²⁵⁶ Even if a tax is “so excessive that it will bring about the destruction of [the taxpayer’s] business, . . . standing alone, this . . . furnish[es] no juridical ground for striking down a taxing Act” as a regulatory penalty in disguise.²⁵⁷ “It is axiomatic,” the Court posited in 1953, “that the power of Congress to tax is extensive and sometimes falls with crushing effect on businesses deemed unessential or inimical to the public welfare, or where, as in dealings with narcotics, the collection of the tax also is difficult.”²⁵⁸ The test for determining the difference between taxes and penalties is highly deferential to Congress: “Unless there are provisions, extraneous to any tax need, courts are without authority to limit the exercise of the taxing power.”²⁵⁹

Sonzinsky, for example, approved a tax on manufacturers, importers and dealers of firearms commonly used by criminals—machine guns, sawed-off long guns and silencers—as well as an excise on each transfer of such weapons.²⁶⁰ The amount of money it produced in 1935 was trivial—\$5400—in comparison to the billions projected from the ACA assessments; it plainly was designed not to produce revenues but to regulate a segment of the firearms industry.²⁶¹ In *United States v. Sanchez*,²⁶² the Court upheld the Marihuana Tax Act, which levied \$100 per ounce of marijuana sold or otherwise transferred by a person without a special federal license (or, in current dollars, over \$900).²⁶³ This amount, needless to say, was beyond the reach of most. Sellers also had to register with the government and it was illegal for buyers to purchase from unregistered dealers, which would help limit access to marijuana to those with “legitimate” reasons to purchase marihuana such as physicians and patients. Those with a license paid a negligible tax of one dollar per ounce,²⁶⁴ which showed that the law was aimed at discouraging “illicit

²⁵⁶ *United States v. Kahriger*, 345 U.S. 22, 27 (1953).

²⁵⁷ *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 47 (1934).

²⁵⁸ *Kahriger*, 345 U.S. at 28.

²⁵⁹ *Id.* at 31.

²⁶⁰ See *Sonzinsky*, 300 U.S. at 511–12, 514 (affirming a Court of Appeals decision stating that a \$200 annual license tax on dealers in firearms was constitutionally within Congress’s taxing power).

²⁶¹ See *id.* at 514 n.1 (“The \$200 tax was paid by 27 dealers in 1934, and by 22 dealers in 1935.”).

²⁶² 340 U.S. 42 (1950).

²⁶³ The Consumer Price Index value of \$100 in 1950 equates to \$906 in 2010. See *Relative Value*, MEASURINGWORTH, <http://www.measuringworth.com/uscompare/relativevalue.php> (last visited Apr. 11, 2012) (providing an online historical value calculator).

²⁶⁴ Marihuana Tax Act of 1937, Pub. L. No. 238, § 7(a), 50 Stat. 551 (repealed 1970). In *United States v. Doremus*, 249 U.S. 86, 90, 95 (1919), the Court likewise upheld a law making it illegal to “produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away” opium, cocoa leaves, or their derivatives, without paying a one dollar per year federal tax. The “aim” of the nominal tax was to assure that sales of these drugs were made pursuant to “legitimate prescriptions of physicians,” but this was irrelevant: “The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue.” *Id.* at 94. In *Alston v. United States*, 274 U.S. 289, 292–94 (1927), the Court sustained a conviction for “purchasing morphine and

uses.”²⁶⁵ All purchases were to be made on forms supplied by the Treasury, thus identifying buyers and seller to authorities. The statute’s purposes were to “raise revenue and at the same time render extremely difficult the acquisition of marihuana by persons who desire it for illicit uses,” as well as “publicizing dealings in marihuana in order to tax and control the traffic effectively.”²⁶⁶

That the stated purpose of the marijuana tax was regulatory made no difference because “a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.”²⁶⁷ It also was irrelevant that “the revenue obtained is obviously negligible.”²⁶⁸ Nor did it matter that the Act made it illegal to sell marijuana without a license, transfer it without paying a fee, or buy it from unlicensed dealers.²⁶⁹

Three years after *Sanchez*, the Court, in *United States v. Kahriger*, approved the federal Gamblers’ Occupational Tax Act, which imposed a fairly modest tax of fifty dollars on bookies (“persons in the business of accepting wagers”), but required them to register with the tax authorities,²⁷⁰ which exposed them to prosecution for engaging in an activity that was unlawful under state or federal law. A ten percent tax on each wage also was imposed, to be collected and paid by the bookie. Failure to register or pay the tax was punishable by a fine of up to five thousand dollars. Again, the Court said that “a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed. Nor is the tax invalid because the revenue obtained its negligible.”²⁷¹

As *Sanchez*, *Kahriger*, and other cases show, for over seventy years the Court has been untroubled by taxes that were structured to discourage consumption of certain products and services, as well as the businesses

cocaine from unstamped packages,” even though the federal tax was a nominal one cent per ounce. “They do not absolutely prohibit buying or selling; have produced substantial revenue; contain nothing to indicate that by colorable use of taxation Congress is attempting to invade the reserved powers of the States. The impositions are not penalties.” *Id.* at 294; *see also* *Jin Fuey Moy v. United States*, 254 U.S. 189, 190–91, 195 (1920) (sustaining conviction of a physician for selling opium without using a form provided by the Commissioner of Internal Revenue), *overruled by* *Funk v. United States*, 290 U.S. 371 (1933).

²⁶⁵ *Sanchez*, 340 U.S. at 42, 43.

²⁶⁶ *Id.* at 43 (quoting S. Rep. No. 900, 75th Cong., 1st Sess., at 3).

²⁶⁷ *Id.* at 44.

²⁶⁸ *Id.*

²⁶⁹ Marihuana Tax Act, § 4(b), 50 Stat. at 556 (1937) (repealed 1970).

²⁷⁰ *United States v. Kahriger*, 345 U.S. 22, 23–25, 31 (1953), *overruled in part* *Marchetti v. United States*, 390 U.S. 39 (1968).

²⁷¹ *Id.* at 28. *Kahriger* was later overruled, not because of a new interpretation of the General Welfare Clause, but because the Court held that its requirement to register as a gambler compelled self-incrimination in violation of the Fifth Amendment. *Marchetti v. United States*, 390 U.S. 39, 54 (1968).

involving them.²⁷² Many years earlier, the Court upheld a federal tax on selling oleomargarine “colored to look like butter,”²⁷³ notwithstanding that the tax rate was vastly higher than for uncolored oleomargarine—“so large as to destroy the business of manufacturing oleomargarine artificially colored to look like butter.”²⁷⁴ It made no difference that the ostensible objective of the tax was to suppress a product Congress thought had the tendency “to deceive the public into buying it for butter,” or that the real purpose was to aid the dairy industry in suppressing a competing product.²⁷⁵ Facially, it was an excise tax, and the Court would not question the motive for enacting it:

[T]he judiciary is without authority to avoid an Act of Congress exerting the taxing power, even in a case where, to the judicial mind, it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress.²⁷⁶

2. *The Problem of Distinguishing Between Taxes and Penalties*

Theoretically, there is a constitutional difference between taxes properly laid under the General Welfare Clause and penalties for violating laws. However, the Court has held in only a handful of cases that a

²⁷² See *Kahriger*, 345 U.S. at 27 (citing examples); see also e.g., *Nigro v. United States*, 276 U.S. 332, 354 (1928) (upholding tax on sale of opiates, requiring that purchases be ordered via forms from the U.S. Commissioner of Revenue); *Alston v. United States*, 274 U.S. 289, 293–94 (1927) (upholding criminal penalty for selling cocaine or morphine without tax stamps evidencing payment of one cent per ounce of narcotics).

²⁷³ *McCray v. United States*, 195 U.S. 27, 28 (1904).

²⁷⁴ *Id.* at 62.

²⁷⁵ *Id.* at 63; see also Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CALIF. L. REV. 83, 88–89 (1989) (describing origin of the “butter lobby” and the dairy industry’s efforts to suppress oleomargarine through legislation and litigation); Note, *The Oleomargarine Controversy*, 33 VA. L. REV. 631, 632 (1947) (detailing “onerous and sometimes vicious legislation” against oleomargarine sales).

²⁷⁶ *McCray*, 195 U.S. at 63–64; see also *United States v. One Ford Coupe Auto.*, 272 U.S. 321, 324–25, 327 (1926) (upholding forfeiture of car “being used for the purpose of depositing or concealing tax-unpaid illicit liquors with the intent to defraud the United States of the taxes imposed thereon,” even though “since the National Prohibition Act, there has been no way in which the tax could be so paid on intoxicating liquor made for beverage purposes.”); *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 548 (1869) (upholding a ten percent tax on notes issued by state banks, even though the rate allegedly was “so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.”); *License Tax Cases*, 72 U.S. 462 (5 Wall.) 462, 474–75 (1866) (sustaining convictions for selling lottery tickets and liquor without obtaining federal license that required payment of a special tax, even though these activities violated state law).

purported tax actually was a regulatory penalty, and all were in a short span of years from the early 1920s until the mid-1930s, the same period when it issued a series of now-discredited decisions finding important federal regulatory laws to exceed the Commerce Clause.²⁷⁷ Prior to 1920, the Court routinely approved revenue measures that plainly were aimed at influencing behavior rather than raising money.²⁷⁸ Since 1937, no case has invalidated a revenue measure on the ground that it was a penalty disguised as a tax.

The most prominent of the older cases finding that a putative tax amounted to a penalty is the *Child Labor Tax Case*, in which the Court held that an exaction for knowingly employing minors was a penalty, not a tax. Writing for a nearly unanimous Court, Chief Justice Taft posed the question this way: "Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty?"²⁷⁹ Taft acknowledged that true taxes can be imposed "with the incidental motive of discouraging [actions] by making their continuance onerous, . . . [b]ut 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 characteristics of regulation and punishment."²⁸⁰

The Child Labor Tax Act was a penalty, Taft concluded, because it exacted ten percent of the entire annual profits earned by business if at any point during the year it employed minors below certain ages or in excess of specified hours to make products (the exact limits varied by industry). This was "a heavy exaction for a departure from a detailed and specified course of conduct in business."²⁸¹ The amount was not "proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs 500 children for a year, or employs only one for a day."²⁸² Scierter, usually "associated with penalties, not with taxes," was required as a condition for being liable to pay the assessment: it was a complete defense that the business owner did

²⁷⁷ See, e.g., *Carter v. Coal Co.*, 298 U.S. 238, 278, 288–89 (1936) (invalidating Bituminous Coal Conservation Act of 1935 as unauthorized by both the General Welfare Clause and the Commerce Clause); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 525, 550–51 (1935) (holding a "code of fair competition" for the poultry industry developed under the National Industrial Recovery Act to exceed Congress' commerce powers); *R.R. Ret. Bd. v. Alton R. Co.*, 295 U.S. 330, 374 (1935) (striking mandatory pension plan for railroad workers as unauthorized by Commerce Clause); *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918) (voiding Child Labor Act as beyond the commerce power).

²⁷⁸ See Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: A Theory of the Tax Power for a Court that Limits the Commerce Power*, VA. L. REV. (forthcoming 2012) (manuscript at 15–16).

²⁷⁹ *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20, 36 (1922).

²⁸⁰ *Id.* at 38.

²⁸¹ *Id.* at 36.

²⁸² *Id.*

“not know the child is within the named age limit, he is not to pay.”²⁸³ Enforcement of the “tax” was the responsibility of both the Department of Treasury, the agency “normally charged with the collection of taxes,” and by officials of the Department of Labor, “whose normal function is the advancement and protection of the welfare of the workers.”²⁸⁴

The Child Labor Tax Act ranks as one of the most flagrant examples of congressional chutzpah in American history. Less than a year before it was enacted, the Court in *Hammer v. Dagenhart* declared the Child Labor Act unconstitutional as exceeding Congress’ powers under the Commerce Clause.²⁸⁵ Congress essentially reenacted the voided child labor law under the pretext of it being a taxing measure: liability for “the so-called tax” was based on exactly the same conduct that gave rise to a violation of the Child Labor Act.²⁸⁶ This was too much for the Court to swallow: “Its prohibitory and regulatory effect and purpose are palpable,” Taft wrote, “[a]ll others can see and understand this. How can we properly shut our minds to it?”²⁸⁷ Even Justices Holmes, Brandeis and McKenna, who vigorously dissented in *Hammer v. Dagenhart*, joined Taft’s opinion.

Very few cases have reached similar conclusions, and again, all of them were decided in a decade and a half during the early 1920s to the mid-1930s.²⁸⁸ In a 1922 case, *Hill v. Wallace*, the Court found unconstitutional the Future Trading Act, with another nearly unanimous opinion from Taft. The Act imposed a prohibitively high “tax” on futures contracts for grain unless they were sold on boards of trade or they submitted to extensive regulation by federal agencies: “The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevancy to the collection of the tax at all.”²⁸⁹ A comparable result was reached in *Carter v. Carter Coal Co.*, a 1936 case holding that an assessment of fifteen percent of the value of bituminous coal mined was “clearly not a tax but . . . a penalty to compel compliance with the regulatory provisions of the act.”²⁹⁰ There was a ninety percent rebate if the business, whether it was in interstate commerce or not, submitted to detailed federal regulations, including a minimum price for coal sales. “The whole purpose of the exaction is to coerce what is called an agreement—which, of course, it is not, for it lacks the essential element

²⁸³ *Id.* at 36–37.

²⁸⁴ *Id.* at 37.

²⁸⁵ 247 U.S. 251, 276–77 (1918), *overruled* United States v. Darby, 312 U.S. 100, 116–17 (1941).

