

WHAT IS ALL THE FUSS ABOUT?: THE UNITED STATES CONGRESS MAY IMPOSE A TAX (IT'S CALLED THE "INDIVIDUAL MANDATE")

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I. INTRODUCTION

*Everything should be made as simple as possible.*¹

On June 28, 2012, the nation held its breath as it awaited the United States Supreme Court's long-anticipated announcement of whether President Obama and the 111th Congress's 2010 healthcare law² was constitutional. The stakes were high—for the President, for Congress, for healthcare providers, for patients, for Americans. But the Court hears important decisions every term; why the fuss over this one? Every few decades a case comes along that asks the Court to delineate the scope of the government, the powers of each branch of government, and the relationship between the people and their sovereign. That is, on special occasion, the country revisits the very questions that the revolutionaries struggled over, questions that fundamentally define America's identity as a nation.

These questions touched America's core and resulted in hundreds of pages of circuit-court verbiage; six hours of dramatic Supreme Court oral argument;³ over 130 amicus briefs on the merits; and healthcare, political,

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1. Popularly attributed to Albert Einstein. FRED SHAPIRO, YALE BOOK OF QUOTATIONS 231 (2006).

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) [hereinafter ACA].

3. The cases before the Court were Nat'l Fed'n of Indep. Bus. v. Sebelius, No. 11-393, U.S. Dep't of Health and Human Servs. v. Florida, No. 11-398, and Florida ex rel. Att'y Gen. v. U.S. Dep't of Health and Human Servs., No. 11-400. The opinion below is reported as Florida ex rel. Att'y Gen. v. U.S. Dep't of Health and Human Servs. (HHS), 648 F.3d 1235 (11th Cir. 2011), cert. granted, 132 S. Ct. 603-04 (2011). After originally allotting five and a half hours for argument, the Court extended the

legislative, constitutional, and tax commentary galore. Although the Court looked separately at questions regarding the law's Medicaid provisions, the Anti-Injunction Act, and the severability of the individual mandate, the heart of the argument lay with the facially simple but remarkably critical question of whether the "individual mandate" was constitutional.⁴ This Note will be limited to that question, incorporating others only as relevant to the mandate's constitutional question.

The healthcare law, formally referred to as the Patient Protection and Affordable Care Act ("ACA"),⁵ was enacted amid a political firestorm that culminated in a delicate compromise.⁶ This compromise included the contested "individual mandate," which requires "applicable individual[s]" to be "covered under minimum essential coverage,"⁷ while imposing a pecuniary burden on those who do not.⁸ This Note will refer to these two components collectively as the "individual mandate" and analyze them according to well-established principles of statutory interpretation. While the mandate was enacted in just one of 10,909 sections that

time to six hours—the longest argument since 1966. S. Ct. of the U.S. Nat'l Fed'n of Indep. Bus. v. Sebelius Proceedings and Orders, available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-393.htm>; Andrew Christy, 'Obamacare' Will Rank Among the Longest Supreme Court Arguments Ever, NPR (Nov. 15, 2011), <http://www.npr.org/blogs/itsallpolitics/2011/11/15/142363047/obamacare-will-rank-among-the-longest-supreme-court-arguments-ever> (documenting that the last six-hour arguments occurred in 1966 in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *Miranda v. Arizona*, 384 U.S. 436 (1966)).

4. S. Ct. of the U.S., 565 U.S. Order List (Nov. 14, 2011), available at <http://www.supremecourt.gov/orders/courtorders/111411zor.pdf> [hereinafter 565 Order List]. The Court uses the term "minimum coverage provision." See also *id.* (granting Question 1 of the Government's Petition for a Writ of Certiorari: "Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision." Petition for a Writ of Certiorari at I, *HHS*, *supra* note 3, *cert. granted* 132 S. Ct. 604 (2011) [hereinafter Gov't's Pet.]). As discussed below, this Note uses the term "individual mandate" to refer to the minimum coverage provision, 26 U.S.C. § 5000A(a), in conjunction with its attached penalty, *id.* § 5000A(b) (2006). See *infra* Part II.A.

5. ACA, *supra* note 2.

6. See, e.g., Brief of Senate Majority Leader Harry Reid et al. as Amici Curiae in Support of Petitioners (Minimum Coverage Provision) at 2, Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-398, 11-400), 2012 WL 160236 [hereinafter Cong. Brief] ("The Act is a landmark accomplishment of the national Legislature, which brings to fruition a decades-long effort to guarantee comprehensive, affordable, and secure health care insurance for all Americans.").

7. 26 U.S.C. § 5000A(a) (2006) (requiring that "[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under *minimum essential coverage* for such month") (emphasis added).

8. *Id.* § 5000A(b) (imposing a "penalty," beginning in 2014, on those who do not self-insure).

comprehensively reform the entire healthcare landscape,⁹ it is the crux of the entire legislation: if brought down, the other provisions necessarily fall as well.¹⁰

9. See, e.g., Brief for State Petitioners on Severability at 4, *NFIB*, 132 S. Ct. 2566 (Nos. 11-393 & 11-400) [hereinafter State Pet'rs' Severability Brief] (“[ACA] impose[s] new and substantial obligations on every corner of society, from individuals to insurers to employers to States.”).

10. This conclusion is an economic, not a legal, one. Although the Government submitted that, if found unconstitutional, the mandate legally could be severed from the rest of the ACA, there was ultimately no real dispute about the economic centrality of the mandate. Brief for Respondents (Severability) at 26–54, *NFIB*, 132 S. Ct. 2566 (Nos. 11-393 & 11-400), 2012 WL 72454 [hereinafter Gov't's Severability Brief]. See, e.g., State Pet'rs' Severability Brief, *supra* note 9, at 26–54 (“The ACA cannot stand without the individual mandate.”); Brief of Private Petitioners on Severability at 54, *NFIB*, 132 S. Ct. 2566 (Nos. 11-393 & 11-400) [hereinafter Private Pet'rs' Severability Brief] (“Eliminating the mandate and insurance reforms would have major ripple effects, twisting Congress' reticulated scheme of ‘shared responsibility’ beyond repair.”); Consolidated Brief for Respondents at 10, *NFIB*, 132 S. Ct. 2566 (Nos. 11-393 & 11-400), 2011 WL 4941020 [hereinafter Gov't's Pet. Resp. Brief] (“Without the minimum coverage provision, the guaranteed-issue and community-rating provisions would not advance Congress's efforts to make affordable coverage widely available.”).

The Supreme Court heard arguments on whether the mandate is, as a matter of law, severable from the remaining provisions—that is, whether the Court can strike the mandate without invalidating the entire Act. 565 Order List, *supra* note 4 (granting the Private Petitioners' Question Presented, Petition for a Writ of Certiorari, *NFIB*, 132 S. Ct. 2566 (No. 11-393)). Private and State Petitioners argued that the mandate is non-severable because it is the “central *quid pro quo*” of the ACA, Private Pet'rs' Severability Brief, *supra*, at 29–61, and “Congress would not have enacted the Act” without it, State Pet'rs' Severability Brief, *supra* note 9, at 42. See Private Pet'rs' Severability Brief, *supra*, at 37 (“The guaranteed-issue and community-rating requirements thus cannot operate without the mandate in the manner intended by Congress. Rather, their associated force—not one or the other but both combined—was deemed by Congress to be necessary to achieve the end sought. To strike the mandate alone would impermissibly eliminate a central *quid pro quo* of the Act. If the mandate falls, the guaranteed-issue and community-rating regulations must therefore fall with it, as the Government itself has conceded.” (internal quotations and citations omitted)). The Government, however, asserted that, but for the guaranteed-issue and community-rating provisions, the rest of the Act could remain intact if the mandate were invalidated. Gov't's Severability Brief, *supra*, at 11 (“When this Court identifies a constitutional defect in a portion of a statute, its normal rule requires partial, rather than total, invalidation, in order to respect the judgments of the democratically accountable branches of government after excising an unconstitutional provision[.]”).

In any event, *as an economic matter*, the mandate is not severable from its sister provisions. The fiscal consequences of eliminating the mandate would simply make the other provisions infeasible. Economists amici (including Nobel laureates and former government officials), for example, concluded that “[w]ithout [the mandate], insurance companies would be subjected to estimated net costs of \$360 billion over that same time period, which they would largely pass on to consumers in the form of higher premiums.” Brief for Amici Curiae Economists in Support of Petitioners Regarding Severability at 1, 8, *NFIB*, 132 S. Ct. 2566 (Nos. 11-393 & 11-400), 2012 WL 78244. In fact, this result would directly oppose the cost-reducing goal central to the legislation. See, e.g., ACA, *supra* note 2, § 1501(a)(2)(H) (2006) (“By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the [mandate], together with other provisions of th[e] Act, will significantly reduce administrative costs and lower health insurance premiums.”).

Prior to June 28, 2012, the country's debate raged over whether the ACA was enacted as a legitimate exercise of Congress's Commerce Clause power, particularly in the wake of *Raich*,¹¹ *Lopez*,¹² and *Morrison*.¹³ For example, are "health care and the means of paying for it . . . 'quintessentially economic' in a way that possessing guns near schools and domestic violence are not?"¹⁴ Does the Commerce Clause house an activity/inactivity distinction?¹⁵

On June 28, 2012, however, Chief Justice Roberts took the nation by surprise when he cast the deciding vote: despite all of the discourse, the Commerce Clause question did not carry the day. Rather, Justice Roberts's decision rested on the largely ignored question of whether the mandate was authorized under Congress's extensive taxing power. Looking behind the mandate's label, as any tax analysis must, the Chief Justice found that the mandate "may for constitutional purposes be considered a tax" and that Congress's enactment of that tax was constitutional.¹⁶ The nation was shocked.

But why the shock? Why the fuss? The mandate was and is an easy case of Congress exercising its broad power to tax. As prominent constitutional law professor Erwin Chemerinsky puts it: "[u]nder current constitutional law, the federal health care law is clearly constitutional. It is not even a close question."¹⁷ Constitutional scholar Larry Tribe agrees: "[the Taxing Clause] surely . . . supports . . . the power to enact a provision of the Internal Revenue Code that reduces the tax refunds that may be received by individuals with incomes above a particular threshold who refuse to obtain health insurance."¹⁸ Not convinced? Try Yale and Columbia constitutional law professors Jack Balkin, Gillian Metzger, and Trevor Morrison: "[t]he Provision also falls squarely within the Constitution's grant to Congress of the 'power to lay and collect taxes,

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

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

13. *United States v. Morrison*, 529 U.S. 598 (2000). *See, e.g.*, *Gov't's Pet.*, *supra* note 4, at 14–25.

14. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 557–58 (6th Cir. 2011) (Sutton, J., concurring) (citing *Lopez*, 514 U.S. 549, and *Morrison*, 529 U.S. 598).

15. *See Lopez*, 514 U.S. at 547–49; *Gov't's Pet.*, *supra* note 4, at 18–23.

16. *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2595 (2012).

17. Erwin Chemerinsky, *The Health Care Law Is Constitutional*, SCOTUSBLOG (Aug. 5, 2011, 5:57 PM), <http://www.scotusblog.com/2011/08/the-health-care-law-is-constitutional>.

18. Larry Tribe, *Responding to the Eleventh Circuit and to Richard Epstein*, SCOTUSBLOG (Aug. 16, 2011, 12:52 PM), <http://www.scotusblog.com/2011/08/responding-to-the-eleventh-circuit-and-to-richard-epstein>.

duties, imposts and excises.”¹⁹ Or tax professor and former Chief of Staff of the Joint Committee on Taxation, Edward Kleinbard: “If analyzed as a tax, then . . . it is plainly constitutional.”²⁰ And as this Note will explore later, when enacting the bill, Congress indeed understood that it was exercising its constitutional authority to tax²¹—an authority so fundamental that its creation was one of the precipitating reasons for adopting the Constitution.²²

But, we do not have to just take these experts’ word for it. What has been lost in the long-winded debates over nuanced and gray-toned legal issues is a clear-headed assessment of the ACA in light of the most basic and fundamental statutory interpretation principles.²³ These fundamentals dictate a two-step inquiry. First, when deciding whether a statute is constitutional, interpret the law—that is, perform a statutory interpretation on the statute—and decide what it means.²⁴ This interpretive step forms the crux of the divide.²⁵ But here, a proper statutory interpretation reveals that

19. Brief of Constitutional Law Professors as Amici Curiae in Support of Defendant-Appellant at 3, *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (No. 11-11021-HH), 2011 WL 1461597 [hereinafter Professors’ Brief] (citing U.S. CONST., art. I, § 8, cl. 1).

20. Edward Kleinbard, *Constitutional Kreplach*, TAX NOTES 755–56 (Aug. 16, 2010).

21. *Infra* Part IV.C.

22. *Infra* Part IV.B.

23. This Note takes no position on the constitutional avoidance canon of statutory interpretation—which, as applied here, would probe the question of whether the Anti-Injunction Act prevents the Court from reaching the merits at this pre-enforcement juncture. *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 193 (2009). This Note discusses the Anti-Injunction Act below. *Infra* Part II.D.2. That canon, however, implicates its own normative considerations. For example, “[t]he canon provides a means to mediate the borderline between statutory interpretation and constitutional law, and between the judicial and legislative roles, where judicial line-drawing is especially difficult and where underenforced constitutional values are at stake.” *See, e.g.*, Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 402 (2005). But regardless of the constitutional-avoidance decision, its normative considerations can, and should, be extended to a constitutional ruling on the merits. Thus, even when the other considerations override total avoidance of constitutional issues, the Court should cautiously patrol the border “between the judicial and legislative roles, where judicial line-drawing is especially difficult and where underenforced constitutional values are at stake.” *Id.* Here, in this difficult context, this separation-of-powers principle counsels that the tie goes to the Congress, and the judiciary owes deference to the legislature’s deliberate role in the constitutional scheme.

24. *See, e.g.*, *Nw. Austin*, 557 U.S. at 193 (2009) (interpreting broadly the phrase “political subdivision” in the Voting Rights Act of 1965 when facing a constitutional challenge to the Act).

25. *See infra* notes 59–66 and accompanying text for a discussion of the lower courts’ interpretation of the § 5000A(b) “penalty.” Notably, many courts did not address whether the “penalty” should be interpreted as a tax, and no majority opinion has found that it should be interpreted as such.

the individual mandate *is* a tax.²⁶ Second, having determined that the mandate is a tax, we may then answer the constitutional question. Given the breadth of Congress's constitutional power to tax, this answer comes easily: this tax is constitutional.²⁷

This two-step analysis is useful for both framing our approach and revealing the importance of beginning with statutory-interpretation fundamentals, as well as the striking nature of omitting those fundamentals. Yet the analysis cannot be so cleanly bifurcated: in declaring the mandate a tax, we must consider the scope of Congress's constitutional power to tax; and, in declaring the tax constitutional, we must pay close attention to the specific meaning, operation, and congressional intent of this tax. Accordingly, the two-step analysis will be performed by drawing upon overlapping analyses.

The fact that the individual mandate is easily a legitimate exercise of Congress's power to tax becomes pellucid by: (1) reviewing Congress's "very extensive"²⁸ power to tax and the ACA's comfortable place within this power; and (2) recognizing, through basic statutory-interpretation principles, the mandate's tax character—as evidenced by the ACA's words, function, purpose, and legislative history, and by comparison to analogous exactions deemed to be valid exercises of Congress's taxing power.

Moreover, "[f]ederal intervention in the nation's health care system is not new," and "the ACA leaves the basic structure of the nation's health care system largely unchanged, preserving rather than radically altering that system."²⁹ Not only is Congress's power under its taxing authority to fund and regulate healthcare far from novel, but its longstanding practice has been to fund and regulate healthcare for the benefit of citizens, states, and the "general welfare."

This Note is not an analysis of the Supreme Court's decision or how the Court reached its conclusion. Instead, this Note attempts to set forth clearly and persuasively that the ACA is indeed a constitutional tax. Thus, rather than piggybacking on the Court's analysis, this Note starts afresh, describing Congress's constitutional power to tax, the characteristics and functioning of the individual mandate, and how the mandate falls within

26. See *infra* Part IV.

27. See Chemerinsky, *supra* note 17.

28. License Tax Cases, 72 U.S. 462, 471 (1866).

29. Brief of Health Care Policy History Scholars as Amici Curiae in Support of Petitioners (Minimum Coverage Provision) at 2–7, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 242899.

the Congressional taxing power. While a comparison is beyond this Note's scope, at times the two analyses overlap (for example, both the Note and the Court hold that the tax's "penalty" label does not control, and that the tax is neither a capitation nor a direct tax requiring apportionment³⁰); at times the analyses diverge (for example, although the Court does, in fact, perform a statutory interpretation, this Note's specific statutory interpretation theory of the case is not suggested by the Court³¹). Both reaffirm Congress's longstanding taxing power; both acknowledge Congress's constitutional right to exercise this authority free from judicial interference.

Accordingly, Section II of this Note will provide background of the ACA, looking at the statute itself and the related prior litigation. Section III will review the constitutional requirements of a tax and demonstrate that, labels aside, the ACA's individual mandate falls well within Congress's broad constitutional power to tax. Section IV will then prove that, even though the ACA labels the pecuniary burden a "penalty," the mandate remains a constitutional tax. This will become evident as a matter of statutory interpretation, the mandate's character, the legislative history, and analogies to similar congressional levies upheld as constitutional taxes. Section V will expose the statutory term "penalty" as politically motivated rhetoric. And Section VI will conclude.