²⁸⁶ *Child Labor Tax Case*, 259 U.S. at 39.

²⁸⁷ *Id.* at 37.

²⁸⁸ See *Lipke v. Lederer*, 259 U.S. 557, 562 (1922) (holding that an assessment on selling liquor in violation of the National Prohibition Act was not a “tax” because it “clearly involves the idea of punishment for infraction of the law—the definite function of a penalty”).

²⁸⁹ *Hill v. Wallace*, 259 U.S. 44, 66 (1922).

²⁹⁰ *Carter Coal Co.*, 298 U.S. 238, 288–89 (1936).

of consent.”²⁹¹

In these two decades, the Court was also skeptical, at times, of taxes imposed only when some substantive law was violated. In *Lipke v. Lederer*, another 1922 case, the Court ruled that an assessment on selling liquor in violation of the National Prohibition Act was not a valid “tax” because it “clearly involves the idea of punishment for infraction of the law—the definite function of a penalty.”²⁹² The assessment “lacks all the ordinary characteristics of a tax, whose primary function ‘is to provide for the support of the government’”²⁹³ “Evidence of crime . . . is essential to assessment” of the supposed tax.²⁹⁴ In *United States v. Constantine*, decided in 1935, the Court invalidated a \$1000 license fee for sellers of alcohol in violation of state law.²⁹⁵ “The point here is that the exaction is . . . in addition to any the state may decree for the violation of a state law,” Justice Roberts wrote for the majority.²⁹⁶ “The condition of the imposition is the commission of a crime. This, together with the amount of the tax, is again significant of penal and prohibitory intent rather than the gathering of revenue.”²⁹⁷

Although the *Child Labor Tax Case* and similar decisions have not been formally overruled, in more recent times the Court has said that it had “abandoned” the “distinctions between regulatory and revenue-raising taxes,” citing the 1937 decision in *Sonzinsky* for authority.²⁹⁸ The Court reached this conclusion because over the years it dismissed all of the bases used by these older cases to distinguish taxes from penalties. A measure that produced a regular flow of money to the government was considered a tax even if Congress admitted that it had regulatory objectives.²⁹⁹ It made

²⁹¹ *Id.* at 289.

²⁹² 259 U.S. 557, 562 (1922).

²⁹³ *Id.* at 562 (citing *O’Sullivan v. Felix*, 233 U.S. 318, 324 (1914) in noting “[t]he term ‘penalty’ involves the idea of punishment for the infraction of the law”).

²⁹⁴ *Lipke*, 259 U.S. at 562.

²⁹⁵ 296 U.S. 287, 288–90, 297 (1935).

²⁹⁶ *Id.* at 296.

²⁹⁷ *Id.* at 295.

²⁹⁸ *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974) (citing *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)). As recently as 1994, the Court cited the *Child Labor Tax Case* with apparent approval in the context of a claim that a “tax” was a penalty for double jeopardy purposes. In *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778 (1994), a case on the double jeopardy implications of a state tax, the Court cited with approval its decision in *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 46 (1934), noting that it relied on the *Child Labor Tax Case*. “[W]e have also recognized 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 characteristics of regulation and punishment.’”

²⁹⁹ See *supra* text accompanying notes 250–55, 260–76 (citing examples of taxes imposed by Congress to further specific regulatory regime).

no difference if the amount of the tax was large or small.³⁰⁰ “As a general matter, the unlawfulness of an activity does not prevent its taxation,”³⁰¹ as the Court has “repeatedly indicated.”³⁰² Even *Constantine* acknowledged that if “the exaction . . . was laid to raise revenue its validity is beyond question notwithstanding the fact that the conduct of the business taxed was in violation of law.”³⁰³

The basis of these older cases overturning laws for not being taxes was a seemingly reasonable proposition: “Congress could not use its taxing power in this *indirect* way to regulate business not within federal control.”³⁰⁴ The problem with this principle lies in the word “indirect,” because the Court also allowed that a valid tax “may incidentally discourage some in the harmful use of the thing taxed.”³⁰⁵ The line between a tax that incidentally affects conduct and a penalty intended to influence behavior was hard to draw distinctly. “In that area of abstract ideas, a final definition of the line between state and federal power has baffled judges and legislators,” the Court admitted in 1953.³⁰⁶ Distinguishing between the two effects in a principled manner proved to be daunting, for the same reason that similar terminology failed in setting limits on Congress’ Commerce Clause powers. “[T]he right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy.”³⁰⁷ “As is well known, the

³⁰⁰ See *supra* text accompanying notes 260–65, 270–71 & 274 (citing examples of both large and small taxes imposed by Congress to further specific regulatory regime).

³⁰¹ *Kurth Ranch*, 511 U.S. at 778; see *id.* at 781 (stating that “while a high tax rate and deterrent purpose lend support to the characterization of the drug tax as punishment, these features, in and of themselves, do not necessarily render the tax punitive,” although they are relevant factors in determining whether a “tax” is punitive); *James v. United States*, 366 U.S. 213, 213 (1961) (holding that under Internal Revenue Code “embezzled funds must be included in the ‘taxable income’ of an embezzler in the year in which [the funds] are misappropriated . . .”). In *Kurth Ranch*, the factors that led the Court to find the tax was a fine for double jeopardy purposes were the “remarkably high tax” rate, the fact that the tax was “conditioned on the commission of a crime” (“the taxed activity is completely forbidden”), that liability attaches only after arrest, and that it purported to be a property tax although it was “levied on goods that the taxpayer neither owns nor possesses when the tax is imposed.” *Kurth Ranch*, 511 U.S. at 780–83.

³⁰² *Marchetti v. United States*, 390 U.S. 39, 44 (1968).

³⁰³ *United States v. Constantine*, 296 U.S. 287, 293 (1935). “The United States has the power to levy excises upon occupations, and to classify them for this purpose; and need look only to the fact of the exercise of the occupation or calling taxed, regardless of whether such exercise is permitted or prohibited by the laws of the United States or by those of a state.” *Id.* (footnotes omitted).

³⁰⁴ *Bd. of Trade of Chi. v. Olsen*, 262 U.S. 1, 32 (1923) (emphasis added).

³⁰⁵ *Nigro v. United States*, 276 U.S. 332, 354 (1928).

³⁰⁶ *United States v. Kahriger*, 345 U.S. 22, 29 (1953), *overruled in part* *Marchetti v. United States*, 390 U.S. 39 (1968).

³⁰⁷ *McCray v. United States*, 195 U.S. 27, 57 (1904) (quoting *Austin v. Aldermen*, 74 U.S. (7 Wall.) 694, 699 (1868)) ((internal quotation marks omitted)). The same was found to be true of the Commerce Clause in post-1937 cases: “The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.” *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (quoting *United*

constitutional restraints on taxing are few.”³⁰⁸ There are but two: “Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity.”³⁰⁹

In applying the General Welfare Clause, the Court does assume that there is a theoretical difference between penalties and taxes, but that has not enabled it to develop doctrines that separate the two consistently in practice. This is not so odd in American constitutional law, which has produced a number of theoretical constructs that are assumed to exist even though they cannot be actualized as enforceable doctrines. For example, the nondelegation doctrine assumes that there is a distinction between non-delegable legislative power and properly constrained delegations to agencies.³¹⁰ Despite the enormous number of statutes delegating congressional authority to agencies, however, there are only two cases in which the Court set aside laws on the ground that they contained excessive delegations, and both were decided in 1935.³¹¹ Small wonder why. Once the justices recognized that Congress could enable agencies to exercise powers that either it or one of the other two branches could carry out, they could not articulate a rule that determined when Congress gave agencies too much independent power. Hence, the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”³¹² Likewise, after the Court granted that taxes can be large or small and have admitted regulatory purposes, it became daunting to cull out the ones that exceeded legislative authority. If not exactly a nonjusticiable political question, the line between taxes and penalties is not one amenable to “judicially discoverable and manageable standards” that can be reliably applied.³¹³

Professors Cooter and Siegel argue that there are two “pure” or “ideal types” of taxes and regulations.³¹⁴ These are identified by the presence or

States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) (internal quotation marks omitted). “Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be ‘production’ nor can consideration of its economic effects be foreclosed by calling them ‘indirect.’” *Id.*

³⁰⁸ *Kahriger*, 345 U.S. at 28.

³⁰⁹ *Id.* (quoting *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1866)).

³¹⁰ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency.”).

³¹¹ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). In *Whitman*, the Court said through Justice Scalia that *Panama Refining* “provided literally no guidance for the exercise of discretion,” and *Schechter Poultry* involved a law that “conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition.’” *Whitman*, 531 U.S. at 474.

³¹² *Whitman*, 531 U.S. at 474–75 (internal quotation marks omitted) (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

³¹³ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

³¹⁴ Cooter & Siegel, *supra* note 278 (manuscript at 4, 28 n.139).

absence of three characteristics: (1) that it is so excessive in amount that “almost everyone” would not suffer the cost; (2) the requirement that there be a “certain mental state,” such as intentionality, as an element of liability; and (3) the amount of the exaction “increase[s] with repetition of the assessed conduct.”³¹⁵ If all three are present in legislation that raises revenue through compulsory exactions, then it counts as a penalty for purposes of the General Welfare Clause; if none are in evidence, it is a tax. When only some of these factors are present, courts confront “a hard case” that must be decided by analyzing the incentives created by an exaction.³¹⁶ Courts should focus on whether “the exaction raise[s] revenues and dampen[s] the conduct, or . . . prevent[s] the conduct[.]”³¹⁷ In “close cases,” the measure should be upheld due to “the presumption of constitutionality” afforded congressional enactments.³¹⁸

Like other essentialist theories, the one proposed by Cooter and Siegel suffers from two problems. First, it assumes that the attributes they identify are the only ones relevant to determining if a law imposes a tax or a penalty. However, other factors arguably are relevant. To list a few: whether the measure exacts significant sums from taxpayers, particularly when it is a predictable revenue stream; whether the amount of the assessment is small compared to the penalties for not paying; whether there is a possibility of incarceration for disobeying the requirement; whether the violation of law occurred as part a discrete set of events (such as common law crimes), rather than the failure to do something for a period of time; or whether the IRS, the usual revenue-gathering agency, is collecting the money.

Second, there are many instances in which speakers have referred to the laws under review as either imposing taxes or penalties, even though not all of these factors were present. The Child Labor Tax Act extracted a ten percent tax on the net profits of companies using child labor, which did not increase with recidivism, yet the Court called it a penalty. Many criminal penalties are so low, and the chance of being detected and cited by the authorities is so unlikely, that many people assume the risk. Jaywalking incurs a penalty, but not so large that everyone is deterred. The charges for parking on public streets are either taxes or user fees; a failure to pay a ticket for not paying the fee incurs a penalty. Yet cities receive a regular flow of income from parking fines, and often depend on the money to balance their budgets, which makes them operate like taxes. Returning a book late to the library produces a penalty, but many are willing to pay the small penalty in order to finish the last chapter, in effect

³¹⁵ *Id.* at 36.

³¹⁶ *Id.* at 37 n.160.

³¹⁷ *Id.*

³¹⁸ *Id.* at 37.

paying a rental fee for the overdue days. Libraries figure them into their budgets. Some exactions have been called "taxes" by the Court, even though the amount assessed was so high as to effectively ban that which is taxed. The power to tax has been recognized as "the power to destroy."³¹⁹ It is true that taxes do not impose obligations based on specific mental states, but neither does the ACA.

"Penalties" and "taxes" are not things-in-this-world. Rather than referring to physical objects, these terms express concepts. Humans constantly use words to name objects, concepts, and mental states, assigning different meanings depending on the context in which they are used. We say "chair" variously to mean something to sit on, the head of an organization, the person presiding over a meeting, a place or title of authority (as in the position of a bishop or the place where a religious leader resides or carries out their duties), an endowed professorship, a position in an orchestra, and a means of executing the condemned, to mention only some possible modern connotations and omitting the considerable number of now obsolete uses. All of these instances have elements shared by the others. Yet there is not a single attribute of "chairness" in existence. In speaking, people may be fooled into thinking that when they use a word like "chair" they are referencing an ideal type of chair. Naming is not describing.³²⁰ People understand the meaning of a word from its use. Words have "meaning only as part of a sentence."³²¹ So it is with "penalties" and "taxes." They are meaningful words despite our inability to describe the ideal type of either one. Judicial opinions use them constantly and sometimes inconsistently, but people generally understand what the judges mean from the context.

In constitutional law, courts and commentators have a penchant for describing rules and principles as lists of factors. For example, "obscenity" consists of three elements; "commercial speech" has four; the requirements of procedural "due process" depend on balancing three factors.³²² Whether state action violates the Establishment Clause depends on a three-part test.³²³ This is an effort to depict the ideal types of these

³¹⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). Professors Cooter and Siegel deny that this is so. Cooter & Siegel, *supra* note 278, (manuscript at 39).

³²⁰ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 24e (G.E.M. Anscombe trans., 3d. ed. 1963) (1958) ("For naming and describing do not stand of the same level: naming is a preparation for a description."); *id.* at 21e ("[I]t makes no sense at all to speak absolutely of the 'simple parts of a chair.'").

³²¹ *Id.* at 10e (attributing remark to Friedrich Frege).

³²² See *Miller v. California*, (obscenity); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980) (commercial speech); *Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976) (due process).

³²³ See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). But see *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.").

concepts involved by listing their essential attributes. Yet courts have struggled to describe the essential characteristics of these terms. All agree on labeling certain scenarios: the person who is executed by the state suffers a punishment; incarceration after conviction is a punishment, whereas pretrial confinement during the pendency of criminal proceedings is not punishment; likewise, civil commitment of mentally ill persons is not punishment, but harm prevention. The yearly tribute the people pay to the federal government on or about April 15 is called a tax; failure to file on time exposes the taxpayer to a penalty.

That everyone agrees on these examples may lull us into thinking that we know the “ideal types” of these words, when what we comprehend is the meaning people ascribe to their various uses. Judges and legislators have been “baffled” in the “hard cases” precisely because they involve situations with elements common to both penalties and taxes. Cooter and Siegel would resolve these mixed situations by asking whether the “the exaction raise[s] revenues and dampen[s] the conduct, or . . . prevent[s] the conduct.”³²⁴ But this merely restates the question of where to draw the line between penalties and taxes. Penalties also “raise revenues,” whereas some taxes produce very little. Both taxes and penalties can dampen as well as prevent behavior.

The Court’s post-1937 cases express increasing skepticism over the prospect of cleanly separating taxes from penalties for purposes of the General Welfare Clause. If a measure produces a stream of payments to the government, large or small, in modern times that has been the end of the inquiry. Other constitutional provisions limit congressional taxation, such as the clauses prohibiting double jeopardy,³²⁵ compulsory self-incrimination,³²⁶ and bills of attainder,³²⁷ as well as the First Amendment’s ban on taxes that “single[] out the press for special treatment.”³²⁸ These temper the tax power somewhat, but the main constraint is political: members of Congress must face the people.

If the pre-1937 cases on the General Welfare Clause have any vitality, they should be reserved for situations like the Child Labor Tax Act in

³²⁴ Cooter & Siegel, *supra* note 278 (manuscript at 37 n.160).

³²⁵ See *supra* note 301.

³²⁶ See *Marchetti v. United States*, 390 U.S. 39, 60–61 (1968) (holding that assertion of privilege against self-incrimination provided complete defense to charges for failure to register with tax authorities in connection with wagering activities). *Marchetti* expressly found that the occupational tax on gamblers was itself valid under the General Welfare Clause. See *id.* at 44, 61.

³²⁷ U.S. CONST. art. I, § 9, cl. 3. A law purporting to tax named individuals probably would be a bill of attainder; cf. *United States v. Lovett*, 328 U.S. 303 (1946) (striking down law curtailing compensation of three named federal employees accused of disloyalty as an unconstitutional bill of attainder). The result presumably would be the same if Congress had taxed the three named employees.

³²⁸ *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Rev.*, 460 U.S. 575, 582 (1983). *Minneapolis Star* involved state law, but the same result would hold if Congress had enacted the tax.

which Congress flagrantly attempted an end-run around a decision limiting its powers to legislate pursuant to Article I. One can imagine that the Court would not be amused if Congress had tried to circumvent *Lopez* by enacting a “tax” on anyone knowingly carrying a firearm near a school, or evade *Morrison* by passing a law forbidding sexual assault on women without paying a “tax.”³²⁹ Or, as in *Constantine*, if Congress assessed a “tax” simply for violating state law, at least when it was unlikely that many (if any) would pay the tax. (The Court would today strike such a tax as violating the privilege against self-incrimination.)³³⁰ It also may be necessary to distinguish between a “tax” and a “penalty” for other purposes: when applying the Anti-Injunction Act or other jurisdictional statutes,³³¹ in judging if an assessment amounts to double jeopardy,³³² for deciding whether an assessment is a “Tax or Duty” barred by the Export Clause³³³ or the Import-Export Clause,³³⁴ and determining whether a bill in Congress must originate in the House of Representatives when it is “for raising Revenue.”³³⁵ These settings involve materially different considerations than the question of Article I power to tax. All of them

³²⁹ See Cooter & Siegel, *supra* note 278, (manuscript at 25) (“It is very unlikely that the Court would uphold such an exaction as a permissible use of the tax power and allow Congress to undermine *Lopez* so easily.”).

³³⁰ See *supra* note 326.

³³¹ See, e.g., *United States v. La Franca*, 282 U.S. 568, 574–75 (1931) (holding that action for nonpayment of an assessment for selling liquor in violation of the National Prohibition Act was a “penalty” and thus barred by the Willis-Campbell Act); *Helwig v. United States*, 188 U.S. 605, 611, 613 (1903) (concluding that monetary assessment for importing goods worth more than their declared value was “penal in its nature” because “the sum is not imposed for any purpose of revenue, but is in addition to the duties imposed upon the particular article imported,” and hence the federal district court has exclusive jurisdiction).

³³² See, e.g., *Montana Dep’t of Rev. v. Kurth Ranch*, 511 U.S. at 767. *Kurth Ranch* held that a tax on “the possession of illegal drugs,” *id.* at 770, was a fine for double jeopardy purposes, *id.* at 783–84, based on several factors: it imposed a “remarkably high tax” rate, *id.* at 780; the law had “an obvious deterrent purpose,” *id.*; liability was “conditioned on the commission of a crime,” *id.* at 781; “the taxed activity is completely forbidden,” *id.* at 782; and despite purporting to be a property tax, it was “levied on goods that the taxpayer neither owns nor possesses when the tax is imposed.” *Id.* at 783.

³³³ U.S. CONST. art. I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”); see, e.g., *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 364 (1998) (holding that Harbor Maintenance Tax, as assessed against the value of exported cargo, was a tax for purposes of the Export Clause); *United States v. Int’l Bus. Mach. Corp.*, 517 U.S. 843 (1996) (holding that tax on insurance premiums paid to foreign insurers to insure export shipments violated Export Clause).

³³⁴ U.S. CONST. art. I, § 10, cl. 2. Both the Export Clause and the Import-Export Clause “have been treated as broad bans on taxation of exports, and in several cases the Court has interpreted the provisions of the two Clauses in tandem.” *United States v. Int’l Bus. Mach. Corp.*, 517 U.S. 843, 852 (1996). However, the Court has warned “that meaningful textual differences exist and should not be overlooked.” *Id.* at 857. In *Department of Revenue of Washington v. Assoc. of Washington Stevedoring Cos.*, 435 U.S. 734, 759 (1978), the Court rejected the claim “that the Import-Export Clause effects an absolute prohibition on all taxation of imports and exports,” saying “the term ‘Impost or Duty’ is not self-defining and does not necessarily encompass all taxes.”

³³⁵ U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives . . .”).

concerned constitutional provisions constraining government action, whereas the General Welfare Clause is a grant of power to Congress. Each requires applying a distinct set of rules based on separate texts and legislative history, as well as different doctrinal histories than the General Welfare Clause.³³⁶

There is nothing unusual about Congress wielding its fiscal powers to force people to insure: Medicare and Social Security are in effect mandatory insurance and pension programs. Much like an insurer's reserves that are created from the payments of policyholders, these programs disburse benefits from trust funds paid for by taxes. "A great deal of federal spending comes from segregated trust funds collected and spent for a particular purpose."³³⁷ Formally speaking, the Medicare, Social Security and similar benefit programs do not create insurance contracts binding on the government. That is, Congress could abolish them tomorrow without having to repay a dime of the tax money it extracted to fund the program.³³⁸ But, given the political invulnerability of these programs, American taxpayers can reasonably count on medical care later in life and protection anytime they become disabled. Unquestionably, these programs are constitutional uses of the General Welfare Clause.³³⁹

The only thing uncommon about the ACA mandate is that people are offered the alternative of purchasing a product from the private market

³³⁶ The Export Clause, for example, prohibits "the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported," but does not apply if "the goods were not in the course of exportation and might never be exported." *Int'l Bus. Mach. Corp.*, 517 U.S. at 847 (quoting *Turpin v. Burgess*, 117 U.S. 504, 507 (1886)). In general, the clause "prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation." *Id.* at 848. Based on the clause, the Court has invalidated taxes on bills of lading for export shipments, *Fairbank v. United States*, 181 U.S. 283 (1901), on ship charters, *United States v. Hvoslef*, 237 U.S. 1 (1915), on marine insurance, *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915), and on goods that had been delivered to an export carrier, *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923). Nonetheless, *Pace v. Burgess*, 92 U.S. 372, 375 (1876), upheld a per-package stamp tax on tobacco exports because "[t]he stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud . . ." In *Cornell v. Coyne*, 192 U.S. 418, 427 (1904), the Court held the Export Clause inapplicable to a federal excise tax on goods manufactured under contract for export, on the ground that the clause did not constrain "the prior ordinary burdens of taxation which rest upon all property similarly situated."

³³⁷ *New York v. United States*, 505 U.S. 144, 172 (1992) (citing 23 U.S.C. § 118 (Highway Trust Fund); 42 U.S.C. § 401(a) (Federal Old-Age and Survivors Insurance Trust Fund); 42 U.S.C. § 401(b) (Federal Disability Insurance Trust Fund); 42 U.S.C. § 1395t (Federal Supplementary Medical Insurance Trust Fund)).

³³⁸ See *Fleming v. Nestor*, 363 U.S. 603, 609–10 (1960) ("The Social Security system may be accurately described as a form of social insurance, enacted pursuant to Congress' power to 'spend money in aid of the 'general welfare,'" but it creates no "accrued property rights . . .") (internal citations omitted).

³³⁹ See *Helvering v. Davis*, 301 U.S. 619, 641 (1937) (sustaining Social Security Old Age Benefits program under the General Welfare Clause as "conducive to the general welfare").

rather than paying the tax. Would it be unconstitutional if Congress gave people an option of contributing to a private pension plan rather than Social Security? (Presumably the Republican politicians who have proposed such an initiative do not question its constitutionality.) Of course, Congress cannot force people to choose between two options when both are beyond its power to enact. "A choice between two unconstitutionally coercive regulatory techniques is no choice at all."³⁴⁰ However, Congress can offer a choice of submitting to lawful federal power or taking some other action that it does not have independent constitutional authority to impose.³⁴¹ Even assuming there is no freestanding authority under the Commerce Clause to force people to buy private insurance, then, it is constitutional to require people to pay taxes for the purpose of funding benefits programs. It thus should be constitutional to offer taxpayers a chance to avoid the ACA assessment by purchasing insurance.

To be sure, the mandate limits personal freedom in choosing how to spend one's wealth. But Medicare and Social Security also do so without running afoul of any constitutional principle. They cause individuals to spend money that they otherwise would not on what effectively is an investment. Prior to Medicare, a substantial number of Americans were financially unable to insure for their medical needs later in life, when people tend to need the most care. In addition to those who were priced out of the insurance market, some failed to buy insurance even though they could have afforded it. Rationally, they should have prepared for the inevitable. They probably failed to act for the same reasons that people who can afford health insurance do not obtain coverage. It is a human tendency to discount future consequences when considering actions that bring immediate satisfaction. People often prefer spending their money for immediate benefits rather than choosing to take the "rational" course of saving a portion of their income and buying insurance. Procrastination also is a common human tendency, even when we are putting off doing something that will benefit us in the long run. The Medicare and Social Security laws make choices for Americans that are contrary to their "natural" inclinations. These are much greater restrictions on liberty than the ACA mandate. The payroll taxes for those programs are much more substantial (and regressive) than the ACA assessment, there is only one option, and the benefits usually are realized in the distant future.³⁴²

³⁴⁰ *New York*, 505 U.S. at 176.

³⁴¹ *See id.* at 172-73 (holding that states can be offered funds derived from taxes on nuclear waste producers in exchange for meeting a series of regulatory milestones).

³⁴² The Social Security tax is 4.2% of up to \$110,100 of a person's earnings (10.4% if self-employed); Medicare is 1.45% (2.9% if self-employed). SOC. SEC. ADMIN., UNDERSTANDING THE

Medicare and Social Security also have enormous effects on the distribution of wealth. In 2010, Medicare spent \$516 billion for patient care.³⁴³ Social Security pays benefits to fifty-five million people who have retired or become disabled,³⁴⁴ totaling more than \$700 billion annually.³⁴⁵ By government fiat, that money went from the pockets of some to those of others.

Congress has taxed estates since 1797 by assessing “the transmission or receipt of property by death,” notwithstanding that it usually is involuntary and much resisted.³⁴⁶ Property can be taxed, regardless of how passively it is used. Tax laws also can openly aim to redistribute wealth, as with the progressive income tax. With the mandate, the class of people bearing the brunt of the assessment *as a class* is fairly chargeable for the costs it imposes on society. It is rather like a tax for polluting, which forces industries to internalize a cost rather than pass it along to the public. Companies have a tax incentive to reduce their emissions. Yes, they are harming the public and deserve to be taxed to offset the costs they inflict. However, there is nevertheless a material similarity between people without health insurance and polluters. They both impose costs on others to benefit themselves, and their impact on the public can be counted with a reasonable degree of accuracy.

Bear in mind that the mandate only affects those who can afford a policy yet for some reason fail to insure.³⁴⁷ They may be like one of the plaintiffs in the Sixth Circuit litigation over the ACA, who alleged that if obliged to buy insurance he would be forced to “cut back on discretionary spending, such as costs associated with entertainment, like going to the movies, a restaurant, or sporting events.”³⁴⁸ Nevertheless, as a practical matter they and every other lawful resident of the country is “insured” to some extent through public assistance programs or the legal requirement that they be given emergency care regardless of ability to pay. In effect, their “premiums” are paid for by other taxpayers, including those who are insured. The mandate forces people to take responsibility for roughly the cost they impose on society.

BENEFITS 5 (2012), available at <http://www.ssa.gov/pubs/10024.pdf>. The penalty under ACA eventually will be the greater of \$695 per person or 2.5% of household income.