II. BACKGROUND

A. THRESHOLD DEFINITION: THE "INDIVIDUAL MANDATE" REFERS TO THE MINIMUM COVERAGE PROVISION AND ITS ATTACHED PENALTY COLLECTIVELY

As intimated above, this Note uses the term "individual mandate" to collectively refer to the minimum coverage provision and its attached penalty.³² The importance of this definition cannot be overstated, for the thrust of the ACA opponents' tax argument flows from their initial contention that the minimum coverage provision is a free-standing obligation, separate and apart from the ensuing penalty for non-compliance.³³

30. Compare *NFIB*, 132 S. Ct. at 2595, 2598–99, with discussion *infra* Parts III.A, IV.B.1.

31. Compare *NFIB*, 132 S. Ct. at 2577–609, with discussion *infra* Parts II–IV.

32. 26 U.S.C. § 5000A(a), (b) (2006).

33. See Brief for Private Respondents on the Individual Mandate at 6, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 379586 [hereinafter Private Resp't's Mandate Brief] ("As we have explained, the ACA's text, structure, and context establish that the mandate in § 5000A(a) is a free-standing legal

But the two adjoining subsections work conjunctively and cannot be bifurcated for either functional or constitutional purposes. As a functional matter, the minimum coverage provision and penalty are wholly interdependent: qualified individuals must either acquire the minimum coverage under subsection (a) or pay the penalty under subsection (b), and the penalty is only triggered by a failure to satisfy subsection (a).³⁴

As a constitutional matter, it is the most elementary canon of statutory construction that provisions must be “taken as a whole.”³⁵ Statutory provisions do not function in isolation, and it is assumed that Congress intended the legislative provisions to conjunctively carry out the statute’s overall purpose.³⁶ Here, the minimum coverage provision is fundamental to achieving Congress’s goal of “significantly reduc[ing] administrative costs and lower[ing] health insurance premiums,”³⁷ and the “penalty” is necessary to achieve that minimum coverage—without repercussions for noncompliance, the requirement would be ineffectual.³⁸ Finally, it bears

duty to obtain insurance.”); Brief for State Respondents on the Individual Mandate at 51, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 392550 [hereinafter State Resp’t’s Mandate Brief] (“[The taxing-power] argument fails at the outset because the States are challenging the mandate, not the penalty.”).

34. 26 U.S.C. § 5000A(a), (b). *See also supra* notes 7–8 and accompanying text. For arguments about why the variations in exemptions for subsections (a) and (b) do not render the provisions “stand-alone,” see Transcript of Oral Argument (AIA) at 45:19–49:15, U.S. Dep’t of Health and Human Servs. v. Florida, No. 11-398 (2012), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-398-Monday.pdf.

35. *See, e.g.*, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (noting that a statute’s “plain meaning” is determined by looking “to the particular statutory language at issue, as well as the language and design of the statute as a whole”); *United Sav. Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (“Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme.”); YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2008), available at <http://www.fas.org/sgp/crs/misc/97-589.pdf> (“A cardinal rule of construction is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes.”); John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373 (1992) (“The second canon of statutory construction is much like the first: ‘Read the entire statute.’”).

36. *See, e.g.*, KIM, *supra* note 35, at 3 (“It is well to keep in mind, however, that the overriding objective of statutory construction is to effectuate statutory purpose.”).

37. ACA, *supra* note 2, § 1501(a)(2)(H) (“By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the [mandate], together with other provisions of th[e] Act, will significantly reduce administrative costs and lower health insurance premiums.”).

38. *See* Gov’t’s Pet. Resp. Brief, *supra* note 10, at 10 (“Without the minimum coverage provision, the guaranteed-issue and community-rating provisions would not advance Congress’s efforts to make affordable coverage widely available.”).

noting that Congress was well aware that courts would interpret the ACA in this manner.³⁹

B. STATUTORY BACKGROUND

Following a tumultuous legislative history,⁴⁰ the Patient Protection and Affordable Care Act was passed by the Senate on December 24, 2009;⁴¹ and by the House on March 21, 2010;⁴² and signed into law by President Obama two days later, on March 23, 2010.⁴³ The House and Senate then passed the Health Care and Education Reconciliation Act of 2010 on March 30, 2010.⁴⁴ This second act “ma[de] a number of health-related financing and revenue changes to the Patient Protection and Affordable Care Act enacted by H.R. 3590 and modifie[d] higher education assistance provisions.”⁴⁵ Together, these bills constitute the ACA.⁴⁶

While the ACA sets forth a “comprehensive and complex regulatory scheme,”⁴⁷ it is Section 5000A of the ACA, home of the individual mandate, which has been the center of the legal debate. Section 5000A

39. See KIM, *supra* note 35, at 3 (“The Court, moreover, presumes that Congress legislates with knowledge of our basic rules of statutory construction. This report sets forth a number of such rules, conventions, and presumptions that the Court has relied on.” (internal quotations and citation omitted)).

40. The legislation was first introduced by Rep. Rangel on September 17, 2009. THE LIBRARY OF CONGRESS, *Bill Summary & Status 111th Congress (2009–2010) H.R.3590 Major Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03590>. For a summary of the bill’s history, see Private Pet’rs’ Severability Brief, *supra* note 10, at 1–10.

41. See LIBRARY OF CONGRESS, *supra* note 40. The Senate bill, H.R. 3590 passed by a 60 to 39 vote. *Id.*

42. *Id.* The House passed the Senate bill by a narrow 219 to 212 vote. *Id.*

43. *Id.*

44. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 109 (2010); H.R. 4872.

45. THE LIBRARY OF CONGRESS, *Bill Summary & Status 111th Congress (2009–2010) H.R.4872*, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR04872>.

46. The final version of the bill has ten titles, the tenth of which amends the original nine. ACA, *supra* note 2. The ACA envisions three implementation periods: (1) some provisions went into effect on September 23, 2010; (2) other “bridge” provisions go into effect between 2010 and 2014; and (3) the final provisions are implemented in 2014 or shortly thereafter. See, e.g., *Health Reform in Action*, THE WHITE HOUSE, <http://www.whitehouse.gov/healthreform/healthcare-overview#healthcare-menu>. Relevant here, the individual mandate goes into effect in 2014, at which time those individuals who do not have minimum coverage and do not qualify for one of the exemptions, see *infra* notes 176–79 and accompanying text, would have to report the penalty on their 2014 federal income tax returns, 26 U.S.C. § 5000A(a).

47. Florida *ex rel.* Att’y Gen. v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011).

amends the Internal Revenue Code (“the Tax Code”).⁴⁸ Subsection (a) requires that “[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.”⁴⁹ Beginning in 2014, subsection (b) imposes a “penalty” capped at the national average premium for the lowest-level plan that provides “minimum essential coverage” for those who do not self-insure.⁵⁰ The “penalty” is calculated as a percentage of an individual’s income, with low-income individuals exempt,⁵¹ and is included on the individual’s income tax return.⁵² No form of penalty may be enforced beyond the four corners of the income tax return—failure to pay may not result in any criminal prosecution or any liens or levies upon the taxpayer’s property.⁵³

The individual mandate was deemed an “essential” provision for the financial feasibility of the ACA and, indeed, of the entire U.S. healthcare system.⁵⁴ Fiscally, the mandate: (1) saves the federal government billions

48. ACA, *supra* note 2, § 1501(b) (“Subtitle D of the Internal Revenue Code of 1986 is amended by adding at the end the following new chapter: ‘Chapter 48—Maintenance of Minimum Essential Coverage[.]’”).

49. 26 U.S.C. § 5000A(a). “Minimum essential coverage” is defined in Section 5000A(f). *Id.* § 5000A(f).

50. *Id.* § 5000A(b), (c).

51. *Id.* § 5000A(b). The “penalty” is the greater of: (1) a “flat dollar amount,” statutorily defined and indexed for inflation; or (2) a graduated percentage of the amount by which the “taxpayer’s household income” exceeds the amount of income required to file a tax return. *Id.* § 5000A(c). “In general, households with lower income will pay the flat dollar penalty, and households with higher income will pay a percentage of their income.” CONG. BUDGET OFFICE, PAYMENTS OF PENALTIES FOR BEING UNINSURED UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 1 (2010), available at http://www.cbo.gov/ftpdocs/113xx/doc11379/Individual_Mandate_Penalties-04-22.pdf. Individuals with sufficiently low incomes—the majority of uninsured individuals—will not have to pay a penalty at all: those with incomes so low that either they are not required to file an income tax return or the penalty would exceed a percentage of their income. *Id.*

52. 26 U.S.C. § 5000A(g)(1) (“The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.”).

53. *Id.* § 5000A(g)(2). *See also* Tribe, *supra* note 18 (“In effect, all the government can do under the Act as drafted is reduce any tax refund owed to an uninsured individual; it may not use criminal or civil sanctions, or even impose levies or liens.”).

54. 42 U.S.C. § 18091(a)(2)(H) (“The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market.”); *id.* § 18091(a)(2)(I) (“The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.”); *id.* § 18091(a)(2)(J) (“The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate

of dollars;⁵⁵ (2) lowers premiums for individuals;⁵⁶ and (3) yields numerous cost-reducing, secondary-market effects.⁵⁷ And although it is beyond the scope of this Note, the anticipated health and social benefits are both deep and far-reaching.⁵⁸

its associated administrative costs.”). This Note also visited the mandate’s fiscal centrality in connection with the severability question before the Court. *See supra* note 10.

55. Although various budgetary numbers have been proffered, the key point is the magnitude of the mandate’s budget-reducing impact. *See* CONG. BUDGET OFFICE, EFFECTS OF ELIMINATING THE INDIVIDUAL MANDATE TO OBTAIN HEALTH INSURANCE (June 16, 2010), available at http://www.cbo.gov/ftpdocs/113xx/doc11379/Eliminate_Individual_Mandate_06_16.pdf (estimating that between 2011 and 2020 eliminating the mandate would increase the federal deficit by \$252 billion). *See also Health Reform in Action*, THE WHITE HOUSE, <http://www.whitehouse.gov/healthreform/healthcare-overview#healthcare-menu> (“Congressional Budget Office, the government’s non-partisan scorekeeper, said the Affordable Care Act would save over \$100 billion over the next ten years, and over \$1 trillion in the following decade.”).

56. 42 U.S.C. § 18091(a)(2)(F) (“By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums.”); Brief for Amici Curiae Economist Scholars in Support of Petitioners at 1, 8, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 135048 (“Without [the mandate], insurance companies would be subjected to estimated net costs of \$360 billion over that same time period, which they would largely pass on to consumers in the form of higher premiums.”); CONG. BUDGET OFFICE, *supra* note 55, at 2 (“in the absence of a mandate . . . adverse selection would increase premiums for new non-group policies (purchased either in the exchanges or directly from insurers in the non-group market) by an estimated 15 to 20 percent relative to current law”).

57. *See, e.g.*, Brief of American Association of People with Disabilities et al. as Amicus Curiae in Support of Petitioners at 16, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 121238 (“The minimum coverage provision, together with the prohibition on exclusions for pre-existing conditions, can be expected to reduce health care costs, prevent medical bankruptcies, encourage fluidity in the job market, and eliminate the economic costs from unnecessary deaths.” (capitalization omitted)); Brief of Amici Curiae Economic Scholars in Support of Petitioners Urging Reversal on the Minimum Coverage Issue at 6, 8, 11, 15, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 135048 (“the unique economics of the health care industry make the minimum coverage provision necessary” because: (1) “people cannot avoid medical care with certainty, or be sure that they can pay for the costs of care if uninsured”; (2) there is other legislation that “mandates access to a minimum level of health care for all who seek it, even those who cannot pay”; and (3) “whether one person buys health insurance has cost implications for everyone else.”); Brief for Amici Curiae American Nurses Ass’n et al. in Support of Petitioners and Reversal on the Minimum Coverage Provision at 6, 10, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 121240 (arguing that “uninsured Americans frequently delay care until their conditions become much more difficult and expensive to treat” and “the costs of caring for uninsured Americans drive up the cost of Medicare and private insurance plans” (capitalization omitted)).

58. Congress intended ACA to be a comprehensive reform, addressing all areas of the healthcare system—a system with tentacles reaching all aspects of American society. The array of amici calling on the Court to declare the mandate constitutional—and their myriad interests—display the broad interest in retaining the mandate. *See generally, e.g.*, Brief Amici Curiae of State Legislators from All Fifty States et al. Supporting Petitioners (Minimum Coverage Provision), *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 135047 [hereinafter State Legislators’ Brief] (arguing that the ACA helps the states work to solve the healthcare crisis which they alone cannot solve); Brief on Behalf of Small Business Majority Foundation, Inc. and the Main Street Alliance (“MSA”) as Amici Curiae in Support of Petitioners (Minimum Coverage Provision) at 1 *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 160233

C. HISTORY OF THE ACA IN THE COURTS

1. Circuit Courts

Prior to the Supreme Court's decision, the ACA's treatment in the lower courts was discordant. Three circuits ruled on constitutional challenges to the ACA, with two (the Sixth and D.C. Circuits) declaring the mandate constitutional, and one (the Eleventh Circuit) invalidating the mandate.⁵⁹ Other circuits never reached the merits of the constitutional challenges, finding instead that they lacked jurisdiction to hear the challenges.⁶⁰

(arguing that the ACA helps alleviate the “skyrocketing health care costs, the largest problem facing small businesses”); Brief of Amici Curiae NAACP Legal Defense & Educational Fund, Inc. et al. in Support of Petitioners (Minimum Coverage Provision) at 5, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 160232 (arguing that the ACA “enhances the ability of individuals to participate in the economic, social, and civic life of our nation, thereby advancing equal opportunity and personal liberty”); Brief of Child Advocacy Organizations as Amici Curiae in Support of Petitioners on the Minimum Coverage Provision Question at 13–43, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 160234 (arguing that that the ACA improves the health of millions of American children); Brief for the American Hospital Association et al. as Amici Curiae in Support of Petitioners with Respect to the Individual Mandate at 4, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 160232 [hereinafter American Hospital Association Brief] (arguing that the ACA helps hospitals provide affordable care and keeps otherwise uninsured families from “financial ruin.”); Brief for Lambda Legal Defense and Education Fund, Inc. et al. as Amici Curiae in Support of Petitioner on the Minimum Coverage Requirement Issue at 1, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 160235 (arguing that the ACA is crucial to stemming the HIV/AIDS epidemic).

59. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 529 (6th Cir. 2011) (Sutton, J., concurring) (citing *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598, 598 (2000)) (rejecting, 2–1, plaintiff's facial challenge to ACA, and upholding it as applied to at least four classes of individuals under Congress's Commerce Clause power) (note: the court divided three ways, leaving no majority as to the scope of the constitutionality holding; because Judge Sutton's reasoning is the most narrow his opinion defines the limits of the Sixth Circuit's decision). *See also Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1235 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 603 (2011) (invalidating, 2–1, the mandate as beyond Congress's Commerce Clause power, but finding other provisions in the ACA constitutional and severable from the mandate); *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (upholding, 2–0, the mandate as constitutional under Congress's Commerce Clause power).

60. *N.J. Physicians, Inc. v. President of United States*, 653 F.3d 234 (3d Cir. 2011) (affirming the district court's dismissal of plaintiffs' constitutional challenge to ACA for lack of standing); *Purpura v. Sebelius*, 446 F. App'x 496 (3d Cir. 2011) (similarly affirming the district court's dismissal of plaintiffs' constitutional challenge to ACA for lack of standing); *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391 (4th Cir. 2011) (holding that the mandate is a “tax” for purposes of the Anti-Injunction Act, stripping the court of subject-matter jurisdiction to enjoin enforcement of the mandate); *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011) (holding that Virginia lacked standing because it had no “sovereign injury” or injury in fact under Article III); *Kinder v. Geithner*, 695 F.3d 772 (8th Cir. 2012) (holding that Missouri lacked standing because it failed to allege injury-in-fact required for Article III standing); *Baldwin v. Sebelius*, 654 F.3d 877 (9th Cir. 2011) (affirming the district court's dismissal of plaintiff's suit for lack of standing).

Of the courts that ruled on the merits of the constitutional challenges, none found the mandate to fall within Congress's taxing power. The Sixth Circuit upheld the mandate while rejecting the government's taxing-power argument,⁶¹ the Eleventh Circuit held that the mandate was outside the bounds of Congress's taxing authority as a "civil regulatory penalty, not a tax";⁶² and the D.C. Circuit did not address the issue,⁶³ despite having asked the parties to brief whether the penalty was within the "authority of the Constitution's tax power."⁶⁴ Numerous district courts similarly disavowed that, in passing the ACA, Congress was legitimately flexing its taxing-power muscle.⁶⁵ The only support for the government's taxing-power arguments came in concurrences or dissents.⁶⁶

61. *Thomas More*, 651 F.3d at 529–72 (Judges Sutton and Graham found the mandate to lie outside of Congress's taxing power on the grounds that Congress intended to impose a regulatory penalty, not a tax. Judge Martin did not reach this question.)

62. *Florida*, 648 F.3d at 1320 ("The individual mandate as written cannot be supported by the tax power.")

63. *Seven-Sky*, 661 F.3d at 1–54.

64. Order, *Seven-Sky*, 661 F.3d at 1 (No. 11–5047) (Aug. 31, 2011) (requesting supplemental briefs addressing: (1) whether the penalty is "punitive or non-punitive," and "[i]f the penalty is non-punitive, [whether] the [f]ederal [g]overnment [may] impose a non-punitive civil penalty under the authority of the Constitution's tax power . . .," and (2) [h]ow [] the constitutional analysis under the Taxation Clause [is] affected, if at all, by the fact that the tax penalty at issue here does not purport only to encourage or discourage conduct but is accompanied by a specific legal mandate").

65. For example, the Eleventh Circuit cited the following district courts as finding the mandate to be a "penalty" and not a "tax": the Northern District of Florida (*Florida ex rel. McCollum v. U.S. Dep't of Health and Human Servs.*, 716 F. Supp. 2d 1120, 1143–44 (N.D. Fla. 2010)); the Northern District of Ohio (*U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903, 909 (N.D. Ohio 2010)); the Western District of Virginia (*Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 629 (W.D. Va. 2010)); the Eastern District of Virginia (*Virginia ex rel. Cucinelli v. Sebelius*, 728 F. Supp. 2d 768, 782–88 (E.D. Va. 2010)); the Middle District of Pennsylvania (*Goudy Bachman v. U.S. Dep't of Health and Human Servs.*, 764 F. Supp. 2d 684, 695 (M.D. Pa. 2011)); and the District Court for the District of Columbia (*Mead v. Holder*, 766 F. Supp. 2d 16, 41 (D.D.C. 2011)). *Florida*, 648 F.3d at 1314.

66. In the Fourth Circuit, Judge Wynn opined, in concurrence, that if he were "to reach the merits, [he] would uphold the constitutionality of the [ACA] on the basis that Congress had the authority to enact the individual and employer mandates under its plenary taxing power." *Liberty Univ.*, 671 F.3d 391, 415 (Wynn, J., concurring). In dissent, Judge Davis stated that:

[A]t root, governments are formed precisely to *compel purchases of public goods*. Because hospitals are required to stabilize the uninsured, the uninsured are able to pass along much of the cost of their health care to the insured. Solving this problem, as the Act attempts to do, creates a public good: lower prices for health services for all citizens. Thus, the Act compels the purchase of a public good, just as the federal government does when it collects taxes and uses it to fund national defense. Indeed, it is undisputed that Congress would have had the power under the Taxing and Spending Clause to raise taxes and use increased revenues to purchase and distribute health insurance for all.

Id. at 447 (Davis, J., dissenting) (emphasis in original) (arguing that the AIA does not bar the suit and the ACA is a constitutional exercise of Congress's Commerce Clause power).

So if the mandate is plainly a tax⁶⁷—as so many of the nation’s top constitutional and tax scholars have concluded—why was that lost on the courts?⁶⁸ One can only speculate. Perhaps the courts failed to look beyond the immediate face of the ACA, in which Congress expressly invoked its Commerce Clause authority to enact the mandate.⁶⁹ Maybe the Commerce Clause argument is simply too compelling, given that, regardless of whether the mandate falls within Congress’s Commerce Clause authority, the healthcare market itself is quite plainly interstate commerce. The courts may have run amok with formalism and may not have looked behind the label “penalty.” Or courts simply ignored the statutory-interpretation principle of reading the mandate’s subsections in conjunction, instead severing the mandate from its attached penalty in their analyses.

Regardless of where the analytic missteps occurred, they are missteps wholly intolerable in our constitutional scheme. “[J]udging the constitutionality of an Act of Congress is ‘the gravest and most delicate duty that this Court is called upon to perform’”;⁷⁰ nothing short of analytic rigor can fulfill that duty.

2. Supreme Court

On November 14, 2011, the Supreme Court granted three pending ACA petitions.⁷¹ Out of the issues raised, the Court agreed to hear argument on (1) the “severability” of the mandate,⁷² (2) the constitutionality of the mandate, (3) whether the Anti-Injunction Act

67. Kleinbard, *supra* note 20, at 756.

68. Perhaps in recognition of the minimal weight the taxing-power issue has been given, the multitude of Supreme Court briefs on this conflict have largely ignored or barely touched upon the issue. Of the twenty-eight amici briefing the mandate-constitutionality issue, only two have even broached the taxing-power argument. See Brief of Constitutional Law Scholars as Amici Curiae in Support of Petitioners (Minimum Coverage Provision), *Nat’l Fed. of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 135050 [hereinafter Constitutional Law Scholars’ Brief]; Brief of Service Employees International Union and Change to Win as Amici Curiae Addressing the Minimum Coverage Provision Issue and Supporting Petitioners and Reversal, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 242898. Even the challenger’s call is an argument of “last resort.” Brief for State Respondents on the Minimum Coverage Provision at 51, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 392550.

69. ACA, *supra* note 2, § 1501(a).

70. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 193 (2009) (quoting *Blodgett v. Holden*, 275 U.S. 142, 147–48 (Holmes, J., concurring)).

71. Amy Howe, *The Health Care Grants: In Plain English*, SCOTUSBLOG (Nov. 17, 2011, 1:00 PM), <http://www.scotusblog.com/?p=132261>.

72. That is, whether the mandate could be declared unconstitutional without the entire law being tossed, as the Eleventh Circuit so found. *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d 1235, 1322–28 (11th Cir. 2011).

(“AIA”)⁷³ stripped the Court of jurisdiction, and (4) the constitutionality of the Medicaid expansion.⁷⁴ On June 28, 2012, the Court answered the second question—the focus of this Note—affirmatively, upholding the mandate under Congress’s taxing power.⁷⁵

D. ADDRESSING THE TAX ISSUE

1. The Taxing Power as a Constitutional Basis for the ACA and Mandate

As discussed above, the circuit courts were either hostile to or utterly silent on the taxing-power issue.⁷⁶ Nevertheless, the Supreme Court broke ways and declared the mandate to be a constitutional tax.⁷⁷

2. The Anti-Injunction Act

The word “tax” also finds breath in conjunction with the AIA.⁷⁸ The AIA generally bars pre-enforcement challenges to tax laws.⁷⁹ The Fourth Circuit was the first and only court to hold that the AIA bars judicial challenges at this pre-enforcement juncture.⁸⁰ The Supreme Court directed

73. 26 U.S.C. § 7421(a).

74. 565 Order List, *supra* note 4, at 3. *See also* Lyle Denniston, *Court Sets 5 1/2-Hour Hearing on Health Care (Final)*, SCOTUSBLOG (Nov. 14, 2011, 10:49 AM), <http://www.scotusblog.com/2011/11/court-sets-5-12-hour-hearing-on-health-care/>.

75. *Nat’l Fed. of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2608–09 (2012). As to the other questions, the Court held that the AIA did not pose a jurisdictional bar to the suit, but the penalty provision of the Medicaid expansion was unconstitutional (although severable from the remainder of the ACA). *Id.* The Court also explicitly held that, despite its validity as a tax, the individual mandate would be unconstitutional if analyzed solely under Congress’s Commerce Clause powers. *Id.*

76. *Supra* notes 61–66 and accompanying text.

77. *NFIB*, 132 S. Ct. at 2608–09.

78. 26 U.S.C. § 7421(a).

79. *Id.* (“Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.”). The “principal purpose of [the AIA] [is] the protection of the [g]overnment’s need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference.” *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974).

80. *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 395 (4th Cir. 2011) (finding the penalty to be a “tax” within the meaning of the AIA). *But see* *Seven-Sky v. Holder*, 661 F.3d 1, 6–11 (D.C. Cir. 2011) (holding that penalty is not a “tax,” and thus the AIA does not apply); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 539–40 (6th Cir. 2011). Following the Fourth Circuit decision, Judge Kavanaugh of the D.C. Circuit authored a sixty-five page dissent arguing that the AIA stripped the court of jurisdiction. *Seven-Sky*, 661 F.3d at 2 (Kavanaugh, J., dissenting). Had the Supreme Court found that the AIA barred review that would have “shut down the constitutional review of the insurance mandate until 2015 at the earliest.” Lyle Denniston, *Analysis: Health Care’s “Sleeper Issue”*, SCOTUSBLOG (Nov. 22, 2011, 12:04 AM), <http://www.scotusblog.com/2011/11/analysis-health-cares-sleeper-issue/>. *See also* Michael C. Dorf, *Who Benefits from a Speedy Adjudication of the Health Care Cases?*, DORF

the parties to address whether the AIA stripped them of subject-matter jurisdiction to hear the challenge⁸¹ and ultimately found that it did not.⁸²

Whether the AIA applies hinges upon whether the mandate is a “tax,” as understood within the AIA universe.⁸³ Although the AIA “tax” universe greatly overlaps with the constitutional “tax” universe, the two are not one and the same.⁸⁴ The definition of a “tax” is statutorily defined for AIA purposes and is broader than the definition under the Taxing Clause.⁸⁵ So, while AIA taxes are also likely to be constitutional taxes, the conclusion does not inexorably follow. Thus, any conclusion that the AIA applies,

ON LAW (Dec. 5, 2011, 12:01 AM), <http://www.dorfonlaw.org/2011/12/who-benefits-from-speedy-adjudication.html> (noting that, if applied, “the AIA forbids pre-enforcement challenges to the ACA, meaning the law can only be challenged in a tax refund action, which would not be filed until 2015 and might not reach the Supreme Court until 2017”).

81. 565 Order List, *supra* note 4, at 3. Because all parties took the position that the AIA did not apply, the Court also appointed an amicus party to advocate that the AIA did bar challenges to the ACA. *See* SUPREME COURT OF THE UNITED STATES, DOCKET FOR 11-398 (2011) (“Robert A. Long, Esquire, of Washington, D.C., is invited to brief and argue this case, as amicus curiae, in support of the position that the Anti-Injunction Act, 26 U.S.C. § 7421(a), bars the suit brought by respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A.”).

82. Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2608–09 (2012).

83. *See* 26 U.S.C. § 7421(a); *supra* note 80. Because no party contended that the penalty was swept up by one of the AIA’s enumerated exceptions, the AIA’s applicability rose and fell on whether the penalty fell within Section 7421’s meaning of “tax.” *See, e.g.*, Brief for Court-Appointed Amicus Curiae Supporting Vacatur (Anti-Injunction Act) at 23, *NFIB*, 132 S. Ct. 2566 (No. 11-398), 2012 WL 195304. (“Respondents do not contend that their suit falls within any of the express exceptions to the Anti-Injunction Act. . . . The critical question is thus whether this is a “suit for the purpose of restraining the assessment or collection of any ‘tax’ within the meaning of the Anti-Injunction Act.”).

84. *See, e.g., Seven-Sky*, 661 F.3d at 48 n.36 (Kavanaugh, J., dissenting) (“Plaintiffs’ suit, if successful, would reduce their payment of taxes (and the tax is not a criminal prohibition such that the Due Process Clause would require a pre-enforcement suit to be available). That’s all that’s needed to find the Anti-Injunction Act applicable. That is not necessarily all that’s needed to justify a civil penalty under the Taxing Clause.”).

85. *Compare* *Bailey v. George*, 259 U.S. 16 (1922) (finding a pre-enforcement challenge to an exaction barred by the AIA), *with* *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (holding that the same exaction was invalid under the Taxing Clause). *See also* *Liberty Univ.*, 671 F.3d at 402 (“The Supreme Court has steadfastly adhered to this broad construction, notably in holding that the AIA bars pre-enforcement challenges to exactions that do not constitute ‘taxes’ under the Constitution. [citing *Bailey* cases] . . . In recent years, the Court has expressly affirmed these holdings, reiterating that the term ‘tax’ in the AIA encompasses penalties that function as mere ‘regulatory measure[s] beyond the taxing power of Congress’ and Article I of the Constitution.”); *Seven-Sky*, 661 F.3d 1 at 47–48 (Kavanaugh, J., dissenting); Akhil Joondeph, *Revisiting the AIA Question in Goudy-Bachman*, ACA LITIG. BLOG (Sept. 13, 2011, 9:42 PM), <http://acalitigationblog.blogspot.com/2011/09/revisiting-ai-a-question-in-goudy.html> (“[A]s the *Bailey* cases illustrate, the definition of a ‘tax’ under the AIA is broader than that under the General Welfare Clause (which is fairly broad to begin with).”).

does not necessarily declare the mandate a “tax” for constitutional purposes.⁸⁶

III. THE THEORY: A CONSTITUTIONAL “TAX”

A. LABELED A “TAX,” THE PECUNIARY BURDEN WOULD FALL COMFORTABLY WITHIN CONGRESS’S PLENARY POWER TO TAX

Setting aside for a moment Congress’s legislative word choice of “penalty,” let us imagine that Congress had simply used the word “tax.” Would this tax be constitutional? The answer is a resounding “yes”—the mandate is a constitutional income tax. This Subsection will articulate this conclusion by first reviewing the extensive nature of Congress’s taxing authority and then demonstrating that the mandate easily falls within this power to tax.

1. Constitutional Requirements

The power to tax is so fundamental to the United States Constitution that it was one of the central impetuses for calling the Constitutional Convention.⁸⁷ Out of that Convention came the Taxing and Spending

86. This Note takes no position on whether the AIA barred either the states’ or private parties’ suits. However, for very serious and persuasive arguments that punting on the constitutional issue would have “invite[d] waste and chaos” to the tune of “tens of billions of dollars,” see Michael C. Dorf & Neil Siegel, “*Early-Bird Special*” *Indeed!: Why the Tax Anti-Injunction Act Permits the Present Challenges to the Minimum Coverage Provision*, 121 YALE L.J. ONLINE 389, 390, 399 (2012). Whether a court should interpret a statute to avoid “waste and chaos” is a page for another article. Nevertheless, the legislature, not the courts, may hold the keys to avoiding this potential catastrophe. See Steve R. Johnson, *The Anti-Injunction Act and the Individual Mandate*, TAX ANALYSTS, <http://www.taxanalysts.com/www/features.nsf/Articles/F12799AA6F03F2C0852579660054ADF5?OpenDocument> (last visited Feb. 11, 2012) (“Fortunately, that threat to resolution on the merits can be easily and expeditiously removed. This report urges Congress to amend the AIA and the DJA to provide that they do not apply to, or prevent pre-enforcement judicial review of, suits challenging the constitutionality of the individual mandate. That could be done rapidly and simply.”). See also *Seven-Sky*, 661 F.3d at 54 (Kavanaugh, J., dissenting) (“Between now and 2015, Congress might keep the mandate as is and the President may enforce it as is. If that happens, the federal courts would resolve the resulting constitutional case by our best lights and would not shy away from a necessary constitutional decision. But history tells us to cross that bridge only if and when we need to. Unlike the majority opinion, I would adhere to the text of the Anti-Injunction Act and leave these momentous constitutional issues for another day—a day that may never come.”).

87. Under the Articles of Confederation the federal government could not levy taxes. U.S. NAT’L ARCHIVES & RECS. ADMIN., *A More Perfect Union: The Creation of the U.S. Constitution*, THE CHARTERS OF FREEDOM, http://www.archives.gov/exhibits/charters/constitution_history.html (adapted from ROGER A. BRUNS, *A MORE PERFECT UNION: THE CREATION OF THE UNITED STATES CONSTITUTION* (1986)). This power void led to the “political economic dilemmas . . . plaguing America” under the Articles of Confederation and led Founders such as James Madison to call for the Constitutional Convention to create a “strong central government.” *Id.* There, a committee resolutely

Clause, which gave—and still gives—the newly amplified federal government its power to tax.⁸⁸ And in 1913, Congress’s taxation powers were further expanded after the ratification of the Sixteenth Amendment, which gives Congress the “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.”⁸⁹ With any apportionment requirement removed, Congress’s power to tax income became virtually limitless.⁹⁰ In fact, since the Court’s long-repudiated 1895 decision in *Pollock*,⁹¹ in which it declared income tax without

warned the Congress of the federal government’s need for a strong power to tax. 30 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 70–76 (Worthington C. Ford ed., 1937), available at http://press-pubs.uchicago.edu/founders/documents/a1_8_1s1.html. (“it most clearly appeared, that the requisitions of Congress, for eight years past, have been so irregular in their operation, so uncertain in their collection, and so evidently unproductive, that a reliance on them in future as a source from whence moneys are to be drawn to discharge the engagements of the Confederacy . . . would be not less dishonourable to the understandings of those who entertain such confidence, than it would be dangerous to the welfare and peace of the Union”). This strong power to tax was adopted in the final Constitution. U.S. CONST. art. 1, § 8, cl. 1.

For a historically based argument that the Constitution as a whole sought to create a “vibrant federalist system that empowers the federal government to provide national solutions,” see State Legislators’ Brief, *supra* note 58, at 5–12 (“The drafters of the Constitution thus made clear that in each enumerated instance in Article I—whether regulating ‘commerce’ or levying taxes—the understanding was that Congress would exercise the enumerated power while applying the general principle that Congress has power to regulate in cases of national concern.”).

88. U.S. CONST. art. 1, § 8, cl. 1 (“The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defen[s]e and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.” (capitalization omitted)).

89. U.S. CONST. amend. XVI (capitalization omitted).

90. The Sixteenth Amendment was a congressional response to the Supreme Court’s short-lived attempt to subject income taxes to the direct-tax apportionment requirement. See *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, *on reh’g*, 158 U.S. 601 (1895), *overruled in part on other grounds by* *South Carolina v. Baker*, 485 U.S. 505 (1988); *William E. Peck & Co. v. Lowe*, 247 U.S. 165, 172–73 (1918) (“The Sixteenth Amendment . . . remove[d] all occasion, which otherwise might exist, for an apportionment among the states of taxes laid on income, whether it be derived from one source or another.”); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 18 (1916) (“the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment”).