³⁴³ CTRS. FOR MEDICARE & MEDICAID SERVS., HOW IS MEDICARE FUNDED? 1 (2011), available at <http://www.medicare.gov/Publications/Pubs/pdf/11396.pdf>.

³⁴⁴ SOC. SEC. ADMIN., *supra* note 342, at 4.

³⁴⁵ OFFICE OF THE CHIEF ACTUARY, SOC. SEC. ADMIN., THE 2011 OASDI TRUSTEES REPORT, Table II.B1 (2011), available at http://www.ssa.gov/oact/TR/2011/II_B_cyoper.html#96807.

³⁴⁶ Knowlton v. Moore, 178 U.S. 41, 56–57 (1900).

³⁴⁷ See 26 U.S.C.A. § 5000A(e)(1) (West 2003 & Supp. 2011) (exempting those who cannot afford coverage from the mandate).

³⁴⁸ Declaration of Plaintiff-Appellant John Ceci at ¶ 7, Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011) (No. 10-2388).

3. *Must Congress Call a Tax a Tax?*

The one significant embarrassment to the claim that the ACA mandate counts as a tax is that Congress called it a “penalty,”³⁴⁹ a point emphasized by the Eleventh Circuit and the Act’s challengers.³⁵⁰ Further, as the Act’s detractors have stressed, Congress described other revenue-generating provisions in the law as taxes.³⁵¹ Moreover, although Congress did not disclaim reliance on its taxing power, it made a number of findings to justify the Act as a regulation of commerce, and as noted earlier, cited the *South-Eastern Underwriters Ass’n* for authority.³⁵² President Obama and other proponents of the Act also declared that the mandate was not a tax. “For us to say that you’ve got to take a responsibility to get health insurance is absolutely not a tax increase,” according to the president.³⁵³ This position may have been based on political considerations, namely the radioactivity of any measure called a tax. Nonetheless, there are other, less cynical explanations. As the government has argued before the Court, “[t]he term ‘tax’ carries with it a number of procedural and substantive implications under various statutory provisions, and a ‘penalty’ is not the same thing as a ‘tax’ for statutory purposes under the Internal Revenue Code.”³⁵⁴ Congress also might have avoided the term to indicate that the Anti-Injunction Act was inapplicable.³⁵⁵ It also may have been concerned that calling the “shared responsibility payment” a tax would have undermined basing the mandate on the Commerce Clause.

The fact that Congress did not describe the “shared responsibility payment” as a “tax” should not make any constitutional difference if it satisfies the loosely-defined constitutional sense of a tax.³⁵⁶ “[T]hat an exaction is not labeled a tax does not vitiate Congress’s power under the Taxing Clause.”³⁵⁷ The Court has said that in reviewing the “the constitu-

³⁴⁹ 26 U.S.C.A. § 5000A(b)(1).

³⁵⁰ See Brief for Private Respondents, *supra* note 191, at 64; Jensen, *supra* note 240, at 49 (“Congress called the charge a penalty, and I see no reason to question that characterization. It is a penalty as we ordinarily understand that term: a punishment for not engaging in desired behavior or for engaging in disfavored behavior.”).

³⁵¹ See Jensen, *supra* note 240, at 191.

³⁵² See 42 U.S.C.A. § 18091(2)(A)–(J) (West 2003 & Supp. 2011) (citing *United States v. Se. Underwriters Ass’n*, 322 U.S. 533 (1944) in which “the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation”).

³⁵³ Robert Pear, *Changing Stance, Administration Now Defends Insurance Mandate as a Tax*, N.Y. TIMES, July 18, 2010, at A14 (quoting President Obama).

³⁵⁴ Brief for Petitioners (Anti-Injunction Act) at 6, *Dep’t of Health & Hum. Servs. v. Florida*, No. 11-398 (Feb. 2012).

³⁵⁵ See *id.*

³⁵⁶ 26 U.S.C. 5000a (C)(1) (2006).

³⁵⁷ *Seven-Sky v. Holder*, 661 F.3d 1, 48 n.37 (2011) (Kavanaugh, J., dissenting) (citing *License Tax Cases*, 72 U.S. 462, 471 (1866)) (“The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it.”).

tionality of a state tax ‘we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.’”³⁵⁸ Congress has never been required to use particular magic words in order to invoke an Article I power. It need not specify the constitutional basis for legislation,³⁵⁹ or for that matter “articulate its reasons for enacting a statute.”³⁶⁰ The Court upholds congressional power on any basis that plausibly could have been cited by Congress as authorization to legislate. Further, “those attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it.’”³⁶¹ In a variety of constitutional contexts relating to taxation, the Court has focused on a law’s “practical operation, not its definition or the precise form of descriptive words which may be applied to it.”³⁶² A rose is a rose. When the issue is the limits of congressional power under the General Welfare Clause, the Court after 1937 has refused to inquire into the motives for enacting a measure.

In the instance of the ACA, however, Congress did not merely fail to label the mandate a tax, it used the term “penalty.” Should that make a difference? There are no cases from the Court precisely addressing precisely such a law. The closest precedent probably is the *License Tax Cases*, in which the Court in 1867 upheld a federal act that licensed those operating a lottery or selling liquor in violation of state law, turning aside the argument that Congress was in effect licensing crimes. Not so, Chief Justice Chase wrote. Notwithstanding that the statute obliged a person to pay a fee to obtain a license, it was “nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be

³⁵⁸ *City of Detroit v. Murray Corp. of Am.*, 355 U.S. 489, 492 (1958) (quoting *Lawrence v. State Tax Comm.*, 286 U.S. 276, 280 (1932)).

³⁵⁹ See *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964) (noting that “no formal findings were made” regarding the basis of the Civil Rights Act of 1964, “which of course are not necessary”); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252 (1964) (upholding the Civil Rights Act of 1964 under the Commerce Clause even though the law “as adopted carried no congressional findings”); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) (“The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”).

³⁶⁰ *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

³⁶¹ *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

³⁶² *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (citation and internal quotation marks omitted) (upholding a state use tax despite Dormant Commerce Clause objections). In determining whether an exaction is a “tax” for purposes of determining priorities in bankruptcy, “the Court [has] looked behind the label placed on the exaction and rested its answer directly on the operation of the provision using the term in question.” *United States v. Reorganized CF & I Fabricators*, 518 U.S. 213, 220 (1996). Likewise, “in deciding whether an imposition on exports ranks as a tax,” and thus violates the Export Clause, U.S. CONST. art. I, § 9, cl. 5, “we must regard things rather than names’” *United States v. U. S. Shoe Corp.*, 523 U.S. 360, 367 (1998) (quoting *Pace v. Burgess*, 92 U.S. 372, 376 (1876)).

subject to no penalties under national law, if he pays it.”³⁶³ This can be read to mean that the Court looks to the substance of the law rather than its labeling. But Congress actually had amended the law in the *License Tax Cases*, changing the word “license” to “special tax,” which distinguishes it from the ACA’s deliberate use of “penalty.”³⁶⁴

The appropriate question to ask is whether an identical exaction would pass muster if the T-word were substituted for penalty. Even the ACA’s fiercest critics acknowledge that “except in special circumstances, courts will not strike down a charge that Congress calls a tax.”³⁶⁵ Should the mandate be invalidated for using the wrong word? Politicians routinely wrangle over whether fiscal laws impose taxes, penalties, or fees. (In this instance, both some members of Congress as well as committee reports labeled the mandate’s exaction a tax.)³⁶⁶ But the meaning they intend from this rhetorical labeling does not necessarily jibe with constitutional usage. President Obama, for example, may have meant that the mandate penalty was not a “tax increase” in the popular sense because it was designed to make people “take a responsibility.”³⁶⁷ The decisive issue should be constitutional power to Act, not the precise descriptor used by Congress to describe the power.

Some commentators have contended that Congress ought to be forced to call a revenue exaction a “tax” in order for it to qualify as such under Article I. The main idea behind this argument is that “taxes are much harder to pass than penalties.”³⁶⁸ This is so because according to “an emerging body of psychology literature[,] . . . voters are significantly more averse to exactions when they are labeled as ‘taxes’ [rather] than . . . ‘fees’ or ‘payments,’ even when the exactions are substantively and functionally identical.”³⁶⁹ Based on this premise, Abigail Moncrieff urges that

³⁶³ *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1866).

³⁶⁴ See Act of July 27, 1866, ch. 283, 14 Stat. 301, 302 (substituting “paying the special tax” for “license”). The Court also said in dictum that “Congress cannot authorize a trade or business within a State in order to tax it.” *License Tax Cases*, 72 U.S. (5 Wall.) at 471. That may appear to mean that Congress can only tax something in existence, but the Court was not making that point. Rather, it was denying that the tax authorized a person to violate state law.

³⁶⁵ Jensen, *supra* note 240, at 104–05.

³⁶⁶ See Brief for the Petitioners (Minimum Coverage Provision) *supra* note 7, at 58 (detailing instances in the congressional record when the mandate was referred to as a “tax”).

³⁶⁷ See *supra* note 353 and accompanying text.

³⁶⁸ Abigail R. Moncrieff, *Safeguarding the Safeguards: The ACA Litigation and the Extension of Indirect Protection to Non-Fundamental Liberties*, 64 FLA. L. REV. (forthcoming 2012); see also Matthew C. Stephenson, *The Prices of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 36–42 (2008) (providing examples of clear statement rules and interpretive presumptions).

³⁶⁹ Moncrieff, *supra* note 368 (manuscript at 14). “The public is acutely aware of tax increases,” Randy Barnett notes. He argues that the mandate’s penalty allows Congress and the President to avoid “the political cost of imposing a general tax on the public using its tax powers.” Barnett, *supra* note 96, at 632.

Congress should be required “to label an exaction a ‘tax’ in order to invoke its taxing power,” because it would “reduce the number of economic impositions that Congress can enact, and it will force members of Congress to allocate their political capital carefully, passing only those taxes that are truly valuable to the legislators.”³⁷⁰ She compares her proposed rule to requiring clear statements in certain types of statutes, such as those imposing spending conditions on grants to states, criminal laws, and limits on speech. There is also a presumption that the historical police powers of states are not preempted, unless it is the “clear and manifest purpose of Congress.”³⁷¹ Randy Barnett makes a related point in arguing that the mandate is not a proper use of the Commerce Clause, that Americans are “acutely aware of tax increases.”³⁷² By imposing the mandate, politicians “escape accountability for tax increases by compelling citizens to make payments directly to private companies.”³⁷³

It is dubious to rest a constitutional principle on “emerging” findings in psychology, lest there be a repeat of the Court’s reliance in *Brown v. Board of Education* on flawed psychological studies purporting to prove the deleterious effects of racial segregation on blacks.³⁷⁴ Barnett’s thesis implicitly rests on a similar psychological assumption: that the public pays much more attention to taxes than legislatively-imposed penalties. Both he and Moncrieff slip a normative bias into their constitutional calculations: that it is preferable to make it harder to enact taxes. Why? One might equally say that the well-known American aversion to taxes is unfortunate because it frustrates achieving goals of greater benefit to the public. Americans may hate taxes but they do not so much object to government spending, especially when it benefits them personally, which explains the perennial federal budget deficits. Rather than adopting a constitutional rule that restricts Congress in devising the means to pay for results that the public wants, it is more sensible to apply one that facilitates increasing revenue to sustain the appetite for public spending. The assumption that

³⁷⁰ Moncrieff, *supra* note 368.

³⁷¹ *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2586 (2011) (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

³⁷² Barnett, *supra* note 96, at 632.

³⁷³ *Id.*

³⁷⁴ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11, 495 (1954) (citing studies demonstrating the deleterious effect segregation had on black children); see also Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 70 (1978) (noting that it is now widely accepted that the social evidence the Court relied on in *Brown* was “methodologically unsound”). Admittedly, however, the Court occasionally relies on assumed psychological facts. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (concluding that a school-sponsored prayer at a high school graduation ceremony violated the Religion Clauses based on “[r]esearch in psychology . . . [showing] that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention”).

people are more aware of taxes than penalties also is suspect. Perhaps Americans do pay more attention to tax laws that affect them than to other types of legislation. But compared to penalties? Offhand, one might think that “penalty” is “the name that signals *more* coercion.”³⁷⁵

Constitutional law should not indulge in the condescending assumption that people are ignorant of widely available information or the impact of legislation on them.³⁷⁶ Presumably the goal of requiring a tax to be called a tax in its enabling statute is to increase public awareness and discussion of the measure. If that is so, the mandate should cause no concern. It did not steal upon Americans under cover of darkness.³⁷⁷ Rather, the process for enacting the law was as transparent as modern legislation gets, with well-publicized debates and regular public commentary. Any American paying a modicum of attention to national news knows that the mandate may have financial consequences for them, the details of which are much less complicated than many other sections of the IRS Code.³⁷⁸ People tend to forget what tax breaks have been awarded by Congress to special interests, but they are not likely to neglect noticing that each year they must report their insurance status to the IRS, and fork over money for every month they are not in compliance with the mandate. For the same reason, it is far-fetched to say that people will not hold politicians accountable if they are obligated to buy a policy from an insurer. When people are forced by their state to buy auto insurance, do they not understand that the legislature made them do it? Are they somehow deceived into thinking that insurance companies can command them to buy their policies? It is not for nothing that President Obama’s opponents have placed the blame for the ACA directly at his feet, to the point of introducing a new word into the American lexicon: Obamacare. Democrats and Republicans in Congress have supported or opposed the law with partisan discipline, which makes it all the easier for voters to

³⁷⁵ See Cooter & Siegel, *supra* note 278 (manuscript at 46 n.207) (“Congress tried to *diminish* political objections by using the name that signals *more* coercion (‘penalty’), instead of the one that signals less coercion (‘tax’).”).

³⁷⁶ Analogously, the Court refuses in an equal protection context to inquire into whether “Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it. If this test were applied literally to every member of any legislature that ever voted on a law, there would be very few laws which would survive it.” *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

³⁷⁷ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402 (1819) (“The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability.”).

³⁷⁸ Unlike many taxes and associated spending, for the ACA mandate “the process is reasonably transparent and information with respect to the provision is readily available.” Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REG. 253, 310 (2011). This is not an instance in which “taxpayers are unaware of the tax or provision” such that “they cannot respond to it” through the political process. *Id.* at 263. Overall, the ACA is very complicated, but it will be simple for individuals to determine their liability.

assign responsibility accurately. The upcoming national elections for Congress and the presidency have already featured vigorous debate over the wisdom of the enactment.

The various clear statement rules imposed on Congress by the Court are inapposite as each has a separate justification inapplicable to the ACA mandate. For example, spending conditions imposed on states must be clearly stated in the legislation. This is because conditions imposed on federal grants are part of a “contract”: “in return for federal funds, the States agree to comply with federally imposed conditions. . . . The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State *voluntarily and knowingly* accepts the terms of the ‘contract.’”³⁷⁹ Requiring conditions to be expressly stated assures there is “knowing acceptance” of the contractual terms by the participating states. For a penal statute, due process requires that “[persons] of common intelligence” not have to guess at its meaning and differ as to its application.³⁸⁰ A “vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”³⁸¹ Moreover, when a statute “interferes with the right of free speech or of association, a more stringent vagueness test should apply” in order to protect expression from being chilled.³⁸² “Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.”³⁸³ Requiring specificity of laws affecting speech “assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation.”³⁸⁴ Obviously none of these considerations apply to the health insurance mandate. Whatever else might be said of the directive, no one can call it vague either in purpose or application.

4. *Is the Mandate’s Assessment an Unapportioned Capitation or Direct Tax?*

The only remaining question with respect to upholding the mandate’s penalty provision as a revenue measure is whether it constitutes a

³⁷⁹ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added).

³⁸⁰ *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

³⁸¹ *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

³⁸² *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982) (“The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law’s vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.”).

³⁸³ *Grayned*, 408 U.S. at 109 (citation omitted).

³⁸⁴ *Id.* at 109 n.5.

capitation tax or a direct tax, which the Constitution requires to be apportioned by state population.³⁸⁵ The mandate's challengers insist that if the ACA assessment counts as a tax, it must be either a capitation or direct tax, and hence unconstitutional as its incidence is not apportioned by population.³⁸⁶

The exaction imposed by the mandate certainly is not a capitation tax—also known as a head tax or poll tax—which means “[a] fixed tax levied on each person within a jurisdiction.”³⁸⁷ As the government has argued in the current litigation, with a quote from Justice Samuel Chase’s concurring opinion in *Hylton v. United States*, a capitation tax is one levied “simply, without regard to property, profession, or *any other circumstance*.”³⁸⁸ That description does not fit the ACA, which bases liability on the circumstance of not purchasing insurance or being otherwise exempt. Only a fairly small portion of the population will be liable. There is little case authority on point, however, as federal capitation taxes have never been enacted in this country, owing to their being “(1) unpopular, (2) incapable of producing significant revenue, and (3) inequitable (as bearing no relation to ability to pay).”³⁸⁹ The mandate does not suffer from the second or third of these flaws precisely because it will produce billions of dollars in revenue while not being the same for everyone, as it is tied to ability to pay.³⁹⁰

³⁸⁵ U.S. CONST. art. I, § 2, cl. 3 (“[D]irect Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers”); *id.* art. I, § 9, cl. 4 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”).

³⁸⁶ See Brief for Private Respondents, *supra* note 191, at 66.

³⁸⁷ BLACK’S LAW DICTIONARY (9th ed. 2009) (entry for “poll tax”). Samuel Johnson defined a capitation as a “[n]umeration by heads.” 1 JOHNSON, *supra* note 216 (entry for “capitation”); see also Jack M. Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, 362 NEW ENG. J. MED. 482, 482 (2010) (contending that capitations extract taxes people “no matter what they do”); Joseph M. Dodge, *What Federal Taxes are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839, 843 (2009) (arguing that apportionment requirement “is confined to federal taxes on real estate and tangible personal property.”); Edward D. Kleinbard, *Constitutional Kreplach*, 128 TAX NOTES 755, 762 (2010).

³⁸⁸ Brief for Private Respondents on the Individual Mandate at 25, U.S. Dep’t Health & Human Servs. v. Florida, No. 11-398 (Jan. 11, 2012) (quoting *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.)).

³⁸⁹ Dodge, *supra* note 387, at 841.

³⁹⁰ *But see* Jensen, *supra* note 240, at 113–17 (arguing that a capitation tax need not be generally applicable). Jensen does not have any case authority for his claim, but instead relies on Adam Smith’s description of a capitation tax in England that varied by the person’s rank, or in the case of shopkeepers and tradesmen, the volume of their business. It may be that “some of the Founders were familiar with Smith’s writings.” *Id.* at 115. However, this hardly counts as strong historical evidence of their accepting any of Smith’s conclusions. Jensen also asks why, if by definition a capitation tax must be the same for everyone, “did the Founders bother to require apportionment based on population for a tax that by its nature seems automatically to be apportioned?” *Id.* at 113. But the Constitution provides that “[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” U.S. CONST. art. I, § 9, cl. 4. This makes it plain that

A direct tax has been said by the Court to be “one imposed upon property as such, rather than on the performance of an act.”³⁹¹ At the Virginia ratifying convention, John Marshall asserted it was “well understood” that the “objects of direct taxes” were “few,” listing them as “[l]ands, slaves, stock of all kind, and a few other articles of domestic property.”³⁹² Aside from capitation taxes, all others were indirect, subject to the limitation that those qualifying as “Duties, Imposts and Excises shall be uniform throughout the United States.”³⁹³ In addition to property and poll taxes, these three covered the gamut of possible taxes known in the late eighteenth century. Samuel Johnson’s 1785 dictionary defined

capitation taxes must be based on the census, which rather suggests uniformity. By contrast, an earlier provision requires that “direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers.” U.S. CONST. art. I, § 2, cl. 3. Presumably the Framers did not include capitation taxes in this clause for the reason Jensen gives: it was unnecessary because by their nature capitation taxes had to be apportioned by population.

³⁹¹ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 318 (2d ed. 1988); see also *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945) (“Congress may tax real estate or chattels if the tax is apportioned, and without apportionment it may tax an excise upon a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property.”); *Murphy v. IRS*, 493 F.3d 170, 181 (D.C. Cir. 2007) (“Only three taxes are definitely known to be direct: (1) a capitation, . . . (2) a tax upon real property, and (3) a tax upon personal property.”); *BLACK’S LAW DICTIONARY*, *supra* note 387, at 1595 (defining “direct tax” as one “imposed on property, as distinguished from a tax on a right or privilege”).

³⁹² 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (VIRGINIA) 1122 (John P. Kaminski et al. eds., 1990) (statement of delegate John Marshall, June 10, 1788).

³⁹³ U.S. CONST. art. I, § 8, cl. 1. In *Pollock v. Farmers’ Loan and Trust Co.*, the Court opined that there were likely only two categories of federal taxes: direct taxes and “Duties, Imposts and Excises.” 157 U.S. 429, 557 (1895); see also *id.* (noting that although there had been occasional “intimations that there might be some tax which was not a direct tax, nor included under the words ‘duties, imports, and excises,’ such a tax, for more than 100 years of national existence, has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.”). The constitutional text does not support this interpretation. It says that a direct tax must be apportioned by population, which implicitly recognizes a category of “indirect taxes,” but the text does not limit those to “Duties, Imposts and Excises.” U.S. CONST. art. I, § 2, cl. 3. Rather, it specifies that that these three types must use the same tax rates in all parts of the country. Perhaps the Court meant that, as a practical matter, the three named taxes “embrace[d] all forms of taxation contemplated by the Constitution.” *Thomas v. United States*, 192 U.S. 363, 370 (1904). That is, both the framers of the Constitution and the justices were unaware of any other types of indirect taxes than these three, which is plausible given its expansive definition of them in the same case. The early Court recognized that there could be other types of taxes than those three that did not require apportionment. See *Hylton v. United States*, 3 U.S. (3 Dall.) at 174 (opinion of Chase, J.) (finding that General Welfare Clause grants “power, . . . to lay and collect taxes, include[ing] a power to lay direct taxes, (whether capitation, or any other) and also duties, impost, and excises; and every other species or kind of tax whatsoever, and called by any other name.”); *id.* at 177 (opinion of Paterson, J.) (asserting that there were “other classes of an indirect kind” aside from duties, impost, and excises, and concluding that it was “a questionable point” “[w]hether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land. . . .”); *id.* at 181 (opinion of Iredell, J.) (stating that if a tax is “neither direct within the meaning of the Constitution, nor comprehended within the term duty, impost or excise[,] there is no provision in the Constitution, one way or another.”).

"impost" as "a tax; a toll; a custom paid."³⁹⁴ He gave a similar reading of a "duty," as a "tax; impost; custom; toll."³⁹⁵ His definition of an "excise" was politically slanted: "[a] hateful tax levied upon commodities. . . ."³⁹⁶ Gouverneur Morris, who introduced the clause at the Constitutional Convention (and later disavowed it), referred to indirect taxes as those "on exports & imports & on consumption."³⁹⁷ Hamilton wrote in *Federalist No. 36* that indirect taxes were "duties and excises on articles of consumption."³⁹⁸ A few years later, when defending the constitutionality of a federal tax on carriages before the Court against the charge that it was an unapportioned direct tax, Hamilton said that the only direct taxes were "Capitation or Poll Taxes," "Taxes on Lands and Buildings," and "General assessments whether on the whole property of individuals or on their whole real or personal estate."³⁹⁹ Every other revenue measure "must of necessity be considered as indirect taxes," including the carriage tax, which had been enacted while Hamilton was Secretary of the Treasury to pay for expanding the military.⁴⁰⁰

Justice Iredell likewise thought that there was "no necessity, or propriety in determining what is or is not a direct or indirect tax in all cases. . . . It is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax contemplated by the Constitution"⁴⁰¹ Justice Chase wrote in *Hylton* that there were "only two" types of direct tax, "a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on LAND."⁴⁰² He then turned the approach to direct taxes into a tautology—a tax was direct only if it *could* be apportioned by population: "The Constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply. . . ."⁴⁰³

³⁹⁴ 1 JOHNSON, *supra* note 216 (entry for "impost").

³⁹⁵ *Id.* (entry for "duty").

³⁹⁶ *Id.* (entry for "excise"). His definition also states that excises were "adjudged not by the common judges of property, but wretches hired by those to whom excise is paid." *Id.*

³⁹⁷ Gouverneur Morris, Constitutional Convention (July 12, 1787), reprinted in 1 RECORDS OF THE FED. CONV. 591–92 (Max Farrand ed., 1966).

³⁹⁸ THE FEDERALIST NO. 36, at 225 (Alexander Hamilton) (Jacob Cooke ed., 1961).

³⁹⁹ 4 ALEXANDER HAMILTON, THE LAW PRACTICE OF ALEXANDER HAMILTON 354 (Julius Goebel & Henry Smith eds., 1980) (summarizing Hamilton's argument for the government in *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796)).

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 183 (opinion of Iredell, J.).

⁴⁰² *Hylton v. United States*, 3 U.S. (3 Dall.) at 175 (opinion of Chase, J.).

⁴⁰³ *Id.* at 174; see also *id.* at 183 (Iredell, J., concurring) (asserting that a direct tax must be "capable of apportionment."); *Pollock II*, 158 U.S. at 687 (Harlan, J., dissenting) ("I regard it as very

In 1881, the Court embraced Hamilton's view that there were two types of direct tax, by capitation or on ownership of real and personal property.⁴⁰⁴ After reviewing several early taxes, Justice Swayne wrote that "whenever the government has imposed a tax which it recognized as a *direct tax*, it has never been applied to any objects but real estate and slaves."⁴⁰⁵

By contrast, with one notable exception, the Court's cases have construed the term "indirect tax" expansively, as "[a] tax laid upon the happening of an event" such as the conveyance of property at death, rather than the tangible fruits" of property ownership.⁴⁰⁶ In *Bromley v. McCaughn*, Justice Stone wrote for the Court in 1929 that whereas "taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct, . . . a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned."⁴⁰⁷ An earlier decision explained that "the words duties, imposts, and excises" were meant to be "used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like."⁴⁰⁸ Excise, in particular, included those "imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax)"⁴⁰⁹

The ACA exaction does not meet the longstanding definition of a direct tax, so by default it must be indirect. Liability under the mandate is not based merely on owning or possessing property ("upon property as such"), but on the circumstance of being uninsured, calculated according to the number of months without coverage and adjusted by income. Those who forgo insuring when they can afford to do so are not merely failing to

clear that the clause requiring direct taxes to be apportioned to the population has no application to taxes which are not capable of apportionment according to population.").

⁴⁰⁴ *Springer v. United States*, 102 U.S. 586, 597–98 (1880).

⁴⁰⁵ *Id.* at 599.

⁴⁰⁶ See *Tyler v. United States*, 281 U.S. 497, 502 (1930) (holding that inheritance taxes are indirect); *Knowlton v. Moore*, 178 U.S. 41, 83 (1900) (holding that inheritance taxes are indirect).