In fact, the Court has suggested that, even without the Sixteenth Amendment, the notion that an income tax would be subject to the direct-tax apportionment requirement was “mistaken.” *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112–13 (1916) (“[T]he provisions of the [Sixteenth] Amendment conferred no new power of taxation, but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged, and being placed in the category of direct taxation subject to apportionment . . . by a mistaken theory.”).

91. *Pollock*, 157 U.S. 429. See also *supra* note 90.

apportionment to be unconstitutional, “[i]t appears that the Supreme Court resolved not to hold another federal tax to be unconstitutional.”⁹²

To pass constitutional muster, congressional taxes must clear five constitutional goalposts. Three of these goalposts are housed in the Taxing and Spending Clause⁹³ and its sister provision, Article I, Section 9.⁹⁴ Thus: (1) taxes must be levied for the “general welfare of the United States”;⁹⁵ (2) “duties, imposts and excises [must] be uniform throughout the United States”;⁹⁶ and (3) “no capitation, or other direct, tax shall be laid, unless in proportion to the census.”⁹⁷ In addition to those express constitutional limits, the Court has determined that taxes (4) must generate “some revenue”;⁹⁸ and (5) may not contravene any of the Constitution’s individual rights provisions.⁹⁹

92. Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 57 (1998). See also Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2344 (1997); Kleinbard, *supra* note 20, at 757 (“The only example that the Supreme Court has ever offered of a direct tax on persons is the simple capitation tax, because that tax alone is imposed ‘without regard to property, profession or any other circumstances.’”) (quoting *Hylton v. United States*, 3 U.S. 171, 175 (1796) (Chase, J.)).

This narrow view of direct taxes is consistent with the Court’s earliest understanding of direct versus indirect taxes. In 1796, in *Hylton*, the Court held that a tax on carriages did not violate the apportionment requirement, finding the tax to be an excise not a direct tax. *Hylton*, 3 U.S. at 175 (Chase, J.). En route, the Court declared that it was “obviously the intention of the Framers of the Constitution, that Congress should possess full power over every species of taxable property, except exports.” *Id.* at 176.

93. U.S. CONST. art. I, § 8, cl. 1. See also *supra* note 88.

94. *Id.* art. I, § 9. See also Kleinbard, *supra* note 20, at 756–59.

95. *Id.* art. I, § 8, cl. 1 (capitalization omitted) (the “General Welfare Clause”).

96. *Id.* (capitalization omitted) (the “Uniformity Clause”). These classes of taxes are “indirect taxes.” *Bromley v. McCaughn*, 280 U.S. 124, 138 (1929) (“imposts or excises . . . since they apply only to a limited exercise of property rights, have been deemed to be indirect”).

97. *Id.* art. I, § 9, cl. 4, *abrogated by id.* amend. XVI (capitalization omitted). See also *id.* art. I, § 2 (“Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers.” (capitalization omitted)). Irrelevant here, Article I, Section 9 also prohibits, with exception, taxes on state exports. *Id.* art. I, § 9, cl. 5 (“No tax or duty shall be laid on articles exported from any state” (capitalization omitted)).

98. *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937) (upholding the tax regardless of “the motives which moved Congress to impose it, or as to the extent to which it may operate to restrict the activities taxed” because it was “productive of some revenue”).

99. See, e.g., *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 784 (1994) (holding the tax unconstitutional as violative of the Double Jeopardy Clause, U.S. CONST. amend. V).

Additionally, during the *Lochner* era, the Court declared some congressional taxes unconstitutional as regulatory measures. See, e.g., *United States v. Butler*, 297 U.S. 1, 53, 68–78 (1936) (finding Agricultural Adjustment Act taxes unconstitutional local regulatory measures). However, these decisions were based on a now-deceased understanding of the Tenth Amendment. See *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974) (“It is true that the Court in those cases drew what it saw at the

2. The ACA's Pecuniary Burden Easily Meets These Constitutional Requirements

These goalposts are very wide, and the ACA's individual mandate easily clears each of them.

a. General Welfare Requirement

The first "general welfare" requirement has force only in the most extreme and wholly irrational misappropriations of congressional authority.¹⁰⁰ Courts must defer to Congress "unless the choice is clearly

time as distinctions between regulatory and revenue-raising taxes. But the Court has subsequently abandoned such distinctions."). Under current Tenth Amendment jurisprudence, "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144, 161 (1992) (internal quotations, citations, and alterations omitted).

In addition, when acting within its plenary power to tax, Congress *may* regulate. In fact, "[e]very tax is in some measure regulatory." *Sonzinsky*, 300 U.S. at 513. *Cf.* *In re Skelton Lead & Zinc Co.'s Gross Prod. Tax for 1919*, 197 P. 495, 498 (Okla. 1921), *overruled on other grounds by Apache Gas Prods. Corp. v. Okla. Tax Comm'n*, 509 P.2d 109 (Okla. 1973) ("the primary object and purpose of every statute which levies an occupation tax is to regulate the conduct of the business affected"). Given that Congress's enumerated taxation power is separate and distinct, this power to regulate holds true even where a "regulatory" tax would not be a legitimate exercise of any of Congress's other enumerated powers. *License Tax Cases*, 72 U.S. 462, 470–71 (1866) ("Over this [internal] commerce and trade Congress has no power of regulation nor any direct control. . . . [But] [t]he power to tax is not questioned. . . . The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax."). *See also* Brief of Service Employees International Union and Change to Win as Amici Curiae in Support of Defendants-Appellants and Reversal at 22, *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021-HH & 11-11067-HH), 2011 WL 2530494 [hereinafter SEIU Brief] (citing cases in which the Supreme Court upheld taxes that "were understood as beyond Congress' other enumerated powers"). And Congress's power to regulate by way of taxation is not altered by the tax's underlying motive; if the tax is within Congress's power to tax, it is constitutional. *Sonzinsky*, 300 U.S. at 513–14 ("Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts."). Thus, any remaining Tenth Amendment, anti-commandeering barriers are swiftly knocked down when Congress invokes its plenary taxation power.

Therefore, although the ACA challengers did, in fact, try to rehash the *Lochner*-era unconstitutional-regulation argument, the argument has no modern-day weight. *See* State Resp't's Mandate Brief, *supra* note 33, at 51 ("[The taxing-power] argument fails at the outset because . . . [t]he mandate is a distinct regulatory requirement that must be supported by a distinct regulatory authority."). As this Note argues, the mandate falls well within Congress's taxation power. And, moreover, Congress's more-than-rational response to an economic matter that threatens the federal government and the entire nation's fiscal health is surely not the proper venue to reawaken the long-slumbering Tenth Amendment.

100. Immediately after the Constitution's ratification, a dispute remained as to the nature of the "general welfare" requirement. Larry DeWitt, *The 1937 Supreme Court Rulings on the Social Security Act*, SOC. SEC. ADMIN. (1999), available at <http://www.ssa.gov/history/court.html>. On one side of the debate was James Madison's strict constructionist view, in which the government could only tax and spend for purposes specifically enumerated in the Constitution. *Id.* On the other side, Alexander

wrong, a display of arbitrary power, not an exercise of judgment.”¹⁰¹ While critics may question Congress’s wisdom in enacting the ACA and its individual mandate, it is beyond debate that it was Congress’s judgment that the legislation would directly address the nation’s fiscal and social welfare.¹⁰² “Whether the chosen means appear ‘bad,’ ‘unwise,’ or ‘unworkable’ . . . is irrelevant; Congress has concluded that the means are ‘necessary and proper’ to promote the general welfare.”¹⁰³

Hamilton expounded a doctrine of implied powers, in which “general welfare” was understood broadly. *Id.* However, not only has this dispute been long-settled in favor of the Hamiltonian view, but the “general welfare” understanding has been dramatically expanded to include taxing and spending toward ends not wholly illegitimate. *See Helvering v. Davis*, 301 U.S. 619, 640 (1937) (“It is now settled by decision. The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison.”) (citing *Butler*, 297 U.S. at 65).

101. *Davis*, 301 U.S. at 640. *See also* *South Dakota v. Dole*, 483 U.S. 203, 208 n.2 (1987) (“The level of deference to the congressional decision is such that the Court has more recently questioned whether ‘general welfare’ is a judicially enforceable restriction at all.”) (citing *Buckley v. Valeo*, 424 U.S. 1, 90–91 (1976) (per curiam)); *Buckley*, 424 U.S. at 90 (“Appellants’ ‘general welfare’ contention erroneously treats the General Welfare Clause as a limitation upon congressional power. It is rather a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause.”).

Davis pens the present “general welfare” analysis. 301 U.S. at 640–45. In *Davis*, the Supreme Court, found it “not doubtful” the Social Security Act was enacted for the “general welfare,” where the “hope behind [the] statute [was] to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey’s end is near.” *Id.* at 641. Moreover, the Court emphasized the flexibility of the “general welfare” concept: “Nor is the concept of the general welfare 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 908–09. The ACA’s fundamental aspiration was precisely the same: to save Americans from the “poor house” by achieving “near-universal” health insurance coverage. ACA, *supra* note 2, § 1501(a)(2)(D). *See also id.* § 1501(a)(2)(E) (“Half of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.”). The mandate is essential for the Act to achieve this “general welfare” aim. *See supra* note 54 and accompanying text. “The issue is a closed one.” *Davis*, 301 U.S. at 645.

102. *See supra* notes 55–57 and accompanying text, and note 101.

103. *Buckley*, 424 U.S. at 91. *See also Davis*, 301 U.S. at 644 (“Whether wisdom or unwisdom resides in the scheme of [the statute], it is not for us to say. The answer to such inquiries must come from Congress, not the courts.”). While congressional taxing power is particularly broad, all economic legislation is owed deference from the courts. *See* Brief of Constitutional Law and Economics Professors as Amici Curiae in Support of Petitioners (Minimum Coverage Provision) at 7, Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-398) (“The Supreme Court has ruled in a broad range of areas in constitutional law that economic legislation is presumed constitutional and that the courts are not to substitute their judgment on economic matters for that of the legislature.”).

b. Uniformity Requirement

The ACA tax also readily meets the second “uniformity” requirement. This requirement “is one of geographic uniformity only.”¹⁰⁴ Yet the Constitution “does not require Congress to devise a tax that falls equally or proportionately on each State.”¹⁰⁵ Rather, Congress may draw meaningful “distinctions between similar classes,”¹⁰⁶ so long as it does not exhibit “undue preference” for members of one class “at the expense of other” members of the same class.¹⁰⁷ Thus, although the ACA tax is a function of the cost of health insurance in the state where a taxpayer resides, the same calculation is uniformly applied nationwide, and therefore it is constitutionally “uniform.”¹⁰⁸ Any differences in rates reflect an attempt to make the tax “operate[] with the same force and effect in every place,” not to impose “undue preferences.”¹⁰⁹

c. Apportionment Requirement

As to the third “apportionment” requirement for “direct taxes,” the Supreme Court has very narrowly limited the definition of a “direct tax” and, thus, the need for apportionment.¹¹⁰ “Only three taxes are definitely

104. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* VOL. 1, 842 (3d ed. 2000) (“[The uniformity] requirement is one of geographic uniformity only; so long as the tax structure does not discriminate among the states, it does not matter that a tax may not be ‘uniform’ as it applies to particular individuals.”).

105. *United States v. Ptasynski*, 462 U.S. 74, 82 (1983).

106. *Id.* at 85 (holding that a tax exemption for oil produced in Alaska met the uniformity requirement because the geographic disuniformity reflected a “determination, based on neutral factors, that this oil required separate treatment”).

107. *Id.* at 86.

108. 26 U.S.C. § 5000A(e)(1)(B)(ii). *See also Ptasynski*, 462 U.S. at 82 (“It was settled fairly early that the Clause does not require Congress to devise a tax that falls equally or proportionately on each State. Rather, . . . a ‘tax is uniform when it operates with the same force and effect in every place where the subject of it is found.’” (quoting *Head Money Cases*, 112 U.S. 580, 594 (1884))); Professors’ Brief, *supra* note 19, at 5.

109. *Ptasynski*, 462 U.S. at 82, 86.

110. *See supra* notes 89–92 and accompanying text. For a history of the apportionment requirement, see Johnson, *supra* note 92, at 57.

As previously discussed, (1) the Sixteenth Amendment expressly exempted income taxes from the apportionment requirement, and (2) the Court has in no unclear terms, declared income taxes to be exempt from apportionment, apparently “resolv[ing] not to hold another federal tax to be unconstitutional.” Johnson, *supra* note 92, at 57. *See also supra* notes 89–92 and accompanying text. Nevertheless, private and State challengers audaciously asked the Court to reverse course and require apportionment. Private Resp’t’s Mandate Brief, *supra* note 33, at 65–67; State Resp’t’s Mandate Brief, *supra* note 33, at 62–63. Petitioners contended that the tax is a direct tax because it is not a tax on income, but “on an individual’s wealth, simply because the individual chooses to keep that wealth rather than spend it to purchase insurance.” State Resp’t’s Mandate Brief, *supra* note 33, at 62; Private Resp’t’s Mandate Brief, *supra* note 33, at 66 (“Rather, it would be levied . . . as a ‘tax’ on the retention

known to be direct: (1) a capitation tax,¹¹¹ (2) a tax upon real property, and (3) a tax upon personal property.”¹¹² And with fidelity to its earliest understanding, the Court has refused to extend the definition by construction.”¹¹³

Although the individual mandate falls far outside this narrow definition of a “direct tax,” it is also, in any event, categorically excluded from this requirement because it is an income tax. To wit, the Sixteenth Amendment explicitly relieved income taxes of any apportionment requirement.¹¹⁴

d. Revenue Requirement

The fourth requirement, “some revenue,” is met with flying colors: the ACA tax is expected to generate over four billion dollars per year.¹¹⁵ Since revenue raising defines taxes, in contradistinction to penalties,¹¹⁶ the four-

of one’s ‘general ownership of property,’ for not having used some of it to purchase insurance.”) (citing cases). But this line of reasoning mischaracterizes the nature of the tax, which is properly understood as an income tax. *See infra* Part IV.B.3. Neither of these two forms of taxes are direct taxes subject to apportionment. And let us not forget the guiding statutory-interpretation command that we are to interpret with an eye toward constitutionality. *Supra* notes 132–136 and accompanying text.

111. A capitation tax is a tax imposed directly on a person “without regard to property, profession or any other circumstances.” *Hylton v. United States*, 3 U.S. 171, 175 (1796) (Chase, J.).

112. *Murphy v. IRS*, 493 F.3d 170, 181 (D.C. Cir. 2007) (internal citation omitted).

113. *Hylton*, 3 U.S. at 178 (Chase, J.). *See also supra* note 92 and accompanying text.

The trend continues toward contraction of the “direct taxes” definition, not expansion. In the well-publicized *Murphy* case, the D.C. Circuit held that a damage award received for emotional distress—a tax imposed directly on the awardee “without regard to property, profession or any other circumstances”—was not, in fact, a direct tax on the awardee. *Hylton*, 3 U.S. at 175; Kleinbard, *supra* note 20, at 758. Rather, the tax was an indirect excise upon the “involuntary conversion of [human] capital,” or, alternatively, a transactional tax “laid upon the proceeds received when one vindicates a statutory right.” *Murphy*, 493 F.3d at 186.

For a concise history of the Direct Tax Clause, see Professors’ Brief, *supra* note 19, at 21–28.

114. *See supra* note 89.

115. CONG. BUDGET OFFICE, *supra* note 51. This estimate is for the 2017 to 2019 tax period, and excludes the vast majority of uninsured individuals who will be exempted from the penalty, as well as compliance and administrability losses. *Id.*

As discussed earlier, the very purpose of the mandate was to generate revenue. *See infra* notes 51–52 and accompanying text; Chemerinsky, *supra* note 17 (“Simply put, the federal health care law imposes a tax on those who do not purchase insurance to generate revenue that the federal government can use to address the significant cost of providing health care for taxpayers without adequate insurance.”). Thus, even though taxes may have other purposes, this tax was enacted for classic taxation purposes. *See Sonzinsky v. United States*, 300 U.S. 506, 513–14 (1937) (“Inquiry into the hidden motives which may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts.”).

116. *Dep’t of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779–80 (1994) (“Whereas fines, penalties, and forfeitures are readily characterized as sanctions, taxes are typically different because

billion-dollar-plus annual intake directly undercuts the ACA challengers' central argument that "the sanction for unlawfully failing to comply is a penalty, not a tax."¹¹⁷ The Supreme Court has already spoken to the contrary.¹¹⁸

e. Individual Rights Requirement

Finally, the ACA does not run afoul of the "individual rights" requirement. Unlike *Kurth Ranch*,¹¹⁹ in which the tax at issue was found to violate the Fifth Amendment's Double Jeopardy Clause,¹²⁰ this tax does not come near any areas protected by the Bill of Rights.