⁴⁰⁷ 280 U.S. 124, 136 (1929) (holding that gift tax is indirect).

⁴⁰⁸ *Thomas v. United States*, 192 U.S. 363, 370 (1904).

⁴⁰⁹ BLACK'S LAW DICTIONARY, *supra* note 387 (entry for "excise"). "An 'excise' duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities." THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION 3 (2d. ed. 1886); see also *Pollock II*, 157 U.S. at 622 (White, J., dissenting) ("Direct taxes, when laid by Congress, must be apportioned among the several States according to the representative population. The term 'direct taxes' as employed in the Constitution has a technical meaning, and embraces capitation and land taxes only.") (quoting COOLEY, A TREATISE ON THE LAW OF TAXATION 3 (2d ed. 1886)); *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945) (defining "excise" as a levy "upon a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property").

act. Rather, they are self-insuring, however inadequately. There is a real cost to self-insurance, both to the individual who must pay medical bills out of personal reserves and the rest of society that picks up the tab after financial resources are exhausted. That sounds more like an excise for the privilege of doing something: "purchasing" self-insurance and consuming health care services with cash or charity. It is a "tax on expence," not on wealth per se.⁴¹⁰

The penalty also has an affinity with income taxes. In effect, uninsured persons have been enjoying unreported income equivalent to the economic value of the "insurance" that guarantees they will receive at least basic care without paying. The amount of the "shared responsibility" assessment is related both to the value of those imputed earnings and the taxpayer's income. The obligation is capped at either a percentage of income or the cost of a basic plan, and it must be reported on the person's annual income tax return. In that sense, the penalties literally are "taxes on incomes," arguably permitted by the Sixteenth Amendment.⁴¹¹ Technically, the amendment may not sanction the mandate, because the triggering event for liability is the failure to insure rather than income per se. But, as previously argued, Congress unquestionably could have achieved an identical outcome through a combination of the income tax and a tax credit for insuring.⁴¹² That counsels against concluding that the mandate offends whatever constitutional policy lies behind the apportionment requirement.

The private plaintiffs in the Florida litigation and several commentators disagree, arguing that the mandate's tax is "levied on the *absence* of any transaction, shift in property rights, or particular use of property."⁴¹³ To them, this seems to be a tax on nothing, a simple redistribution of wealth from younger, healthier people who would otherwise not buy insurance to an older population of less healthy individuals. Older Americans get the benefit of eliminating pre-existing conditions while having their premiums kept from rising astronomically by increasing the pool of healthy people paying premiums. On this view, Congress is nakedly "'tak[ing] property from A. and giv[ing] it to B,' thus usurping the power of individuals to preserve their property and to choose with whom they financially associate."⁴¹⁴

According to the state plaintiffs, the mandate does not impose an

⁴¹⁰ *Hylton v. United States*, 3 U.S. (3 Dall.) at 175 (opinion of Chase, J.).

⁴¹¹ U.S. CONST. amd. XVI.

⁴¹² See *supra* note 250 and accompanying text.

⁴¹³ Brief for Private Respondents, *supra* note 191, at 66; see also Willis & Chung, *supra* note 244, at 727 (arguing that a tax cannot be based on doing "nothing").

⁴¹⁴ Brief for Private Respondents, *supra* note 191, at 13 (quoting *Calder v. Bull*, 3 U.S. 386, 388 (1798)).

excise, which is triggered by some action of a person (including dying), but rather “a direct tax on an individual’s wealth, simply because the individual chooses to keep that wealth rather than spend it to purchase insurance.”⁴¹⁵ The private plaintiffs rely heavily on the one case in which the Court has found an assessment to be an unapportioned direct tax—the harshly-criticized 5-4 ruling in *Pollock v. Farmers’ Loan and Trust Co.*,⁴¹⁶ which invalidated a “tax on income derived from real estate, and from invested personal property,”⁴¹⁷ as well as a “a tax upon a person’s entire income—whether derived from rents or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property”⁴¹⁸ This result was surprising given that in *Springer v. United States* the Court in 1880 had upheld a Civil War tax on personal “income, gains, and profits.”⁴¹⁹ In *Pollock*, the majority distinguished *Springer* as upholding a tax on earned income, not the profits of real property, a mighty fine distinction.⁴²⁰

“*Pollock* caused a public furor,” Bruce Ackerman has written, noting William Howard Taft’s assessment that “[n]othing has ever injured the prestige of the Supreme Court more.”⁴²¹ The Court quickly retreated from its implications, and never again struck down a tax on the ground that it was direct and unapportioned. Even before the adoption of the Sixteenth Amendment in 1913 repudiating *Pollock*, other decisions sharply limited its scope.⁴²² The post-*Pollock* Court upheld a federal inheritance tax, a corporate income tax, and a tax on income from specific types of business.

⁴¹⁵ Brief for State Respondents on the Minimum Coverage Provision at 62, *U.S. Dep’t Health & Human Servs. v. Florida*, No. 11-398 (Feb. 6, 2012).

⁴¹⁶ *Pollock v. Farmers’ Loan and Trust Co.*, 158 U.S. 601 (1895) [*Pollock II*]; *Pollock v. Farmers’ Loan and Trust Co.*, 157 U.S. 429 (1895) [*Pollock I*]. The criticism started with Justice Harlan’s blistering dissent: “I cannot assent to an interpretation of the constitution that impairs and cripples the just powers of the national government in the essential matter of taxation, and at the same time discriminates against the greater part of the people of our country.” *Pollock II*, 158 U.S. at 685 (Harlan, J., dissenting). Among the many academic critics of *Pollock*, see e.g., Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 28, 58 (1999). (*Pollock* “was utterly wrongheaded”); Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 Const. Commentary 295, 298 (2004) (“*Pollock* is a model of bad judicial behavior.”).

⁴¹⁷ *Pollock II*, 158 U.S. at 635. The Court reasoned that because “taxes on real estate [were] indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.” *Id.* at 637. See *Pollock I*, 157 U.S. at 581 (“An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.”).

⁴¹⁸ See *Pollock II*, 158 U.S. at 635 (invalidating a “tax on income derived from real estate, and from invested personal property”).

⁴¹⁹ 102 U.S. 586, 597–98 (1880); see also Dodge, *supra* note 387, at 880.

⁴²⁰ See *Pollock I*, 157 U.S. at 578–79; *Pollock II*, 158 U.S. at 656–57.

⁴²¹ Ackerman, *supra* note 416, at 5 (quoting 1 ARCHIBALD BUTT, TAFT AND ROOSEVELT 134 (1930)).

⁴²² U.S. CONST. amd. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).

In finding these taxes to be indirect, the Court effectively limited *Pollock* to its facts: only taxes on income from property or investments were direct.⁴²³ In *Pollock* itself, Chief Justice Fuller stressed that the Court had not “commented on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.”⁴²⁴

The private plaintiffs in the Florida litigation nevertheless regard *Pollock* as “governing precedent on the scope of direct taxes, despite the mooted of its specific holding” by the amendment.⁴²⁵ (In contrast, the state plaintiffs do not cite *Pollock*.) The private plaintiffs read *Pollock* to mean “that taxes on income from real or personal property are direct, as *de facto* taxes on the owner’s retention of that property.”⁴²⁶ However, *Pollock* does not give precisely this rationale for treating income from property as direct. Rather, the Court reasoned formalistically, declaring that taxes on “income derived from real estate, and from invested personal property”⁴²⁷ were direct inasmuch they were assessed “merely because of ownership” of the property, “with no possible means of escape from payment.”⁴²⁸

The Court soon repudiated the significance of a tax being unavoidable to the question of whether it was direct. A few years after *Pollock*, it rejected the claim that a tax on sales at commodities exchanges was “direct because it cannot be added to the price of the thing sold, and therefore ultimately paid by the consumer.”⁴²⁹ The tax still could be “a duty or an excise,”⁴³⁰ as the Court classified the exchange tax.⁴³¹ By 1900, the Court had all but dismissed the relevance of cost-shifting, calling it a “disputable theory” proposed by “certain economists” that “was not the basis of the conclusion of the court” in *Pollock*.⁴³² That position has been reiterated in a “long line of cases.”⁴³³ A few academic commentators have promoted

⁴²³ See *TRIBE*, *supra* note 391, at 575; see also e.g., *Flint v. Stone Tracy Co.*, 220 U.S. 107, 150, 162 (1911) (upholding corporate income tax); *Spreckels Sugar Refining Co. v. McClain*, 192 U.S. 397 (1904) (holding that a “special excise tax” on sugar refiners under the War Revenue Act of 1898 was indirect, even though it was based on a percentage of a refiner’s gross annual receipts above a certain amount); *Knowlton v. Moore*, 178 U.S. 41 (1900) (ruling that an inheritance tax was indirect).

⁴²⁴ *Pollock II*, 158 U.S. at 635.

⁴²⁵ Brief for Private Respondents (Individual Mandate), *United States Dep’t Health & Human Servs. v. Florida*, No. 11-398, at 66 n.2 (Jan. 11, 2012). (“*Pollock* remains governing precedent on the scope of direct taxes, despite the mooted of its specific holding [by] the Sixteenth Amendment . . .”).

⁴²⁶ *Id.* at 66.

⁴²⁷ *Pollock II*, 158 U.S. at 635.

⁴²⁸ *Id.* at 627.

⁴²⁹ *Nicol v. Ames*, 173 U.S. 509, 520 (1899).

⁴³⁰ *Id.*; see also *Knowlton v. Moore*, 178 U.S. 41, 82 (1900) (holding that the ability to shift costs onto others is not the test for whether a tax is direct).

⁴³¹ *Nicol*, 173 U.S. at 520.

⁴³² *Knowlton*, 178 U.S. at 82.

⁴³³ *Murphy v. IRS*, 493 F.3d 170, 184 (D.C. App. 2007).

cost-shifting as the key consideration in determining whether a tax is direct,⁴³⁴ but they have not persuaded either courts or scholars. The criterion does not have a clear basis in constitutional text or the documentary history of the Constitution's ratification, and it would produce arbitrary results if adopted.⁴³⁵

Businesses cannot avoid income taxes—which the Court held indirect—except by closing their doors. They may blunt the impact by shifting some of the burden onto customers in the form of higher prices. But not always or in full. All indirect taxes are unavoidable, save by not engaging in the taxed activity. A sales tax, for example, can only be dodged by not buying, which is tough to avoid doing. Death taxes are considered indirect even though they are inevitable and cannot be shifted by the estate.⁴³⁶ Sometimes indirect taxes can be shifted to others, sometimes not. A business may be able to pass a sales tax onto customers, but then those consumers are stuck with paying; they then can be hit with an indirect use tax (like the carriage tax) for possessing what they bought. On the other hand, property taxes sometimes can be shifted. A property owner may be able to pass property taxes onto tenants by raising rent, but they are still regarded as direct. The reason that property taxes are considered direct is not that they are unshiftable, but because they were regarded as direct by the framing generation.

Assuming that *Pollock* has some viability for deciding whether a tax is direct, the ACA mandate still should be unaffected. The tax in *Pollock* was said to be direct because it had been “laid upon a person’s ‘general ownership of property,’”⁴³⁷ whereas the mandate is a tax based on insurance status. It is only a tax on property in the trivial sense that it must be paid for with money, a feature of all modern taxes. There is no relationship between the ACA assessment and the value of a person’s property, although liability for the tax is linked to a person’s income. It can either be characterized as an excise on self-insurance or a tax on imputed income.

Pollock, however, does not merit much respect. In considering its continued relevance, the Court should treat the Sixteenth Amendment like

⁴³⁴ Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes,”* 33 ARIZ. ST. L.J. 1057, 1091–1107 (2001) (contending that a tax on individual consumption would be direct); Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997) (same).

⁴³⁵ See Dodge, *supra* note 387, at 862 (footnotes omitted) (“On the merits, the ‘non-shifted’ meaning of ‘direct tax’ sinks into quicksand, because even ‘add-on’ taxes might not be shifted but rather absorbed by the seller, and, at the other end of the spectrum, taxes ‘directly’ on persons, property, or income might be shifted if it is (realistically) assumed that markets are imperfect.”).

⁴³⁶ The beneficiaries might be said ultimately to bear the cost of the tax, but the decedent still is unavoidably deprived of wealth.

⁴³⁷ *Murphy*, 493 F.3d at 181 (quoting *Bromley v. McCaughn*, 280 U.S. 124, 136 (1929)).

it does other amendments that were intended to overrule specific cases. The Eleventh Amendment overruled *Chisholm v. Georgia* after a public outcry.⁴³⁸ In a long line of cases, the Court has interpreted the Eleventh Amendment as extending beyond its literal language, which only bars suits in federal courts against states brought by citizens of other states or foreign countries, not cases involving a state and its own citizens.⁴³⁹ More broadly, it was intended "to restore the original constitutional design" of protecting the states against all suits.⁴⁴⁰ The Court applies what it regards as the larger purpose of the Eleventh Amendment, "to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."⁴⁴¹ Similarly, the anti-commandeering principle that the Court has developed to restrain Congress in its regulation of the states, "is not derived from the text of the Tenth Amendment itself, which, . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."⁴⁴²

The Sixteenth Amendment should likewise be interpreted as not merely overruling *Pollock*, allowing income taxes even though they are direct, but instead restoring the original understanding of direct taxes as limited to those on the value of property itself or based on capitation. The Court, however, has not embraced this view of the amendment. Rather, it decided nearly a hundred years ago that the amendment "provides for a hitherto unknown power of taxation; that is, a power to levy an income tax which, although direct, should not be subject to the regulation of apportionment applicable to all other direct taxes."⁴⁴³ This conclusion was dictum that does not deserve continuing recognition by the Court. It also should enforce the principle that if there is uncertainty about whether a revenue-raising measure is a direct or indirect tax, the presumption ought to favor Congress. Justice Chase wrote in *Hylton* that "if the case was *doubtful*," deference must be given to a "deliberate decision of the National

⁴³⁸ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); see also U.S. CONST. amend. XI.

⁴³⁹ U.S. CONST. amend. XI.

⁴⁴⁰ *Alden v. Maine*, 527 U.S. 706, 722 (1999).

⁴⁴¹ *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (internal quotation marks removed) (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)); see also *Ex Parte Young*, 209 U.S. 123, 188–89 (1908) ("To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose.").

⁴⁴² *New York v. United States*, 505 U.S. 144, 156–57 (1992).

⁴⁴³ *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 11 (1916); see also *Hale v. Iowa State Bd. Assessment & Review*, 302 U.S. 95, 107 (1937) ("By the teaching of the *Pollock* Case an income tax on the rents of land . . . or even on the fruits of other investments . . . is an impost upon property within the section of the Constitution . . . governing the apportionment of direct taxes among the states.").

Legislature” in deciding that a tax was not direct.⁴⁴⁴ Subsequent opinions have deferred to Congress on the question of whether a tax is direct, and as we have seen, the Court has found a wide variety of revenue measures to be indirect.⁴⁴⁵

There are several reasons why the Sixteenth Amendment should be interpreted broadly, combined with a deferential approach to congressional judgment on whether a tax is direct tax. To begin with, the requirement that direct taxes be apportioned by population has an unsavory origin. It was “part and parcel of a larger compromise over slavery at the Philadelphia Convention,”⁴⁴⁶ introduced during the debates leading to the Great Compromise. A slave state “would get three-fifths of its slaves counted for purposes of representation in the House and the Electoral College.”⁴⁴⁷ At the same time, in calculating any “tax reasonably linked to overall population,” the tally must include slaves (discounted to three-fifths of a person).⁴⁴⁸ Linking taxes to population was proposed initially by Gouverneur Morris, and it was quickly approved with a friendly amendment from James Wilson limiting “the rule to *direct* taxation.”⁴⁴⁹ This occurred while the Convention was still debating whether to include slaves in determining a state’s representation in Congress, and if so, whether they would be counted equally with whites. Morris and Wilson were hardly friendly to slavery, and they both spoke strongly against counting slaves for purposes of representation. Wilson said doing so would “give disgust to the people of Pena,”⁴⁵⁰ and fellow Pennsylvanian Morris insisted that its “people . . . will never agree to a representation of Negroes.”⁴⁵¹ He also predicted that including slaves in the tally would “give . . . encouragement to the slave trade.”⁴⁵² Agreeing to count slaves at all for representation purposes was seen by them and others from the North as a major concession, which the South must recompense. Their proposal to apportion direct taxes to population evidently was intended to make the South pay if slaves were counted in representation. Wilson commented during the debate on “that less umbrage would perhaps be taken agst. an

⁴⁴⁴ *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173 (1796) (opinion of Chase, J.).

⁴⁴⁵ See *supra* notes 393, 406–07 & 423.

⁴⁴⁶ Ackerman, *supra* note 416, at 4.

⁴⁴⁷ *Id.*; see also 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 597 (Max Farrand ed., 1937) (adopting motion for “proportioning representation to direct taxation & both to the white & 3/5 of black inhabitants”).

⁴⁴⁸ Ackerman, *supra* note 416, at 4; see U.S. CONST. art. I, § 2, cl. 3 (apportioning representation and direct taxes by state population); *id.* § 9 (requiring that capitation and direct taxes be apportioned according to the census).

⁴⁴⁹ Gouverneur Morris, 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 447, at 592 (July 12, 1787); see *id.* at 592 (Wilson’s amendment); *id.* at 592–93 (approving motion unanimously).

⁴⁵⁰ *Id.* at 587 (July 11, 1787).

⁴⁵¹ *Id.* at 593 (July 12, 1787).

⁴⁵² *Id.* at 588 (July 11, 1787).

admission of the slaves into the Rule of representation, if . . . they should enter into the rule of taxation).⁴⁵³ Nonetheless, several leading southern delegates (who happened to be major slave owners) immediately agreed with "the justice of the principle."⁴⁵⁴ Charles Cotesworth Pinckney thought that "it is so just that it could not be objected to."⁴⁵⁵ And no one did. Later the same day, the Convention agreed to Edmund Randolph's motion for "rating the blacks at 3/5 of their number" in the next census, with another amendment by Wilson, "that the representation ought to be proportioned according to direct taxation."⁴⁵⁶ A few days later, the Convention approved the Great Compromise providing for equal representation of states in the Senate and apportioning the House and direct taxes according to population, counting slaves as three-fifths of a person.⁴⁵⁷

Gouverneur Morris soon regretted what he had done. Less than two weeks after proposing the apportionment rule, and after the Great Compromise was adopted, he unsuccessfully urged delegates to "strike out the whole of the clause proportioning direct taxation to representation. He had only meant it as "a bridge to assist us over a certain gulph," the issue of representation for slaves, and "having passed the gulph the bridge may be removed."⁴⁵⁸ Now he "thought the principle laid down with so much strictness, liable to strong objections."⁴⁵⁹ Morris had been too clever for his own good. Apparently, he had proposed linking taxation with representation as a parliamentary maneuver to chill the South's insistence on counting slaves for representation. Southerners quickly realized that they had gotten the better of the deal and they were not about to revisit the issue. The South was guaranteed to benefit politically from counting slaves for purposes of representation in the House and in the Electoral College. At the same time, poll taxes and direct taxes were unlikely to be enacted, as Morris and others realized. "It is idle to suppose that the Genl. Govt. can stretch its hand directly into the pockets of the people scattered over so vast a Country. They can only do it through indirect taxes on

⁴⁵³ James Wilson, 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 447, at 595 (July 11, 1787).

⁴⁵⁴ George Mason, 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 447, at 592; *see also* Pierce Butler, 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 447, at 592 (insisting that representation should "be according to the full number of inhabits. Including all the blacks. . .").

⁴⁵⁵ Charles Cotesworth Pinckney, 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 447, at 592.

⁴⁵⁶ James Wilson, 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 447, at 595.

⁴⁵⁷ *See* James Wilson, 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 447, at 15 (July 16, 1787) (approving Great Compromise).

⁴⁵⁸ Gouverneur Morris, 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 447, at 106 (July 24, 1787). Morris had meant "to lessen the eagerness on one side, & the opposition of the other, to the Share of Representation by the S. States on account if the Negroes." *Id.*, n.*.

⁴⁵⁹ *Id.*

“exports imports & excises,”⁴⁶⁰ which he realized would “fall heavier on” Northerners “than on the Southern inhabitants.”⁴⁶¹ If a national capitation or property tax were enacted, the South was protected against discriminatory treatment. Justice William Paterson, who had been a New Jersey delegate at the Convention, wrote in *Hylton v. United States* that the direct tax provision “was made in favor of the southern States.”⁴⁶² Without it, the South “would have been wholly at the mercy of the other states. Congress in such case, might tax slaves, at discretion or arbitrarily. . . .”⁴⁶³

The compromise over apportioning direct taxes was unraveled by the Thirteenth and Fourteenth Amendments. The Fourteenth Amendment, provided that “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”⁴⁶⁴ Bruce Ackerman has argued that after “the Reconstructionist Amendments, there is no longer a constitutional point in enforcing a lapsed bargain with the slave power.”⁴⁶⁵ That has not been the attitude of the Court, which has taken the direct tax provision seriously, nor does the text demand Ackerman’s interpretation. Neither amendment explicitly refers to allotting direct taxes by population, presumably because in abolishing slavery the Thirteenth Amendment made everyone “free,” and hence the three-fifths rule was moot even if not abolished, remaining in the Constitution as a vestigial reminder of its nefarious purpose.⁴⁶⁶

⁴⁶⁰ Gouverneur Morris, 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 447, at 223 (Aug. 8, 1787). Elbridge Gerry realized that a direct tax could “not be carried into execution as the States were not to be taxed as States,” *id.* at (July 12, 1787). Oliver Ellsworth observed that a poll tax could be apportioned with “no difficulty,” but “probably” would not be enacted. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 447, at 597.

⁴⁶¹ Gouverneur Morris, 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 447, at 222 (Aug. 8, 1787).

⁴⁶² 3 U.S. (3 Dall.) 171, 177 (1796).

⁴⁶³ *Id.* A few days before the Convention ended, George Read of Delaware successfully moved to amend Article I, § 9, “to insert after ‘capitation’ the words, ‘or other direct tax.’” Read had a different agenda than Morris; he “was afraid that some liberty might otherwise be taken to saddle the States, with a readjustment by this rule, of past requisitions of Congs.—and that his amendment . . . would take away the pretext.” 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 447, at 618 (Sept. 14, 1787). There was no recorded debate on the amendment, which passed unanimously. The Articles of Confederation provided that requisitions from the states “for the common defence or general welfare” must be apportioned according to “the value of all land within each state,” including “buildings and improvements.” ARTICLES OF CONFEDERATION OF 1781, art. 8. Since Article I, § 2, cl. 2, already provided that direct taxes must be apportioned by population, Read’s interest must have been in assuring that direct taxes could not be laid until the first census was laid, which would make “it impossible for Congress to force Delaware to pay off its old requisitions without regard to its share of the total population.” Ackerman, *supra* note 416, at 13. “Delaware in substantial default on its prior requisitions . . .” *Id.* at 14.

⁴⁶⁴ U.S. CONST. amend. XIV, § 2.

⁴⁶⁵ Ackerman, *supra* note 416, at 58 (1999).

⁴⁶⁶ U.S. CONST. amend. XIII.

The repellent origins of the direct tax provision and the repudiation of its purpose by amendment should not be ignored when applying it today. It was based on a principle that was repudiated by the Reconstruction amendments. At the most, the apportionment requirement for direct taxes should be interpreted as proscribing taxes that overtly discriminate against certain states without regard to the basis for taxation,⁴⁶⁷ a most unlikely occurrence. Putting aside the odious setting for the rule, the legitimate purpose of the Direct Tax Clause was to prevent Congress from overtly taxing some states more heavily than others. The Court said in 1900 "that the requirement that direct taxes should be apportioned among the several states, contemplated the protection of the states, to prevent their being called upon to contribute more than was deemed their due share of the burden, is clear."⁴⁶⁸ That aligns it with the requirement that "all Duties, Imposts and Excises shall be uniform throughout the United States," meaning that the same tax rate must apply wherever the taxable event occurs.⁴⁶⁹ And it comports with the Port Preference Clause, which forbids Congress from giving preference in "any Regulation of Commerce or Revenue to the Ports of one State over those of another."⁴⁷⁰

Whatever else might be said about the ACA mandate, it does not discriminate on its face by state or region. The rate is the same for everyone who pays the assessment. To be sure, more revenue will be extracted per capita from the residents of some states than others, but not for a discriminatory reason. It is no more offensive in this regard than other federal taxes that collect disproportionate amounts from different states.

Another reason that counsels against applying the direct tax clause aggressively is uncertainty over what it meant to the founding generation. Although the general purpose of the apportionment requirement is known from the records of the Convention, the same cannot be said for the exact meaning of "direct tax." Rufus King asked the delegates, "what was the precise meaning of direct taxation?"⁴⁷¹ Madison recorded that no one answered the question. The discussion of the subject inside and outside of

⁴⁶⁷ The Court eventually recognized that taxes could be considered uniform for constitutional purposes even if they applied to only a few states defined geographic area. See *United States v. Ptasynski*, 462 U.S. 74 (1983).

⁴⁶⁸ *Knowlton v. Moore*, 178 U.S. at 89.

⁴⁶⁹ U.S. CONST. art. I, § 8, cl. 1; see also *Steward Mach. Co. v. Davis*, 301 U.S. 548, 583 (1937) ("According to the settled doctrine, the uniformity exacted is geographical, not intrinsic."); *Edye v. Robertson*, 112 U.S. 580, 594 (1884) ("The tax is uniform when it operates with the same force and effect in every place where the subject of it is found."); *United States v. Singer*, 82 U.S. (15 Wall.) 111, 121 (1872) ("The tax here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike.").

⁴⁷⁰ U.S. CONST. art. I, § 9, cl. 6.

⁴⁷¹ 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 447, at 350.

the Convention was sparse. At most, there was consensus that direct taxes included land taxes, although as noted some thought that personal property taxes were direct. In the debates on the federal carriage tax in 1794 that was at issue in *Hylton v. United States*, Rep. Fisher Ames found it “difficult to define whether a tax is direct or not.”⁴⁷² Many years later, the Court said the same. “It does not appear that an attempt was made by any one to define the exact meaning of the language employed,” lamented Justice Swayne in 1880.⁴⁷³ Justice Harlan wrote in 1904 that the distinction between “taxes that are direct and those which are to be regarded simply as excises” is “often very difficult to be expressed in words.”⁴⁷⁴ On such occasions, it is to best to follow Wittgenstein’s admonition: “What we cannot speak about we must pass over in silence.”⁴⁷⁵

The Court also should be chary of finding a tax to be direct because doing so would deprive Congress of an option in garnering revenues, and possibly derail innovative programs. Any direct tax would have to be apportioned by population, which would be politically difficult to accomplish.⁴⁷⁶ Finding a type of tax to be direct thus would effectively preclude its use by Congress. This result is contrary to the Court’s longstanding emphasis on the breadth of the taxing power, that it is “complete and all-embracing.”⁴⁷⁷ For more than a century, it has stressed the importance of practicality in deciding the constitutionality of federal taxes:

Taxation is eminently practical, and is, in fact, brought to every man’s door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.⁴⁷⁸

⁴⁷² 1 Annals Cong. 730 (May 29, 1794) (noting that Ames thought the carriage tax was indirect, an excise).