The ACA challengers couched their individual-rights argument in federalism terms, arguing that "[p]reserving our [g]overnment's federal structure is essential, not [to] protect the sovereignty of [the] States as abstract political entities, but for the protection of individuals."¹²¹ But, of critical note, the ACA challengers rendered this argument specifically with respect to Commerce Clause jurisprudence—that is, how far the federal government's Commerce Clause power can reach without invading states' police power, to the supposed detriment of individual liberty.¹²²

Whatever weight this argument may carry in the Commerce Clause context,¹²³ no force of logic can transport it to the taxing-power arena. First, wish as we may, there is simply no individual right to be free from a tax with which we disagree.¹²⁴ Second, the ACA opponents' animating

they are usually motivated by revenue-raising, rather than punitive, purposes."). *See also supra* note 165 and accompanying text.

117. Private Resp't's Mandate Brief, *supra* note 33, at 63–65; State Resp't's Mandate Brief, *supra* note 33, at 51.

118. *Supra* note 116.

119. *Kurth Ranch*, 511 U.S. at 784.

120. U.S. CONST. amend. V.

121. Private Resp't's Mandate Brief, *supra* note 33, at 12–14 (alterations in original) (internal quotation marks omitted) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

122. *Id.* at 11–14.

123. Commerce Clause jurisprudence is beyond the scope of this Note. For a thorough response to the ACA opponents' federalism challenge, see generally Brief of the States of Maryland et al. as Amici Curiae in Support of Petitioners, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 160230 [hereinafter *State Amicus Brief*].

124. *See, e.g., Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916) ("So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause.").

federalism concerns are entirely different in the taxing-power context. Regardless of the balance the Framers sought to strike between congressional commerce power and state police power, as outlined above, the Framers' unequivocal intention was to give the federal government a strong, plenary power to tax—cabined-in not by limitations of state sovereignty, but only by the few limitations presently discussed.¹²⁵

Because Congress's power to tax is so broad and limitations on that power so narrow, "the courts in the United States almost invariably affirm the [g]overnment's power to tax in the face of constitutional challenges."¹²⁶ The ACA tax, falling comfortably within the Constitution and the associated jurisprudence, presents no justification for reversing such Supreme Court precedent—precedent rooted in the earliest and most fundamental aims of the Constitution and Congress's "very extensive"¹²⁷ power to tax.

IV. THE PRACTICE: THE ACA MANDATE IS A TAX

Now that we have established that the mandate, labeled a "tax," would be well within Congress's constitutional taxing power, the question becomes whether the analysis must change given that the mandate is labeled a "penalty." This analysis explores "[t]he meaning of terms on the statute books . . . (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated."¹²⁸

Fortunately, the law here is clear: the constitutional analysis does not change based on labels; rather, the mandate remains constitutional so long as it functions as a tax.¹²⁹ And this function-first analysis does not change, even where the label has changed. Since it does function as a tax, as a

125. Moreover, as this Note will explore later, these federalism arguments have already had their day in court. The Court heard these very same federalism arguments when challengers sought to bring down the federal Social Security Act as overly intrusive. *Infra* notes 228–239 and accompanying text. The Court squarely rejected these arguments. *Id.*

126. Tracy A. Kaye & Stephen W. Mazza, *United States—National Report: Constitutional Limitations on the Legislative Power to Tax in the United States*, 15 MICH. ST. J. INT'L L. 481, 481 (2007). See also Kleinbard, *supra* note 20, at 758–59, n.22.

127. License Tax Cases, 72 U.S. 462, 471 (1866).

128. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (emphasis omitted).

129. See *infra* Part IV.B.1.

prudent statutory interpretation will make clear, the mandate—even re-labeled a “penalty”—remains well within Congress’s plenary taxation power.

A. GUIDING CANONS OF STATUTORY INTERPRETATION

The canons of statutory interpretation lay down the rules of the game for both Congress and the courts to follow. “What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”¹³⁰ In circular fashion, because “[t]he Court . . . presumes that Congress legislates with knowledge of our basic rules of statutory construction,” Congress so legislates.¹³¹ Accordingly, adhering to these rules is essential to a clear system of mutual respect among the branches.

1. Viewed as a Whole, the Court Must Construe the ACA as Constitutional

First, it is a nearly sacramental rule that federal statutes must be presumed constitutional.¹³² The weight of this rule resides in its federalism and democratic commitment; disregarding the presumption is tantamount to judicial overreach into the democratically elected legislature’s arena.¹³³ For example, Justice Ginsburg has warned that “[i]n urging invalidation of [the statute], [a plaintiff] swims against our case law’s current, which requires us, if we can, to construe, not condemn, Congress’ enactments.”¹³⁴

130. *Finley v. United States*, 490 U.S. 545, 556 (1989).

131. *KIM*, *supra* note 35, at 3 (internal quotations and citation omitted).

132. *See, e.g., United States v. Morrison*, 529 U.S. 598, 607 (2000) (acknowledging a “presumption of constitutionality” when determining the constitutionality of an act out of “[d]ue respect for the decisions of a coordinate branch of [g]overnment.”); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 477 (1957) (Frankfurter, J., dissenting) (“Therefore, before resting on an interpretation of [the statute] that would compel a declaration of unconstitutionality, we must . . . defer to the strong presumption . . . that Congress legislated in accordance with the Constitution.”).

133. *See* Constitutional Law Scholars’ Brief, *supra* note 68, at 5 (“Fidelity to that presumption—and respect for the elected Branches and the people they represent—requires that a provision falling within a grant of legislative power, including the tax power, be deemed an exercise of that power in the absence of clear evidence that Congress intended otherwise.”); Brief of Constitutional Law and Economics Professors as Amici Curiae in Support of Petitioners (Minimum Coverage Provision), *supra* note 103, at 7; *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-398) (“The Supreme Court has ruled in a broad range of areas in constitutional law that economic legislation is presumed constitutional and that the courts are not to substitute their judgment on economic matters for that of the legislature.”).

134. *Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010) (refusing to declare § 1346 (the honest-services statute) void for vagueness, and instead construing the statute in light of, *inter alia*, congressional intent and the rule of lenity).

As discussed above, in the taxing arena, Congress is entitled to a particularly strong presumption of validity. Such a presumption can only be overcome if there exists “clear evidence that Congress intended otherwise.”¹³⁵ Because Congress did, in fact, intend the ACA to operate as a constitutional tax—as evidenced by the form in which it drafted the ACA and its legislative history¹³⁶—the constitutional presumption must continue to operate in full force.

Moreover, this constitutional presumption implicates the key analytical framework when placed in a constitutional context with multiple plausible meanings of a statute. In this instance, the mandate is plausibly interpreted as either (1) a “penalty” or (2) a “tax.” But in light of the mandate to construe a statute as constitutional wherever possible, the only relevant question is whether the pecuniary burden can be understood as a “tax” such that it falls within its constitutional taxing power, not whether it can also be understood as a “penalty.” If it can be construed as a constitutional tax, the court must so construe. Thus, we only ask: can the mandate’s “penalty” be understood as a tax?

Second, another well-established statutory-interpretation canon demands that a statute be interpreted to avoid an absurd result.¹³⁷ This both makes perfect sense and is critical to a smoothly functioning democracy. The messy politicking of factions and interest groups often produces a haphazardly conjoined compromise as legislation.¹³⁸ But regardless of any incongruences, the bill was enacted to solve a problem, to enhance society,

135. Constitutional Law Scholars’ Brief, *supra* note 68, at 5.

136. *See infra* Part IV.B–C.

137. EINER ELHAUGE, STATUTORY DEFAULT RULES 148 (2008). *See also* *Green v. Bock Laundry Mach. Co.*, 490 U.S. at 527 (Scalia, J., concurring) (“We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result. Our task is to give some alternative meaning to the word . . . that avoids this consequence.”).

138. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 27 (1994) (“To be enacted a statute must be acceptable to a range of public officials, political parties, and interest groups.”); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 64 (1988) (“[The laws] must run the gamut of the process—and process is the essence of legislation. That means committees, fighting for time on the floor, compromise because other members want some unrelated objective, passage, exposure to veto, and so on.”). *See also* Private Pet’rs’ Severability Brief, *supra* note 10, at 1 (“The Act reflects an intricate deal that emerged from one of the most hard-fought and narrowly decided legislative battles in recent memory.”); Cong. Brief, *supra* note 6, at 2 (“The Act is a landmark accomplishment of the national Legislature, which brings to fruition a decades-long effort to guarantee comprehensive, affordable, and secure health care insurance for all Americans.”).

and to further the public interest.¹³⁹ Thus, interpretations should, where possible, implement the act in accordance with and bring to fruition these aims.

Here, the problems Congress sought to solve and the public interests it sought to further are well-documented issues of the most pressing and far-reaching nature.¹⁴⁰ Invalidating the mandate would wreak havoc on our nation's budget, health, businesses, and social fabric,¹⁴¹ all while upheaving a monumental "legislative achievement" passed, at last, "[a]fter decades of failed attempts . . . and a year of bitter partisan combat."¹⁴² This would be an absurd result, indeed; such an absurdity cannot be borne out by a judiciary that, in this democratic and federalist system, must retain the highest fidelity to its coordinate branches and, above all, the welfare of its people.¹⁴³

Although this democratic-welfare point is nearing redundancy, its significance earns it one more moment of consideration. While courts may not remain solely beholden to the "best public result"—and, in fact, here courts must not seek to impose their own judgment of the "best result"¹⁴⁴—the fact that the ACA does extensively promote the people's welfare attests to its constitutionality. As Judge Davis of the Fourth Circuit notes:

Governments exist, most fundamentally, to solve collective action problems. Core governmental functions, like the provision of domestic peace, enforceable property rights, national defense, and infrastructure, are assigned to government because the market fails to produce optimal levels of such public goods. Since public goods are enjoyed by all, most individuals refuse to purchase them themselves, hoping instead that they can free-ride when someone else does. By forcibly collecting tax revenue and using it to purchase public goods, governments are able to solve this

139. See, e.g., Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538–39 (1947) ("Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in light of the other external manifestations of purpose. That is what the judge must seek and effectuate.").

140. See CONG. BUDGET OFFICE, *supra* note 55.

141. *Id.*

142. *Healthcare Reform*, N.Y. TIMES (Feb. 8, 2012), http://topics.nytimes.com/top/news/health/diseasesconditionsandhealthtopics/health_insurance_and_managed_care/health_care_reform/index.html.

143. E.g., THE FEDERALIST NO. 51 (James Madison) (arguing that protection of the people emanates from the "separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty").

144. See *supra* note 103 and accompanying text.

collective action problem. Thus, at root, governments are formed precisely to *compel purchases of public goods*.

Because hospitals are required to stabilize the uninsured, the uninsured are able to pass along much of the cost of their health care to the insured. Solving this problem, as the Act attempts to do, creates a public good: lower prices for health services for all citizens. Thus, the Act compels the purchase of a public good, just as the federal government does when it collects taxes and uses it to fund national defense.

Indeed, it is undisputed that Congress would have had the power under the Taxing and Spending Clause to raise taxes and use increased revenues to purchase and distribute health insurance for all. It seems quite odd that Congress's attempt to enhance individual freedom by allowing citizens to make their own purchase decisions would give rise to such bloated concerns about a federal power grab.¹⁴⁵

Indeed, “concerns about a . . . power grab” would be raised only if the judiciary were to upheave Congress's carefully deliberated and legitimate effort to perform its “most fundamental[]” role.

Third, another canon of statutory interpretation holds that statutes must be construed to avoid the abrogation of state sovereignty.¹⁴⁶ At first blush, this principle seems to weigh against the ACA's federal footsteps into an area in which the states have historically performed the bulk of the regulation.¹⁴⁷ But this blush quickly dissipates upon examination of law and fact.

As a matter of law, *Gregory* makes clear that state sovereignty is trampled on only when Congress brazenly reaches into an area that the Constitution fundamentally reserves to the states.¹⁴⁸ As a matter of fact,

145. *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 447 (4th Cir. 2011) (Davis, J., dissenting) (emphasis in original) (arguing that the AIA does not bar the suit and the ACA is a constitutional exercise of Congress's Commerce Clause power).

146. *See Gregory v. Ashcroft*, 501 U.S. 452, 469–70 (1991) (“we will not attribute to Congress an intent to intrude on state governmental functions”); *Gonzales v. Oregon*, 546 U.S. 243, 291–92 (2006) (discussing the requirement that Congress make a clear statement when it preempts state law or “intrudes upon an area traditionally reserved exclusively to the States”).

147. Although the ACA challengers' argument appears primarily as a claim of infringement on personal decision-making, the challengers premise the claim almost entirely on the appropriate balance of powers between the federal and state government. *See State Resp't's Mandate Brief*, *supra* note 33, at 28–29; *Private Resp't's Mandate Brief*, *supra* note 33, at 12–14; *supra* note 17 and accompanying text.

148. *Gregory v. Ashcroft*, 501 U.S. at 463–64 (1991) (assessing whether state-court judges are covered by the federal Age Discrimination in Employment Act, given that “the authority of the people of the States to determine the qualifications of their most important government officials . . . is an authority that lies at the heart of representative government . . . [and] is a power reserved to the States

regulating healthcare—particularly the ACA’s “national regulation of a \$2.5 trillion industry, much of it financed through ‘health insurance . . . sold by national or regional health insurance companies’”¹⁴⁹—is not such a state power.¹⁵⁰ As the states themselves put it in the clearest of terms:

For a host of practical and legal reasons, . . . the states, acting alone, cannot fully address the defects in our country’s healthcare system. . . . The healthcare reforms adopted in the Affordable Care Act do not represent an incursion on state sovereignty or an encroachment on state regulatory authority. On the contrary, . . . the Act’s “operation is not constraint, but the creation of a larger freedom, the states and the nation joining in cooperative endeavor to avert a common evil.”¹⁵¹

But even when Congress does act in an arena traditionally left to the states, it may “displace” state law if it is acting under its own constitutional authority.¹⁵² And traditional state exclusivity is often displaced. For example, as the size and complexity of the national economy has increased, so too has Congress’s nationwide regulation in every facet of the economy—regulation that often has pushed some prior state regulatory control to the side.

under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States guarantee[s] to every State in this Union a Republican Form of Government” (internal quotations omitted).

149. *Thomas More Law Center v. Obama*, 651 F.3d 529, 525 (2011) (Sutton, J., concurring) (quoting 42 U.S.C. § 18091(a)(2)(b)).

150. *See* State Amicus Brief *supra* note 123, at 29–36. The states, in making Commerce Clause arguments, demonstrate that healthcare is a nationwide problem under the auspices of the federal government, and cannot—constitutionally or practically—be left wholly to the states:

Uncompensated care in one state creates effects for multiple states, and so represents a problem that is not fully susceptible to state-by-state solutions. The impediments are practical ones and are rooted in the interconnectedness of the American economy. Today, if a state adopts a policy to reverse the rising number of people lacking access to basic health care, or to control the spiraling costs of health care, insurers who object to that policy can exit that state with relative ease, as could healthcare providers, individuals, and employers who wish to avoid the taxes, insurance expenses, or other burdens associated with the state’s policy. . . .

. . . . Beyond the impediments to effective state policymaking that flow from the interconnectedness of each state’s healthcare economy, many potential state solutions are foreclosed or preempted by federal law.

Id. at 20–21.

151. *Id.* at 26, 36 (quoting *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 587 (1937)).

152. *Cf. id.* at 5–7 (arguing that, as a matter of structural federalism, Congress’s plenary Commerce Clause power does, and should, extend into states’ intrastate-commerce authority).

Fourth, the question of where the appropriate state-federal balance resides can be reconciled by the “plain statement rule”¹⁵³—another well-established canon of interpretation. The “plain statement rule” holds that, when a statute can be interpreted to abridge rights traditionally left to individuals or states, a court “must be absolutely certain that Congress intended such an exercise.”¹⁵⁴ Here, there is no dispute: Congress plainly intended to enact a regulation of “national, commercial markets,”¹⁵⁵ and to “[c]omprehensive[ly] change . . . the [n]ation’s system of health insurance.”¹⁵⁶

2. The Mandate, in Particular, Must Be Construed as Constitutional

It is the mandate itself that must be construed. Namely, is the mandate’s pecuniary burden a “tax” or is it simply a regulatory “penalty”? In addition to adopting the discussed construction principles, the interpretation of the mandate specifically is dictated by the substance of the question—the taxing power. The next Subsection will demonstrate that, in taxing-power inquiries, statutes must be construed not by labels but by interpreting whether the statutory provision functions as a tax.¹⁵⁷ A proper statutory interpretation will make clear that the mandate indeed functions as a tax and, therefore, must be found constitutional.

B. THE MANDATE FUNCTIONS AS A TAX

The ACA’s “penalty” operates precisely as a tax (if an individual does not satisfy the minimum coverage) and a credit (if an individual satisfies the minimum coverage).¹⁵⁸ This Subsection will demonstrate that (1) in

153. *Id.* (“[C]onsider[ing] the limits that the state-federal balance places on Congress’ powers[,] . . . [a]pplication of the plain statement rule [governs].”).

154. *Id.*

155. Cong. Brief, *supra* note 6, at 3. *See, e.g.*, State Legislators’ Brief, *supra* note 58, at 26 (“Congress has the power to regulate the nearly 20 percent of the U.S. economy that is the health care industry, and, when faced with a national health care crisis in which millions are uninsured and cannot afford decent health care, is empowered to act to reform the health care industry. . . . Far from offending our Constitution’s careful balance of Federal-State power, the Act reflects our system of vibrant federalism and allows the federal and State governments to better protect their citizens and resources.”).