⁴⁷³ *Springer v. United States*, 102 U.S. 586, 596 (1880).

⁴⁷⁴ *Spreckels Sugar Ref. Co. v. McClain*, 192 U.S. 397, 413 (1904).

⁴⁷⁵ Ludwig Wittgenstein, *TRACTATUS LOGICO-PHILOSOPHICUS* 151 (D.F. Pears & B.F. McGuinness trans., 1961).

⁴⁷⁶ See Jensen, *supra* note 240, at 110 (noting that with a proportioned tax, “a state with one-tenth of the national population” would have to “bear, in the aggregate, one-tenth of the total liability for any direct tax, regardless of how the tax base is distributed across the country”).

⁴⁷⁷ *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 13 (1916).

⁴⁷⁸ *Nicol v. Ames*, 173 U.S. 509, 516 (1899) (upholding tax on sale of commodities at a board of trade); see also *id.* at 519 (holding a tax on sales at commodity exchanges was indirect because “in effect” imposed “a duty or excise laid upon the privilege, opportunity, or facility offered at boards of

In *Veazie Bank v. Fenno*, Chief Justice Chase wrote in the course of holding that a tax on bank notes was indirect, that even though the taxing power may be “may be exercised oppressively upon persons, . . . the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected.”⁴⁷⁹ The American public may not understand the distinction between direct and indirect taxes, but the people have not been shy about opposing new taxes, whatever they are called. These are the people paying the tax bills, not the members of the Constitutional Convention.

V. CONCLUSION: NOT ALL SLIPPERY SLOPES ARE ALIKE

All of the constitutional attacks against the ACA mandate in the current litigation and commentaries rely on slippery slope reasoning. In law, a slippery slope argument claims that a proposed rule or the resolution of a lawsuit would inevitably lead to or at least risk results inconsistent with other established laws or values. In the case of the ACA mandate, the claim is that granting Congress power under the Commerce Clause to order people to buy health insurance would allow it to command every American to buy most any product or service. Similarly, those asserting that the “shared responsibility” assessment is not a valid tax—either because it is a penalty or an unapportioned direct tax—assert that if the law were upheld as a tax it would permit Congress to regulate most anything under the guise of a tax.

Not all slippery slopes are alike, nor are they equally risky. To the contrary, some amount of slipperiness may be desirable in both real slopes and rules. A slippery slope is best for rolling timber down a hill or a delight for children tumbling on a summer afternoon. In law, slipperiness may simply signify flexibility—the ability to adapt to changed circumstances. For example, Chief Justice Warren declared in *Brown v. Board of Education* that “we cannot turn the clock back to 1868 when the Amendment was adopted”⁴⁸⁰ The Court later explained the thinking behind this conclusion: “Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.”⁴⁸¹ That paved the way for the Court to strike down a poll tax, even though it had previously upheld such extractions, and notwithstanding that “[p]roperty qualifications and poll taxes ha[d] been a traditional part of our political

trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted.”).

⁴⁷⁹ 75 U.S. 533, 548 (1869); *see also* *Springer v. United States*, 102 U.S. 586, 594 (1880) (“If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected.”); *supra* note 203.

⁴⁸⁰ 347 U.S. 483, 492 (1954).

⁴⁸¹ *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966).

structure.”⁴⁸² The same can be said of substantive due process rights, which must be “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”⁴⁸³ Judges, however, have sharply differed in interpreting those historical roots. As the Court has recognized, the “guideposts for responsible decision-making in this uncharted area are scarce and open-ended.”⁴⁸⁴ The sheer chronicle of historical events is not what guides the Court in deciding whether to recognize due process rights. Rather, it is “reasoned judgment” about the past.⁴⁸⁵ And as Justice Scalia has warned, the historical guideposts are “omnidirectional,” and “reasoned judgment” can devolve into “picking the rights we want to protect and discarding those we do not.”⁴⁸⁶

Some constitutional doctrines explicitly incorporate indeterminacy. Procedural due process claims are assessed according to an “intensely practical”⁴⁸⁷ inquiry that involves “a careful weighing of the respective interests”⁴⁸⁸ of the parties and the larger society.⁴⁸⁹ “Due process is flexible and calls for such procedural protections as the particular situation demands.”⁴⁹⁰ That flexibility comes at the expense of split decisions and overruling of precedents as different judges assess the relative weights.⁴⁹¹

In every one of these instances, the constitutional doctrine is sufficiently malleable that a judge bent on reaching a certain outcome could contrive a rationalization. Yet that possibility can be found to varying degrees in most any constitutional setting. For example, at least theoretically, the literal words of the Equal Protection Clause could be stretched by judicial ideologues to require the equalization of wealth in the country or mandatory public funding of elections. But one can hardly imagine more unlikely prospects. Even if the meaning of equal protection changes, that does not entail that there are no constraints on its development. Whether a classification violates the Equal Protection Clause depends on the legitimacy of governmental purpose, and attitudes

⁴⁸² *Id.* at 684 (Black, J., dissenting); see also *Breedlove v. Suttles*, 302 U.S. 277, 281 (1937) (“Levy by the poll has long been a familiar form of taxation, much used in . . . in the colonies and later in the states.”), *overruled by* *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

⁴⁸³ *Reno v. Flores*, 507 U.S. 292, 303 (1993) (internal quotations omitted).

⁴⁸⁴ *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72 (2009) (internal quotations omitted).

⁴⁸⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992).

⁴⁸⁶ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3052 (2010) (Scalia, J., concurring).

⁴⁸⁷ *Goss v. Lopez*, 419 U.S. 565, 578 (1975).

⁴⁸⁸ *Comm’r Internal Revenue v. Shapiro*, 424 U.S. 614, 630 n.12 (1976).

⁴⁸⁹ See *Mathews v. Eldridge*, 424 U.S. 319, 339–49 (1976) (applying balancing test to determine whether due process required a full hearing before the termination of federal disability benefits).

⁴⁹⁰ *Id.* at 334 (internal quotations omitted).

⁴⁹¹ See, e.g., *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993) (exemplifying a Court that was sharply divided on requirements of due process in property forfeiture cases); *Daniels v. Williams*, 474 U.S. 327, 330–31 (1986) (overruling in part, *Parratt v. Taylor*, 451 U.S. 527 (1981), on procedural rights of prisoners claiming negligent injury by guards).

about that are subject to change, both among judges and the public. They are hardly likely to outpace society by much. Likewise, the Court's approach to substantive due process questions in the period after 1937 has been far more cautious than expansive.

In law, some slippery slopes present greater dangers to the liberty of the people than others. In general, those that occur in constitutional interpretation pose greater threats than in statutory construction. The people can correct flaws in statutes far more easily than they can overcome constitutional interpretations not to their liking. "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action."⁴⁹² For that reason, the Court "exercise[s] the utmost care" when overturning a statute on substantive due process grounds.⁴⁹³ Moreover, among constitutional doctrines, some are more susceptible to judicial abuse than others. When assessing whether Congress has power under Article I to enact regulatory legislation or to impose a certain tax, the Court has two choices. By upholding the statute, the Court defers to a body that has some accountability to the people. If it strikes a law as beyond Congress' power, however, the Court frustrates the will of the people as expressed through their representatives. If the Court invalidates the health insurance mandate as exceeding congressional powers, the option will be unavailable for the foreseeable future.

In *Martin v. Hunter's Lessee*, Justice Story observed that it was "always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power a restriction which is not to be found in the terms in which it is given."⁴⁹⁴ Story meant that "[f]rom the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse."⁴⁹⁵ Madison had asserted much the same in *Federalist No. 41*, that "in every political institution, a power to advance the public happiness involves a discretion which may be misapplied and abused."⁴⁹⁶ Justice Story paraphrased Madison's remark in *Martin v. Hunter's Lessee*, albeit without attribution.⁴⁹⁷ In *Federalist No. 63*, Madison emphasized that the structure of the Constitution would prevent congressional power from abuse. Liberty could only be endangered if both houses of Congress were "corrupt," along with the "state legislatures" that choose Senators, and

⁴⁹² *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (internal quotations omitted).

⁴⁹³ *Id.* (internal quotations omitted).

⁴⁹⁴ 14 U.S. (1 Wheat.) 304, 344–45 (1816).

⁴⁹⁵ *Id.* at 345.

⁴⁹⁶ THE FEDERALIST NO. 41, *supra* note 398, at 269 (James Madison).

⁴⁹⁷ See *Martin*, 14 U.S. (1 Wheat.) at 344–45.

“finally . . . the people at large.”⁴⁹⁸

Consider the power to tax, borrow, and spend. The open-ended fiscal powers granted to Congress in Article I theoretically offer endless possibilities for exploitation. Yet Hamilton wrote in *Federalist No. 36* that “[t]he abuse of this power of taxation seems to have been provided against with guarded circumspection.”⁴⁹⁹ He listed only two devices: the provisions for apportionment of direct taxes and uniformity of duties, imposts, and excises.⁵⁰⁰ In *McCulloch v. Maryland*, Chief Justice Marshall said: “The only security against the abuse of [the] power [to tax], is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.”⁵⁰¹ Politics, not litigation, was supposed to be the solution to oppressive taxes and excessive regulation.

Opponents of the mandate argue that it is not like any other tax or regulation precisely because Congress has placed the burden of reforming the health care system on a relatively few, thus defeating the safeguard that Marshall emphasized. Moreover, they maintain that is unfair to do so because those bearing the brunt have done nothing to deserve the liability other than exercise one of a “citizens’ most fundamental liberties, . . . the power of choosing the private parties whom they will transfer property to or contract with.”⁵⁰² Invoking a principle from tort law, critics assert that the “regulation elides the ‘deeply rooted’ ‘difference . . . between ‘misfeasance’ and ‘nonfeasance’—[i.e.,] between [an individual’s] active misconduct working positive injury to others’ and his passive ‘failure to take steps to protect them from harm.’”⁵⁰³ “Historically, one is not responsible for omissions to act unless one has a preexisting duty to act.”⁵⁰⁴ Consequently, to them it amounts to nothing more than “tak[ing] property from A. and giv[ing] it to B”⁵⁰⁵

This criticism rests on a particular view of liberty and constitutional purpose, and ultimately as Holmes wrote in a later-vindicated dissent, “an economic theory which a large part of the country does not entertain.”⁵⁰⁶ Their view is premised on the competition of individuals in free markets as the natural ordering of society. Departures from this archetype require

⁴⁹⁸ THE FEDERALIST NO. 63, *supra* note 398, at 429 (James Madison).

⁴⁹⁹ THE FEDERALIST NO. 36, *supra* note 398, at 226 (Alexander Hamilton).

⁵⁰⁰ *Id.*

⁵⁰¹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819).

⁵⁰² Brief for Private Respondents, *supra* note 191, at 61.

⁵⁰³ *Id.* at 13 (quoting PROSSER & KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984)).

⁵⁰⁴ Barnett, *supra* note 96, at 606.

⁵⁰⁵ Brief for Private Respondents, *supra* note 191, at 13 (internal quotations omitted).

⁵⁰⁶ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); see also e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 861 (1992) (noting that “the theory of laissez-faire” that Holmes identified as the basis for *Lochner* had been repudiated by later cases, starting with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

justification. That makes sense—even if it is arguable—in depicting the foundation of tort and contract law, where the issue is determining liability among individuals. But constitutional law has an entirely different purpose and foundation, at least by modern understanding. Regulation and taxation are used to solve social problems affecting the people as a whole. Their purpose is not necessarily to allocate responsibility among individuals for injuries, although that at times may be an objective. One's susceptibility to a tax or regulation need not be based on the person having done something to deserve a tax or regulatory burden. Rather, the question is whether the imposition is for the good for the general welfare. In general, individuals cannot object that they are paying more than their fair share in taxes and regulatory compliance. There is no objective measure of what is fair in this regard. Instead, a person has been treated fairly when liability conforms to a law with a legitimate public purpose. In extreme instances, which rarely occur, an imposition may be so arbitrary and excessive that it violates the Equal Protection Clause or the Due Process Clause.⁵⁰⁷ There is an important reason why the Court since 1937 has decided these questions with great deference toward legislative judgment: it does "not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."⁵⁰⁸

Even if critics of the mandate were correct that taxation and regulation must be correlated to personal behavior, this Article has shown that it is equitable to require individuals to obtain insurance to the extent of their personal ability. As Madison wrote in *Federalist No. 63*, "liberty may be endangered by the abuses of liberty as well as by the abuses of power; . . . and that the former, rather than the latter, are apparently most to be apprehended by the United States."⁵⁰⁹ In the health care system that now exists in the United States, the liberty to be uninsured has pernicious consequences for others. Whether the new approach taken by Congress succeeds in addressing one of the most momentous social and economic problems ever to confront the country remains to be seen. But lawyers and judges should not trouble themselves with the issue, except in their capacity as citizens who vote.

⁵⁰⁷ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (punitive damage award "was an irrational and arbitrary deprivation of the property of the defendant"); *Allegheny Pittsburgh Coal Co. v. Webster Cty.*, 488 U.S. 226, 344 (1989) (property tax assessment system that was "arbitrary" violated equal protection).

⁵⁰⁸ *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

⁵⁰⁹ THE FEDERALIST NO. 63, *supra* note 398, at 428 (James Madison).