156. Private Pet’rs’ Severability Brief, *supra* note 9, at 2.

157. *See infra* Part IV.B.1.

158. Finding otherwise would entail rhetorical maneuvering detached from a substantive analysis of the mandate. *See* SEIU Brief, *supra* note 99, at 30 (“Any argument that Congress could have passed the minimum coverage provision as an increased income tax on all taxpayers, accompanied by a credit for those who purchase qualifying health insurance, but could not give individuals the direct choice of purchasing insurance or paying a tax, is meaningless formalism. Both methods afford the taxpayer the same choice with the same net tax effect.”) (citing *United States v. New York*, 315 U.S. 510, 517 (1942)).

taxing-power inquiries, the character of an exaction prevails over its label; (2) the mandate functions as a tax; and (3) specifically, it is an income tax.

1. Tax Character Trumps Labels

Congressional labels do not dictate what constitutes a “tax.” Whether the ACA’s “pecuniary burden”¹⁵⁹ is called a “penalty,” a “provision,” or a “congressional slap-on-the-wrist,” the only constitutionally relevant question for taxing-power purposes is whether the fine has the function of a tax.¹⁶⁰ Accordingly, numerous pecuniary burdens not labeled “taxes” nevertheless have been upheld as constitutional exercises of Congress’s taxing authority.¹⁶¹ This principle is not in dispute.¹⁶²

Moreover, this function-first principle animates every step of the interpretation. Thus, for example, debates about how to determine a statute’s plain meaning¹⁶³ are washed away; here, a “tax,” by definition, can include labeled “penalties.” The inquiry ends there.

159. *New York*, 315 U.S. at 515–16.

160. *See, e.g., Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (“In passing on the constitutionality of a tax law we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.” (internal quotations omitted)); *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (“magic words or labels” cannot “disable an otherwise constitutional levy.”). The Supreme Court has specifically articulated this to be true when deciding whether a provision is a “tax” or a “penalty.” *Helwig v. United States*, 188 U.S. 605, 613 (1903) (noting that “words do[] not change the nature and character of the enactment”).

161. Judge Wynn provided useful examples in his Fourth Circuit concurrence:

[T]he Supreme Court has characterized legislative acts as “taxes” without regard to the labels used by Congress. *See, e.g., United States v. Sotelo*, 436 U.S. 268, 275, 98 S. Ct. 1795, 56 L. Ed. 2d 275 (1978) (deeming an exaction labeled a “penalty” in the Internal Revenue Code a tax for bankruptcy purposes); *License Tax Cases*, 72 U.S. (5 Wall.) 462, 470–71, 18 L. Ed. 497 (1866) (sustaining under the taxing power a federal statute requiring the purchase of a license before engaging in certain businesses and stating that “the granting of a license . . . must be regarded as nothing more than a mere form of imposing a tax”).

Liberty Univ., Inc. v. Geithner, 671 F.3d 391, 416 (4th Cir. 2011) (Wynn, J., concurring).

162. *See generally* Private Resp’t’s Mandate Brief, *supra* note 33; State Resp’t’s Mandate Brief, *supra* note 33.

163. *Compare, e.g., NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 294 (7th Cir. 1992) (“We must determine what Congress meant *by what it enacted*, not what Senators and Representatives said, thought, wished, or hoped.”) (emphasis in original), with Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 398 (1942) (“The statute . . . was enacted to achieve a purpose The legislature that put the statute on the books had the constitutional right and power to set this purpose as a desirable one for the community, and the court or administrator has the undoubted duty to obey it. The translation involved is the act of discovering this purpose.”).

2. The Mandate Is Substantively a Tax

As a matter of statutory interpretation, the mandate functions as a tax. As with all statutory-interpretation exercises, we may begin with the ordinary definition of a “tax”:¹⁶⁴ “a charge, usually monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue. . . . [T]he term embraces all governmental impositions on the person, property, privileges, occupations, and enjoyment of the people, and includes duties, imposts, and excises.”¹⁶⁵ Here, the ACA’s provision is no close call: the penalty (1) is imposed by the government, (2) on either persons (who don’t insure), and (3) produces public revenue.¹⁶⁶

Moreover, as already established, the very definition of a tax may include levies labeled as “penalties.”¹⁶⁷ But in the instant case, “may” turns to “must”; Congress specifically declared in the statute that the “penalty” be construed as a tax for Tax Code purposes.¹⁶⁸ And when Congress has explicitly spoken in the statute, a court must listen.¹⁶⁹

Finally, a proper statutory interpretation must seek to give a provision the interpretation that enables it to address the “evils which gave rise to the statute and the aims which the proponents sought to achieve.”¹⁷⁰ In light of

164. *Smith v. United States*, 508 U.S. 223, 228 (1993) (“When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning”). *See also* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1557–58 (1998) (“All major theories of statutory interpretation consider the statutory text primary. . . . For any [theory of interpretation], there must be a compelling reason to derogate from the meaning the words would convey to an ordinary speaker or reader. . . . Text primacy ought not mean text fetishism, however, especially when the texts are normative, as they are with statutes.”). Eskridge further argued that all would agree that policy should inform the reading of text when the text could “literally apply to th[e] circumstances,” but “cannot reasonably apply, in light of the policy of the Rule [] or other important goals.” *Id.*

165. BLACK’S LAW DICTIONARY (9th ed., 2010).

166. *See supra* note 49.

167. *Supra* note 165.

168. 26 U.S.C. § 5000A(g)(1) (“The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68”); *id.* § 6671(a) (“Penalty assessed as tax.—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to “tax” imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.”).

169. *E.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself.” (internal quotations and emphasis omitted)).

170. *United States v. Carbone*, 327 U.S. 633, 637 (1946); *Holy Trinity Church v. United States*, 143 U.S. 457, 463 (1892) (“[A]nother guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it

Congress's unequivocal aim to reduce the budgetary impact of the mandatory-coverage provision and overall healthcare bill,¹⁷¹ the mandate should be construed as a tax designed "to yield public revenue"¹⁷² that will make expanding healthcare coverage a fiscally feasible endeavor.

3. Specifically, the Mandate Is an Income Tax

"On its face, section 5000A(b) functions as an income tax."¹⁷³ The "penalty" operates precisely like any other income tax. First, § 5000A(b) is codified in the Tax Code.¹⁷⁴ Second, the fine is reported on the individual's tax return and enforced by the IRS in identical fashion as other Tax Code exactions.¹⁷⁵ Thus, the fine is paid into general revenues along with any other income tax collected. Third, the ACA "penalty" has identical attributes to that of the ordinary income tax: the fine is levied only upon taxpayers who are otherwise required to file income tax returns; the amount collected is a percentage of household income as calculated for income-tax purposes;¹⁷⁶ a taxpayer's responsibility for family members depends on whether they are "dependents" under the Tax Code;¹⁷⁷ taxpayers filing jointly are also jointly liable for the penalty;¹⁷⁸ and low-income individuals are excluded entirely.¹⁷⁹ Finally, any penalties imposed for failure to comply are assessed solely as "traditional tax penalties."¹⁸⁰

existed, and as it was pressed upon the attention of the legislative body."); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 93 (2006) ("Even when clear contextual evidence of semantic usage exists, priority is accorded to (sufficiently powerful) contextual evidence of the policy considerations that apparently justified the statute.").

171. See, e.g., Private Pet'rs' Severability Brief, *supra* note 9, at 3–5 ("We all know that the present . . . health insurance system in our country is unsustainable. We simply cannot afford it. . . . The best action that we can take on behalf of America's family budgets and on behalf of the Federal budget is to pass health care reform." (quoting 156 Cong. Rec. H1891, 1896 (daily ed. Mar. 21, 2010))).

172. BLACK'S LAW DICTIONARY (9th ed., 2010).

173. Kleinbard, *supra* note 20, at 760.

174. See ACA, *supra* note 2, §§ 1501(b), 1502 (amending the Internal Revenue Code to include 26 U.S.C. §§ 5000A, 6055).

175. 26 U.S.C. § 5000A(b), (g).

176. *Id.* § 5000A(c). Amici have pointed to other instances of income-based exactions. See SEIU Brief, *supra* note 99, at 9 (citing *Jefferson Cnty. v. Acker*, 527 U.S. 423, 437–39 (1999), in which a state levy was deemed an income tax for purposes of the Buck Act because it was "levied on, with respect to, or measured by, net income, gross income, or gross receipts" (additional quotations omitted)).

177. 26 U.S.C. § 5000A(a), (b)(3).

178. *Id.* § 5000A(b)(3)(B).

179. *Id.* § 5000A(c)(2)(B).

180. Professors' Brief, *supra* note 19, at 19. See also 26 U.S.C. § 5000A(g). However, Congress, aware that the provision was a tax but wanting to insulate it from some of the penalties imposed for

C. THE ACA'S LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS UNDERSTOOD IT WAS EXERCISING ITS TAXING POWER

To say that the legislators did not know they were imposing a tax flies in the face of reality. In the Senate, for example, ACA opponent Senator Orrin Hatch declared: “Some may say this is simply a penalty for not doing what Uncle Sam wants you to do, but let us face it, it is nothing more than a new tax.”¹⁸¹ And in the House, ACA supporter Representative Henry Waxman stated: “The individual responsibility requirement requires individuals to pay a tax on their individual tax filings.”¹⁸²

At the outset, we must recognize the narrow role legislative history plays in statutory interpretation. As a general matter, Congress need not identify the constitutional basis upon which it acts.¹⁸³ And to re-emphasize, the constitutionally relevant determination in the taxing domain is whether the mandate functions as a tax. Thus, if “the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it.”¹⁸⁴

Nevertheless, congressional intent to impose a tax only strengthens the determination that the “penalty” must be construed to be a tax.¹⁸⁵ Here, the

noncompliance with other taxes, specifically spelled out that certain tax penalties—that is, criminal penalties as well as liens and levies—do not attach to the mandate. *See id.*

181. 155 Cong. Rec. S10877 (Oct. 29, 2009).

182. COMM. ON THE BUDGET, THE RECONCILIATION ACT OF 2010, H.R. Rep. No. 111-443 (2010). Representative Waxman was a ranking member on the House Committee on Energy and Commerce.

183. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) (“[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”).

184. *United States v. Doremus*, 249 U.S. 86, 93 (1919). *See also* *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 416 (4th Cir. 2011) (Wynn, J., concurring). *Cf. Ex parte McCardle*, 74 U.S. 506, 514 (1868) (“We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution.”).

185. It is well accepted that legislative history plays an important, if somewhat limited, role in determining a statute’s meaning. Various theories of statutory interpretation differ as to what and how big that role is, but the general consensus is that the legislative history can “resolv[e] textual ambiguities or [] avoid absurdities.” *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 65 (2004) (Stevens, J., concurring) (“[T]he Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress’s true intent.”). *But see* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) (“We do not inquire what the legislature meant; we ask only what the statute means.”).

Some have criticized the use of legislative history, arguing that determining actual legislative intent is a futile endeavor. *See, e.g.,* *ESKRIDGE, supra* note 138, at 16–25. For example, Eskridge cites problems of vote counting, strategic behavior, and aggregation. *Id.* at 19. Potentially more condemning,

legislative history bears direct witness to the legislators' intent to tax.¹⁸⁶ In both the Senate and House, the legislators (1) understood the penalty to be a "tax," and (2) acknowledged that, in imposing it, they were acting under their taxing-power authority.

First, in addition to the statements quoted at the outset of this Subsection, numerous legislators fill the congressional record with explicit acknowledgments that they were levying a tax.¹⁸⁷ Legislators who were fiercely against any new tax were quick to attack the ACA's imposition of a "tax."¹⁸⁸ Supporters, on the other hand, pointed to Congress's taxing power.¹⁸⁹ And because any individual legislator's silence as to whether the

"[a]ny theory of interpretation that formally treats the views of a legislative subgroup (a sponsor or committee) as presumptive or conclusive evidence of the views of the majority of the legislature is in tension with [A]rticle I, section 7 of the Constitution." *Id.*

But these criticisms only apply in "hard cases" where issues have been unanticipated by the majority coalition. *Id.* at 20. Legislative intent was elusive in *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979), where supporters of Title VII had not discussed the voluntary preferences at issue. And for a bill as hotly debated and high-profile as the ACA, no arguments of the "the legislators were not aware" variety can be raised: surely, all 2010 legislators were aware that the bill imposed a penalty on individuals by way of the Tax Code.

186. Chemerinsky, *supra* note 17 ("Besides, the legislative history is clear that members of Congress on both sides of the political aisle saw this as a tax and used the words 'tax' and 'penalty' interchangeably.").

187. Over the course of the litigation, parties have helped parse through the voluminous congressional record and have pointed to numerous statements acknowledging that the mandate imposes a tax. For example, the Service Employees International Union and Change to Win amici set forth the following instances of such acknowledgment:

156 Cong. Rec. H1917 (Mar. 21, 2010) (Rep. Kirk) ("Among the new taxes is a new 'Individual Mandate Tax' . . . of \$2,250 per household or 2 percent of household income."); 155 Cong. Rec. S12768 (Dec. 9, 2009) (Sen. Grassley) ("The . . . individual mandate penalty tax . . . is a tax. It can be called a penalty, but it is a tax."); 155 Cong. Rec. S11454 (Nov. 18, 2009) (Sen. McCain) ("Taxes on individuals who fail to maintain government-approved health insurance coverage will pay \$4 billion in new penalties . . ."); 155 Cong. Rec. H12576 (Nov. 6, 2009) (Rep. Franks) ("It would impose a 2.5 percent penalty tax on those who do not acquire healthcare insurance."); 155 Cong. Rec. S11143 (Nov. 5, 2009) (Sen. Johanns) (discussing "penalty tax on individuals without insurance"); 155 Cong. Rec. S10746 (Oct. 27, 2009) (Sen. Enzi) ("Most young people will probably do the math and decide . . . I can pay the \$750-a year tax penalty rather than pay \$5,000 a year more for health insurance."); 155 Cong. Rec. S8644 (Aug. 3, 2009) (Sen. Kyl) ("There would be a penalty if they refused to [buy health insurance] that would go directly to their income tax.").

SEIU Brief, *supra* note 99, at 14 n.6.

188. See, e.g., 156 Cong. Rec. S12768 (Dec. 9, 2009) (Sen. Grassley); Brief for Appellants at 54, *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health and Human Servs. (HHS)*, 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021 & 11-11067), 2011 WL 1461593.

189. See, e.g., 156 Cong. Rec. H1854, H1882 (Mar. 21, 2010) (Rep. Miller); *id.* at H1826 (Rep. Slaughter); 155 Cong. Rec. S13751, S13753 (Dec. 22, 2009) (Sen. Leahy); *id.* at S13558, S13581-82 (Dec. 20, 2009) (Sen. Baucus); Brief for Appellants at 54, *HHS*, 648 F.3d 1235 (Nos. 11-11021 & 11-11067), 2011 WL 1461593.

mandate was a “tax” is explainable by a desire to avoid uttering that politically charged word,¹⁹⁰ the fact that a multitude of key legislators described the pecuniary burden as a “tax” sufficiently shows that the legislature as a whole knew of the mandate’s tax character and voted to pass it as such.

Moreover, any remaining doubts as to Congress’s understanding of the mandate as a tax may be disposed of by the fact that various drafts of the ACA itself expressly used the term “tax.”¹⁹¹ Given that Congress only changed the label of this “tax” and never its substance, these early understandings of the mandate’s character accurately reflect Congress’s awareness of the character of the final, enacted mandate.

As to Congress’s taxing-power understanding, Congress expressly enacted the mandate under its plenary constitutional taxing power. For example, when the Senate explicitly weighed its “authority under Constitution to enact” the ACA, Senator Leahy, Chair of the Senate Committee on the Judiciary, provided that Congress was fully authorized by the Commerce Clause, the Necessary and Proper Clause, *and* the Taxing Clause.¹⁹² Other legislators similarly articulated a taxing-power authority for the ACA.¹⁹³ The full Senate agreed: it debated the authority issue, and

190. ESKRIDGE, *supra* note 138, at 20 (“If the issue is controversial, the agents are likely to suppress discussion in order to preserve the cohesion coalition.”).

191. In its Eleventh Circuit briefing, the Government detailed uses of the term “tax” in drafts of the ACA:

[T]he legislative history of the provision shows that Congress used terms like “excise tax” and “penalty” interchangeably. For example, at a time when the Senate bill used the term “excise tax,” the accompanying Senate Report described it as a “penalty . . . accounted for as an additional amount of Federal tax owed.” *Compare* S. 1796 (Oct. 19, 2009), *with* S. Rep. No. 111-89, at 52 (Oct. 19, 2009). Similarly, in the Act’s employer responsibility provision, Congress alternated among the terms “tax,” “assessable payment,” and “assessable penalty.” 26 U.S.C. § 4980H(b)(1), (2), (c)(2)(D), (d)(1).

See Brief for Appellants at 53, *HHS*, 648 F.3d 1235 (Nos. 11-11021 & 11-11067), 2011 WL 1461593.

Note that, while the term quoted here is “excise tax,” excise and income taxes are distinct only in conceptualization, not in any constitutionally significant manner. Excise taxes, like income taxes, are indirect taxes free from any apportionment requirement. U.S. CONST. art. I, § 9, cl. 4. So akin are these taxes that some circuits have declared that an income tax *is* an excise tax. *See* *White Packing Co. v. Robertson*, 89 F.2d 775, 779 (4th Cir. 1937) (“The [windfall] tax is, of course, an excise tax, as are all taxes on income.”); *United States v. Gaumer*, 972 F.2d 723, 725 (6th Cir. 1992) (“*Brushaber* and the Congressional Record excerpt do indeed state that for constitutional purposes, the income tax is an excise tax.”). Regardless, the key point here is that Congress viewed the mandate as a tax.

192. 155 Cong. Rec. S13751 (daily ed. Dec. 22, 2009). *See also* Cong. Brief., *supra* note 6, at 6 n.2.

193. *See, e.g.*, 156 Cong. Rec. H1854, H1882 (Mar. 21, 2010) (Rep. Miller); *id.* at H1826 (Mar. 21, 2010) (Rep. Slaughter); 155 Cong. Rec. S13751, S13753 (Dec. 22, 2009) (Sen. Leahy); *id.* at

voted first that the ACA was constitutionally authorized by these enumerated powers,¹⁹⁴ and, second, that it properly struck the federal-state balance embodied in the Tenth Amendment.¹⁹⁵

D. CONGRESS DID NOT AND CANNOT SUBSEQUENTLY DISAVOW ITS
TAXING POWER

Congress drafted what it understood to be a tax and what functioned as a tax; it did not and cannot then disavow reliance on its taxing power. As explored in Section IV, Congress changed the word “tax” to “penalty” in the final bill for political purposes. This semantic change cannot remove the mandate from the taxing power’s ambit.

Yet the Eleventh Circuit ostensibly adopted the novel theory that (1) Congress could disavow its taxing power when imposing an exaction, and (2) a court must thereafter find the exaction removed from the constitutional sphere.¹⁹⁶ Relying on the fact that Congress changed the word “tax” to “penalty” for the final ACA bill, the Eleventh Circuit concluded that the legislators did not intend to impose a tax and, as a result, the mandate was not a tax.¹⁹⁷

This disavowal theory fails on both grounds. As an initial matter, only a faulty syllogism would allow one to conclude that Congress’s word swap was an express repudiation of its taxing power as a basis for the exaction. On the one hand, this semantics-only alteration suggests that Congress still understood it was imposing a tax: Congress did nothing to change the form

S13558, S13581–82 (Dec. 20, 2009) (Sen. Baucus); Brief for Appellants at 54, *HHS*, 648 F.3d 1235 (Nos. 11-11021 & 11-11067), 2011 WL 1461593.

194. Although the present tax comes within Congress’s enumerated powers, Congress may also act within its implied powers. In either case, congressional grants are, indeed, *grants* of power, not restrictions upon its constitutional powers. See ANGELA RODDEY HOLDER & JOHN THOMAS RODDEY HOLDER, *THE MEANING OF THE CONSTITUTION* 5–7 (3d. ed. 1997) (explaining that *McCulloch v. Maryland*, 17 U.S. 316 (1819), “g[ave] the federal government the right to expand its power to meet the challenge of changing times,” and crediting this approach as “responsible for the fact that our Constitution has survived our evolution from a small rural nation to an industrial, urban one.”).

195. See 155 Cong. Rec. S13830–31 (daily ed. Dec. 23, 2009) (vote upholding the ACA as within Congress’s enumerated powers); 155 Cong. Rec. S13832 (daily ed. Dec. 23, 2009) (vote upholding the ACA as consistent with the Tenth Amendment); COMM. ON THE BUDGET, *THE RECONCILIATION ACT OF 2010*, H.R. Rep. No. 111-443, at 265 (2010); Cong. Brief, *supra* note 6, at 6 n.2.

196. *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d 1235, 1315–20 (2011).

197. See *id.* at 1317 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded *in favor of other language*.” (quotation marks omitted))).

or function of the exaction it understood to be a tax from the very outset, it merely re-labeled that tax for political purposes.¹⁹⁸ More importantly, eliminating the word “tax” says nothing of Congress’s exercise of its taxing power. Recall that an exaction does not need to be labeled as a “tax” to be grounded in taxing-power authority.¹⁹⁹ And no amount of sophistry can explain why Congress would disclaim its constitutional authority to enact its very own piece of legislation.

But even if Congress did intend to disavow its imposition of a tax or its taxing-power authority, it would not matter. “[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”²⁰⁰ Rather, courts objectively assess the character of the exaction imposed and simply ask, “is this exaction a legitimate exercise of Congress’s taxing authority?” Because the mandate is, the court’s work is done.

E. ANALOGOUS CONGRESSIONAL EXACTIONS CONFIRM THAT THE MANDATE IS A CONSTITUTIONAL EXERCISE OF CONGRESS’S TAXING POWER

Such a use of congressional taxing power is not unprecedented: the Supreme Court has expressly declared strikingly analogous legislative acts to be constitutional. The Court must not now defy this well-established precedent. Precedent is, of course, absolutely fundamental to constitutional fidelity. “Throughout American history, in interpreting the Constitution, the justices have looked to the text, the Constitution’s structure, its goals, *judicial precedent*, historical practices and traditions, and contemporary needs and value.”²⁰¹ Here, a brief review of compelling—and still

198. *See supra* Part IV.

199. *See supra* Part IV.B.1.

200. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

201. AM. CONSTITUTION SOC’Y FOR LAW & POLICY, Transcript, Panel Discussion: “Constitutional Fidelity over Time,” (Oct. 6–7, 2006) <http://www.ruleoflawus.info/Constitutional%20Interpretation/Constitutional%20Fidelity%20Over%20Time.pdf> (Erwin Chemerinsky) (emphasis added). In addition, precedent may play a particularly important role in constitutional interpretation in the face of a federalism challenge—which, indeed, was at the heart of the ACA opponents’ attack. That is, because “[t]he Constitution is vague on the specific contours of our federalism, and there is considerable evidence that the Founders left many details to be worked out over time[,] . . . courts legitimately can—and should—develop innovative doctrinal solutions to the problem of maintaining the federal balance, whether or not those doctrines can be grounded directly in the text and history of the Constitution.” Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1736 (2005). But court-made doctrine can only serve the fundamental rule-of-law purposes of clarity, legitimacy, and predictability if courts do not oscillate year-to-year and issue-to-issue. *See id.* at

authoritative—precedent demonstrates that the 111th Congress’s taxing-power exercise in the ACA was well within long-authorized bounds.

As an initial matter, despite early, now-defunct restrictions on the “scope of government authority to respond to the nation’s needs,” there is now “no question that developing, enacting, and implementing such policies are an important and legitimate part of what government does.”²⁰² The Court and nearly all commentators have long since rejected any restrictions on this important governmental function, as grounded in “formal[ities] . . . that failed to correspond to the economic reality of the challenges Congress tried to address.”²⁰³ The Court should not suddenly return to such formalities—for example, rhetorical line-drawing between “penalties” and “taxes”—now decried as hallmark “error[s] of the Court’s [earlier] jurisprudence on the scope of federal power”²⁰⁴

More specifically, the Court has long upheld exactions not labeled “taxes” as coming within Congress’s plenary taxing power. In the 1867 *License Tax Cases*,²⁰⁵ the Court held that a “license”—an exaction on gambling and liquor businesses—was a constitutional tax.²⁰⁶ In so doing, the Court affirmed four key taxing-power principles. First, the Court explicitly held that substance of a congressional act trumps labels when determining whether that act comes within the taxing power.²⁰⁷ Second, the Court reiterated that the power to tax has an expansive nature.²⁰⁸ Third, the Court found this power to extend to matters that would not come within

1742 (“Doctrine in this sense is equivalent to precedent or stare decisis; it represents our unwillingness to reopen interpretive questions resolved in the past.”).

202. GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, *KEEPING FAITH WITH THE CONSTITUTION* (2009), available at <http://www.acslaw.org/publications/books/keeping-faith-with-the-constitution> (“Today, Americans do not think twice about the authority of government to respond to economic needs. Social Security, Medicare, collective bargaining and minimum wage laws, disaster assistance, regulation of the financial markets, and robust initiatives to stabilize the economy comprise large parts of the work we expect our federal and state governments to do. . . . It was not always so. Until 1937, two lines of judicial doctrine often prevented government from responding to pressing economic problems.”).

203. *Id.* at 70.

204. *Id.*

205. *License Tax Cases*, 72 U.S. 462, 471 (1866).

206. *Id.* (“The granting of a license . . . must be regarded as nothing more than a mere form of imposing a tax.”).

207. *Id.*

208. *Id.* at 470–71 (affirming that the taxing power “reaches every subject”).

Congress's other enumerated powers.²⁰⁹ And finally, the Court affirmed that Congress can use its taxing power to regulate.²¹⁰

In addition, the Court has, on numerous occasions, upheld Congress's ability to use its taxing power upon taxpayers for failing to make a particular economic arrangement. For example, Constitutional Law Scholars' amici point to: "26 U.S.C. § 4974 (tax on failure of retirement plans to make the minimum required distribution of assets); *id.* § 4980B (tax on failure of group health plan to extend a minimum coverage to qualifying beneficiary); *id.* § 4980E (tax on failure of employer to satisfy the required Archer MSA contributions)."²¹¹ Thus, any arguments that Congress may not tax the failure to purchase health insurance have already been rejected.

Yet most persuasive is the tale of the "constitutionally indistinguishable"²¹² 1935 federal Social Security Act ("SSA").²¹³ Like the ACA, opponents cried federalism "wolf"; unlike the ACA, there was no "indistinguishable" precedent.²¹⁴ Moreover, the ACA's reach is far less novel in substance: the federal government has long had its hands in healthcare, including both its funding and regulation.²¹⁵

209. SEIU Brief, *supra* note 99, at 22.

210. *Id.* at 12–13 (declaring the license at issue "unambiguously regulatory" because "legislatures generally use 'licenses' to regulate; and the 'license' requirement discouraged businesses that were widely considered to be immoral" (internal citations omitted)).

211. Constitutional Law Scholars' Brief, *supra* note 68, at 18 n.9.

212. SEIU Brief, *supra* note 99, at 25 ("From a constitutional perspective, the tax imposed by the minimum coverage provision is no different from the unemployment and old age insurance system Congress established through the Social Security Act.").

213. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (currently codified as amended at 42 U.S.C. §§ 301–1397jj (2006)).

214. DeWitt, *supra* note 100; *Social Security History*, SOC. SEC. ADMIN., <http://www.ssa.gov/history/court.html> (1999) (last visited April 10, 2013) ("This was a new untested area of federal authority The constitutional basis of the Social Security Act was uncertain. The basic problem is that under the "reserve clause" of the Constitution (the Tenth Amendment) powers not specifically granted to the federal government are reserved for the States or the people Obviously, the Constitution did not specifically mention the operation of a social insurance system as a power granted to the federal government! . . . Ultimately, the CES opted for the taxing power as the basis for the new program, and the Congress agreed, but how the courts would see this choice was very much an open question.").

215. *See, e.g.*, Brief for Appellants at 3, *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health and Human Servs. (HHS)*, 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021 & 11-11067), 2011 WL 1461593. ("Federal intervention in the nation's health care system is not new, as most federal appellate court judges who have ruled on the constitutionality of the ACA have recognized." (citing *Seven-Sky v. Holder*, 661 F.3d 1, 19 (D.C. Cir. 2011); *Liberty Univ., Inc. v. Geithner*, 671 F.3d 391, 438 (4th Cir. 2011) (Davis, J., dissenting); and *HHS*, 648 F.3d 1235, 1333–36 (11th Cir. 2011) (Marcus, J., dissenting in part); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 544 (6th Cir. 2011)). *See also* Brief for

The ACA was enacted to “tackle the central problems of our healthcare system—rising costs and the insecurity many Americans rightly feel about the lack of dependability of their insurance.”²¹⁶ The SSA, similarly, established insurance programs “heroic in scope”²¹⁷ “to address the financial insecurity stemming from economic retrenchment and old age.”²¹⁸ The SSA “la[id] two different types of tax, an ‘income tax on employees,’ and ‘an excise tax on employers.’”²¹⁹ Both taxes were “measured by wages” and were used to fund the “Federal Old-Age Benefits,”²²⁰ which would then “fund . . . workers’ retirement.”²²¹ The ACA, likewise, levies taxes measured by income in order to “generate revenue that the federal government can use to address the significant cost of providing health care for taxpayers who lack adequate insurance.”²²²

Not surprisingly, challenges were brought to the vast, controversial, and unprecedented SSA legislation. In 1936, the Supreme Court heard three constitutional challenges to the Act, and resolutely rejected all three.²²³ The Court held that (1) the income and excise taxes were valid exercises of Congress’s plenary tax-and-spend power, (2) the expansive federal program did not encroach upon state power or unconstitutionally

Appellants at 10, *HHS*, 648 F.3d 1235 (Nos. 11-11021 & 11-11067), 2011 WL 1461593 (“As these figures indicate, the federal government’s involvement in health care financing is pervasive. In 2009, federal spending on Medicare and Medicaid was around \$750 billion, with billions more funding other federal programs. These figures do not include the federal government’s longstanding use of tax incentives to finance health care costs.”) (citing CONG. BUDGET OFFICE, *THE LONG-TERM BUDGET OUTLOOK* (2010); CONG. BUDGET OFFICE, *KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS* (2008)).

216. 156 CONG. REC. S1931 (Mar. 24, 2010).

217. *Social Security History*, U.S. SOC. SEC. ADMIN., <http://www.ssa.gov/history/court.html> (last visited April 10, 2013).

218. SEIU Brief, *supra* note 99, at 26 (internal quotations omitted). *See also id.* at 29 (“The minimum coverage provision is, in substance and effect, indistinguishable from the conditional tax *Steward* upheld. Providing healthcare to the uninsured imposes an immense burden on the state and federal fiscs.”); DeWitt, *supra* note 100 (“The old-age insurance system introduced in the Social Security Act was designed, at a public policy level, to be a contributory social insurance program in which contributions were made by workers to what was called the ‘old age reserve account,’ with the clear idea that this account would then be the source of monies to fund the workers’ retirement.”).

219. *Helvering v. Davis*, 301 U.S. 619, 635 (1937).

220. *Id.* (citing 42 U.S.C. §§ 1001, 1004).

221. DeWitt, *supra* note 100.

222. Chemerinsky, *supra* note 17.

223. *Helvering*, 301 U.S. at 640 (challenging the old-age insurance program); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 583–93 (1937) (challenging the unemployment compensation program); *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 527 (1937) (challenging the unemployment compensation program).

coerce the states, and (3) Congress may use its taxing power to address national economic problems.²²⁴

First, the Court rejected the contention that the SSA taxes were not of the variety contemplated by the Constitution.²²⁵ The challengers posited that the payroll tax was unconstitutional because it was not specifically enumerated in the Constitution and did not fall within the ratification-era dictionary definitions of “tax.”²²⁶ The Court disagreed: “Congress may spend money in aid of the ‘general welfare[,]’ . . . [t]he discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.”²²⁷

Second, the SSA Court rejected the challengers’ argument that taxes were “an invasion of powers reserved by the Tenth Amendment to the states or to the people.”²²⁸ Nevertheless, the ACA opponents sought a second bite of the Tenth Amendment apple. For example, the States challenging the ACA declared, “When Congress withholds the entirety of a substantial federal grant from States that refuse to submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States, then a Tenth Amendment claim of the highest order lies.”²²⁹

But the Court’s prior reasoning rings no less true today. As the Court said with respect to the SSA:

The United States and the [states] are not alien governments. They coexist within the same territory. [An economic and social problem] within it is their common concern. [State and federal statutes] embody a cooperative legislative effort by state and national governments for carrying out a public purpose common to both, which neither could fully achieve without the

224. *Helvering*, 301 U.S. at 640–45; *Steward*, 301 U.S. at 583–93; *Carmichael*, 301 U.S. at 509–25.

225. *Id.* at 640.

226. *See DeWitt*, *supra* note 100.

227. *Helvering*, 301 U.S. at 640. *See also id.* at 638 (rejecting the claim that the tax was not an “excise as excises were understood when the Constitution was adopted,” as the circuit court has so found).

228. *Id.* at 638.

229. *See, e.g.*, *Petition for Writ of Certiorari, Florida ex rel. Att’y Gen. v. Dep’t of Health and Human Servs.*, at 19–20, 132 S. Ct. 604 (2011) (No. 11-400), 2011 WL 4500702 [hereinafter *States’ Pet.*] (“Accordingly, when Congress withholds the entirety of a substantial federal grant from States that refuse to submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States, then a Tenth Amendment claim of the highest order lies.” (internal quotations omitted)).

cooperation of the other. The Constitution does not prohibit such cooperation.²³⁰

In fact, this cooperation is precisely what the ACA enacts.²³¹ The States' amici could not have put it more appositely: "the Affordable Care Act, rather than displacing state authority, preserves state policymaking discretion in the implementation of healthcare reforms, building on a successful model of cooperative federalism."²³²

In a similar vein, in the SSA arena, the Court shot down the challengers' claim that "[t]he excise [was] . . . void as involving the coercion of the [s]tates in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government."²³³ Yet, again, the ACA opponents levied the coercion argument afresh: "[t]he Act is without precedent both in its coercive impositions on the States and in its effort to force individuals to engage in commerce so that the federal government may regulate them."²³⁴

But the SSA was "coercive" in the same way that the ACA is purportedly "coercive." The SSA, using payroll taxes, compelled participation in a "single-payer health-care system operated by the federal government itself"; the ACA, using income (or excise) taxes, "authorize[s] private insurers, regulated by federal statute, to administer the same system with the money raised by the tax."²³⁵ The two enactments could hardly be more analogous.

230. *Carmichael*, 301 U.S. at 526.

231. See State Amicus Brief, *supra* note 123, at 29–36.

232. See *id.* (alterations to capitalization). To read an eloquent demonstration of the cooperative federalism fashioned by ACA, see *id.*

233. *Charles C. Steward Mach Co. v. Davis*, 301 U.S. 548, 585 (1937). See also SEIU Brief, *supra* note 99, at 28–29 ("Steward rejected the argument that Congress' tax and credit system was a[n] . . . [impermissible] mandate on employers to make particular insurance contributions and on states to create particular programs.").

234. States' Pet., *supra* note 229, at 1.

235. Tribe, *supra* note 18 (emphasis in original). See also Cong. Brief, *supra* note 6, at 5 ("The provision is no more intrusive than Social Security or Medicare. The Social Security Act requires individuals to make payments to provide for their retirement. Medicare requires individuals to make payments to provide for their health coverage after they are 65 years of age or if they meet other criteria. The ACA requires individuals to obtain health coverage before they are 65. Under Medicare, individuals choose between privately insured plans or a government-administered plan. Under the ACA, individuals are given an option to choose among insurers in the private market. Neither Social Security nor Medicare nor the ACA is such a novel intrusion into liberty that judges would be justified in overriding the considered judgment of the elected branches that adopted those laws."); State Amicus Brief, *supra* note 123, at 30 n.5 (pointing out the "notable irony" of the ACA challengers' attempt to show a federalism breach where Congress used private markets, where *Davis* and *Steward* had already closed the door on the claim for such a breach when using public programs).

Yet here, too, the SSA Court has foreclosed the claim that this kind of federal program constitutes unconstitutional coercion.²³⁶ On what grounds? The SSA Court found no coercion because “[t]he purpose of [the federal government’s] intervention . . . [was] to safeguard its own treasury and as an incident to that protection to place the states upon a footing of equal opportunity.”²³⁷ The ACA, in purpose and practice, falls precisely within this rationale: the mandate seeks to reduce the federal government’s budget deficit,²³⁸ yet “[f]or a host of practical and legal reasons . . . the states, acting alone, cannot fully address the defects in our country’s healthcare system.”²³⁹

Thus, what is not “without precedent” is federal legislation in an economic arena shared by the states; what is “without precedent” is that such a federal role in addressing a national fiscal problem is unconstitutionally coercive.

Finally, the SSA cases upheld Congress’s constitutional power to address national economic problems by way of its taxing power. Specifically, the cases held “that Congress may use its taxing power to encourage activity, including the purchase of insurance.”²⁴⁰ This was so in the SSA context because:

The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it effectively. Congress, at least, had a basis for that belief. . . . Only a power that is national can serve the interests of all.

Whether wisdom or unwisdom resides in the scheme of benefits set forth in [the SSA], it is not for us to say. The answer to such inquiries must come from Congress, not the courts. . . . When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield.²⁴¹

It is undisputed that the American healthcare system is also a national crisis that cannot be solved by state and local governments.²⁴² It is similarly undisputable that Congress can impose a tax to solve this problem in light

236. *Steward*, 301 U.S. at 590–91.

237. *Id.*

238. *See, e.g.*, ACA § 1563(a)(1) (“Based on Congressional Budget Office (CBO) estimates, this Act will reduce the Federal deficit between 2010 and 2019.”).

239. State Amicus Brief, *supra* note 123, at 26.

240. SEIU Brief, *supra* note 99, at 29.

241. *Davis*, 301 U.S. at 644–45 (citing U.S. CONST., art. VI, para. 2).

242. *See supra* notes 149–51.

of the Court's unwaveringly expansive interpretation of the taxing power and, specifically, in light of the Court's clear statement in the SSA cases that Congress has the power to employ that taxing power to solve national economic problems.²⁴³

Thus, the Court's SSA decisions mandate the present outcome; here, a remarkably analogous healthcare scheme faces re-hashed and already-foreclosed attacks. As constitutional scholar Larry Tribe asserts:

The constitutionality of the Social Security System . . . would of course be a decisive precedent for the constitutionality of a system under which Congress creates a single-payer health-care system funded by a tax on everyone with incomes above a given threshold. . . . Shorn of the rhetorical flourish . . . and viewed in terms of the power of Congress to "lay and collect Taxes" . . . under Article I, including "taxes on incomes," as specified by the Sixteenth Amendment . . . [T]his is simply an objection to the *form* in which Congress has chosen to use the federal tax structure to encourage insurance coverage that it could have directly compelled just as it compels participation in Social Security and Medicare through payroll taxes that the Supreme Court upheld decades ago²⁴⁴

Form does not govern constitutionality,²⁴⁵ and decisive precedent cannot, under any jurisprudential theory, be patently ignored. To a court bound by precedent, the healthcare challenges present a strikingly easy case.

In sum, Congress enacted an exaction that functions as an income tax. That alone is sufficient and semantic changes cannot alter the constitutional taxing-power determination. The legislative history also reveals that Congress knew it was enacting a tax and exercising its taxing authority. To abrogate Congress's long-held, expansive power to tax would fundamentally undermine the federalism that was contemplated by the Framers²⁴⁶ and borne out consistently and prudentially in the years since,²⁴⁷

243. Chemerinsky, *supra* note 17 ("Simply put, the federal health care law imposes a tax on those who do not purchase insurance to generate revenue that the federal government can use to address the significant cost of providing health care for taxpayers without adequate insurance.").

244. Tribe, *supra* note 18 (emphasis in original).

245. See *supra* Part IV.B.1.

246. See *supra* notes 87–88.

247. See *infra* notes 89–92 and accompanying text and Part IV.E.

“seriously undermin[ing] Congress’s constitutional authority and its practical ability to address pressing national problems.”²⁴⁸

V. THE RATIONALE: POLITICS, POLITICS, POLITICS

Thus far we have established that: (1) Congress had the constitutional power to impose the penalty were it labeled a “tax”;²⁴⁹ (2) Congress intended to impose a tax;²⁵⁰ (3) the fact that it is not labeled a “tax” is irrelevant;²⁵¹ and (4) closely analogous legislative acts were upheld as constitutional.²⁵² One question remains: why, then, did Congress neglect to save us all of the fuss and just call the mandate a “tax” if that was precisely what they intended to impose?

Fortunately, the answer to this question is simple. For anyone who glanced at a newspaper, turned on a radio, or even sat through a late-night talk show in 2010, the hysteria surrounding this issue still rings fresh. Protesters flooded Capitol Hill, consumed with the politically charged rhetoric that swept the nation—for example, calling the bill “socialistic health care,” contending that the “advanced care planning consultations” provision established “death panels,” and targeting politicians with signs painted, “You lie!”²⁵³ Republicans called the “health care legislation . . . more frightening . . . than terrorists,”²⁵⁴ and, most saliently, were fiercely opposed to both a greater governmental role in healthcare and the imposition of any new taxes.²⁵⁵ Thus, call it pusillanimous cowardice or call it political wisdom, Congress knew that their constituents would be their own “death panel” were they to breathe the dreaded word “tax,” particularly in connection with the other dreaded word “healthcare.”

But if a “tax” is a political wolf, then a “penalty” would be that wolf in a sheep’s clothing: still by nature within Congress’s taxing power, but in political appearance, not a “tax.” Even the ACA opponents expressly

248. Cong. Brief, *supra* note 6, at 3.

249. *See supra* III.A.

250. *See supra* IV.C.

251. *See supra* IV.B, D.

252. *See supra* IV.E.

253. *See, e.g.*, David M. Herszenhorn, *On the Hill, Protesters Chant “Kill the Bill”*, N.Y. TIMES (Nov. 5, 2009), available at <http://prescriptions.blogs.nytimes.com/2009/11/05/on-the-hill-protesters-chant-kill-the-bill/>; Kate Snow, *Health Care “Death Panels” a Myth*, ABC NEWS (Aug. 10, 2009), available at <http://abcnews.go.com/Politics/story?id=8298267&page=1#.TzPIBONAAaDo>.

254. Herszenhorn, *supra* note 253.

255. *Id.*

acknowledge this political reality.²⁵⁶ Simply put, a “penalty” was the only politically palatable vehicle through which to enact the tax that the politicians deemed absolutely necessary for the entire bill’s functioning.²⁵⁷

This political reality thus folds back in to above-discussed questions of (1) labels versus character of taxes, and (2) the nature and scope of Congress’s taxing power.²⁵⁸ Because labels do not determine what constitutes a tax and because Congress’s power to tax is enormously “expansive,” rhetorical maneuvers serve nothing more than their political purposes; they do not change the constitutional inquiry. As we have shown, this constitutional inquiry dictates one permissible conclusion: the mandate, as a “tax” or “penalty,” is plainly constitutional.²⁵⁹

VI. CONCLUSION

As Albert Einstein famously said, “Everything should be made as simple as possible.”²⁶⁰ This maxim holds equal, if not greater, weight in the legal context. So, instead of all of the fuss, the mandate should clearly and resolutely be understood as a tax under time-honored principles of statutory construction and constitutional understanding. These principles specifically have borne out as pillars of taxing power and federalism jurisprudence, as well as foundations of effective, cooperative government action. The importance of properly applying these principles cannot be understated: the consequences of wrongly invalidating the mandate were potentially calamitous—as both jurisprudential and practical matters.

A. JURISPRUDENTIAL EFFECTS

Private and State challengers asked the Court to turn its taxing-power jurisprudence on its head. Precedent—viewed broadly through taxing power and federalism lenses and viewed narrowly in analogous contexts—declares that the present exercise of Congress’s taxing power is, in no novel way, constitutional. This precedent cannot be taken lightly: “The very concept of the rule of law underlying our own Constitution requires such

256. Private Pet’rs’ Severability Brief, *supra* note 10, at 6 (“Many legislators were concerned about imposing the onerous taxes that would be necessary to fund an expansion in health-insurance coverage.” (citing David M. Herszenhorn, *Democrats Are at Odds on Financing Health Care*, N.Y. TIMES (July 10, 2009), available at http://www.nytimes.com/2009/07/10/health/policy/10health.html?_r=0)).

257. *See supra* notes 54–57.

258. *See supra* Parts III.B.1, IV.B.1.

259. Kleinbard, *supra* note 20.

260. *See supra* note 1.

continuity over time that a respect for precedent is, by definition, indispensable.”²⁶¹

On rare occasion, the Court has deemed it necessary to overturn well-established precedent.²⁶² But such a departure is permissible only in the gravest instance when the prior doctrine has proved wholly intolerable under the Constitution.²⁶³ As a matter of principle and of practice, no such intolerability exists in the ACA. As to principle, ensuring healthcare for American citizens and seeking to shore up the financial welfare of the United States are quite the opposite of intolerable. Moreover, as demonstrated by the earlier discussion of analogous congressional acts held constitutional, similar exercises of congressional power have never been deemed intolerable.²⁶⁴ As to practice, non-partisan analysts confirm that the ACA will achieve these goals.²⁶⁵ And these estimates are not mere speculation: the five-year report of the akin Massachusetts healthcare plan concluded that the plan’s goal of “achiev[ing] nearly universal health insurance coverage” was, only five years in, “effectively achieved.”²⁶⁶

Thus, overturning the ACA would have reflected some new, greatly lowered bar for when precedent may be overruled. Such a reduction in the weight of precedent is wholly antithetical to the American judicial system.

261. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (internal citations omitted).

262. The Court has held that a rule may be overturned if:

[it] has proven to be intolerable simply in defying practical workability; . . . the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; . . . related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or . . . facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Id. at 854–55 (internal citations omitted).

263. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (reversing, in large part, *Plessy v. Ferguson*, 163 U.S. 537 (1896), which endorsed racial segregation); *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), which denied privacy rights to homosexuals).

264. *Supra* Part IV.E.

265. *E.g., ACA, supra* note 2, at § 1501(a)(2)(C) (adopting the non-partisan CBO’s finding that “[t]he requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services”).

266. ALAN G. RAYMOND, MASSACHUSETTS HEALTH REFORM: A FIVE-YEAR PROGRESS REPORT (2011), *available at* http://bluecrossfoundation.org/healthreform/~/_media/0ff9bf33e14e4e089335ad12e8deb77e.pdf (finding that an “estimated 98.1 percent of Massachusetts residents have health insurance coverage, including 99.8 percent of children,” and that “[e]xpanded coverage has been accompanied by improved access to care, especially among low-income adults, with significant increases in physician office visits and the use of preventive care, and in the percentage of adults with a usual source of care”).

B. GOVERNMENTAL EFFECTS

Moreover, overturning an act Congress enacted under careful cognizance of its constitutional powers would have raised serious separation-of-powers and institutional-capacity concerns.

First, invalidating the mandate would have disrupted years of unquestioned judicial practice: the Court simultaneously would have meddled in an area traditionally left to Congress, adopted formality over form, and eroded the power of Congress. This is no small concern. As Judge Sutton of the Sixth Circuit reminded, deferring to Congress's power in federalism challenges has been a fundamental practice of the Court since *McCulloch v. Maryland*.²⁶⁷ It bears restating that this deference is particularly strong in the taxing realm where "Congress zealously guards [its] prerogatives."²⁶⁸

Second, taking the rug out from under Congress would have called into question its ability to legislate for the "general welfare" of the nation:

[T]he legal theories advanced by the Act's challengers, if embraced by the courts, would seriously undermine Congress's constitutional authority and its practical ability to address pressing national problems. Congress regularly relies on its enumerated powers to protect American consumers and workers, keep families safe, and ensure civil rights. [The legislators] take seriously their oath to "support and defend the Constitution of the United States," and write in their constitutional role as Members of a coequal branch of government.²⁶⁹

It is nearly a truism that an increasingly complex society has required that the federal government play an increasing role.²⁷⁰ But in healthcare, the government's interest is even stronger: healing the nation's admittedly broken and costly healthcare system is, health and social considerations

267. *McCulloch v. Maryland*, 17 U.S. 316 (1819). *See also* *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 566 (6th Cir. 2011) (Sutton, J.) ("Any remaining doubt about rejecting this facial challenge is alleviated by the most enduring lesson of *McCulloch*, which remains an historical, not a doctrinal, one. No debate in the forty years after the country's birth stirred the people more than the conflict between the federalists and anti-federalists over the role of the [n]ational [g]overnment in relation to the States. And no issue was more bound up in that debate than the wisdom of creating a national bank. In upholding the constitutionality of a second national bank, not a foregone conclusion, the Supreme Court erred on the side of allowing the political branches to resolve the conflict.")

268. *Seven-Sky v. Holder*, 661 F.3d 1, 27 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("Under the Constitution, Congress possesses the power to tax and spend . . . Congress zealously guards those prerogatives.")

269. Cong. Brief, *supra* note 6, at 3.

270. *See, e.g.,* *HOLDER & HOLDER*, *supra* note 194, at 5–7.

aside, necessary to ensure the nation's fiscal health. No task could be more fundamental to the government's job.

C. HEALTHCARE EFFECTS

There is no question that America's healthcare system is broken. For example, the healthcare market is extremely distorted because hospitals, doctors, clinics, and healthcare systems are forced to pick up—and ultimately pass along to consumers and taxpayers—the tabs of the “tens of millions of uninsured residents [that] consume tens of billions of dollars' worth of health care each year.”²⁷¹ In 2008, this amounted to fifty-six billion dollars; an amount that American Hospital Association amici point out “exceeds the gross domestic product of some seventy percent of the world's nations.”²⁷² These “spiraling” costs are simply unsustainable.²⁷³

Costs aside, lack of insurance directly compromises Americans' health. “[U]ninsured Americans are more likely to see health care providers only sporadically and to delay before seeking treatment for illnesses. That leads to a greater incidence of chronic diseases such as diabetes and coronary artery disease, as well as poorer health outcomes for people suffering from those diseases.”²⁷⁴

The mandate and the ACA respond to this very serious national crisis.²⁷⁵ The mandate, specifically, seeks to remedy the adverse selection problem that would wholly thwart any attempts to achieve universal health coverage.²⁷⁶ The SSA cases have made it unmistakably clear that Congress *must* be able to respond to such national crises:

271. American Hospital Association Brief, *supra* note 58, at 6, 8, 11. *See also* 42 U.S.C. § 18091(a)(2)(F) (“The cost of providing uncompensated care to the uninsured was \$43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. This cost-shifting increases family premiums by on average over \$1,000 a year. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums.”).

272. *Id.* at 8.

273. *Id.* at 12.

274. *Id.* at 12, 20–21.

275. *E.g.*, 42 U.S.C. § 18091(a)(2)(F) (“By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums.”).

276. *Id.* § 18091(a)(2)(I) (“[I]f there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.”).

The purge of nation-wide calamity that began in 1929 has taught us many lessons. . . . Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. . . . But the ill is all one or at least not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.²⁷⁷

No less may Congress rescue Americans from unbearable healthcare costs and disease that otherwise awaits them.

The fuss must end: in respect to its coequal branch of government and its well-established precedent, the Court was unequivocally correct to declare the mandate plainly and clearly constitutional.

277. *Charles C. Steward Mach Co. v. Davis*, 301 U.S. 548, 641 (1937).