

ARTICLES

THE TAXING POWER OF THE FEDERAL GOVERNMENT AND THE GENERAL WELFARE: WHAT ARE THE LIMITS IN THE WAKE OF *NFIB* *V. SEBELIUS*?

Mark Klock

ISSN 0041-9915 (print) 1942-8405 (online) • DOI 10.5195/lawreview.2015.331
<http://lawreview.law.pitt.edu>



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Mark Klock*

ABSTRACT

The Affordable Care Act seeks to remedy the problem of information asymmetry in the health insurance market by mandating that everyone obtain health insurance or pay a penalty, and by requiring the States to expand Medicaid or lose existing federal funds. In *NFIB v. Sebelius*, Chief Justice Roberts held that Congress' power to regulate under the Commerce Clause could not justify the Individual Mandate to purchase insurance, but that the penalty could be construed as a tax and upheld under the taxing power. Chief Justice Roberts also held the Medicaid Expansion to be an unconstitutional use of spending power, but determined that the Medicaid Expansion could remain with the States having the option to keep existing funding and not expand or expand and take the incremental funding. Eight Justices disagreed with the Chief Justice on the Individual Mandate, and six Justices disagreed with the Chief Justice on the Medicaid Expansion. This creates a paradox in that a supermajority of the Court believes the case was

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wrongly decided on both main questions. More distressing is the scant analysis given in all of the opinions to the constitutional constraints on taxes.

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I. INTRODUCTION

In *NFIB v. Sebelius*,¹ Chief Justice Roberts held that the Patient Protection and Affordable Care Act of 2010 (popularly known as Obamacare and also referred to as the ACA)² could not withstand constitutional review under the Commerce Clause³ but could be upheld under the federal government's taxing power.⁴ Interestingly, the eight other justices strenuously disagreed with fifty percent of this holding.⁵ Justices Scalia, Thomas, Kennedy, and Alito agreed that the Commerce Clause does not permit the implementation of Obamacare but strongly dissented to Justice Roberts' use of the taxing power to uphold a main provision of the Act.⁶ On the other hand, Justices Ginsburg, Breyer, Sotomayor, and Kagan were happy to uphold the law under the taxing power but strongly dissented to Justice Roberts' holding regarding the Commerce Clause.⁷ This creates a paradox: If one views the result as correct; one must necessarily conclude that eight out of nine justices got the question wrong. However, if eight Justices disagreed with the Chief Justice, how can the Chief Justice be correct?

¹ 132 S. Ct. 2566 (2012).

² Patient Protection and Affordable Care Act of 2010, 26 U.S.C. § 5000A (2102); *see also* Stewart Jay, *On Slippery Constitutional Slopes and the Affordable Care Act*, 44 CONN. L. REV. 1133, 1192 (2012) (noting that there is now, "a new word in the American lexicon: Obamacare").

³ *NFIB*, 132 S. Ct. at 2591 ("The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to 'regulate Commerce.'").

⁴ *Id.* at 2601 ("The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax.").

⁵ *See id.* at 2615 (Ginsburg, Sotomayor, Breyer & Kagan, JJ., dissenting in part) (arguing that the ACA should survive under the Commerce Clause); *id.* at 2655 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[T]o say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it.").

⁶ *See id.* at 2655 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.").

⁷ *See id.* at 2629 (Ginsburg, Sotomayor, Breyer & Kagan, JJ., dissenting in part) (writing with respect to the Chief Justice's holding that the ACA is within Congress' taxing power, "I concur in that determination, which makes The Chief Justice's Commerce Clause essay all the more puzzling. Why should The Chief Justice strive so mightily to hem in Congress' capacity to meet the new problems arising constantly in our ever developing modern economy?").

NFIB actually involved two major questions.⁸ The first involved the individual mandate to purchase health insurance as just summarized.⁹ The second question involved the Act's expansion of Medicaid.¹⁰ The Chief Justice held that this provision of the Act would strip states of all Medicaid funding if they did not expand coverage was void, but incremental funding could be withheld for states that did not expand coverage.¹¹ Again, there were strong dissents from both sides. The four conservative justices argued in favor of striking down the entire Medicaid expansion as a coercive use of federal force to compel state action,¹² and two of the liberal justices argued that the entire expansion should be upheld as written.¹³ Again, we have a paradox, as a supermajority of the justices arrived at an answer different from the Chief Justice's holding.

Obamacare is a creative attempt to resolve the well known problem of adverse selection in health insurance markets.¹⁴ Economists, who agree on very little, will

⁸ *See id.* at 2577 (majority opinion) ("Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010. . . .").

⁹ *See id.* ("[T]he individual mandate . . . requires individuals to purchase a health insurance policy providing a minimum level of coverage. . . .").

¹⁰ *See id.* ("[T]he Medicaid expansion . . . gives funds to the States on the condition that they provide specified [healthcare] to all citizens whose income falls below a certain threshold.").

¹¹ *See id.* at 2608 ("The remedy for that constitutional violation [threatening existing Medicaid funding] is to preclude the Federal Government from imposing such a sanction.").

¹² *See id.* at 2662 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("In this case, however, there can be no doubt [that the legislation crosses the line of unconstitutional coercion]. . . . If the anticoercion rule does not apply in this case, then there is no such rule."); *see also id.* at 2666 ("The Medicaid Expansion therefore exceeds Congress' spending power and cannot be implemented.").

¹³ *See id.* at 2609 (Ginsburg & Sotomayor, JJ., dissenting in part) ("I agree with the Chief Justice . . . that the minimum coverage provision is a proper exercise of Congress' taxing power. . . . I would also hold that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it.").

¹⁴ *See* Amy B. Monahan & Daniel Schwarcz, *Saving Small-Employer Health Insurance*, 98 IOWA L. REV. 1935, 1944 (2013). The authors explain:

Although individual health insurance markets vary significantly by state, most suffer from significant adverse selection, meaning that the population that buys coverage has a higher risk level than the population as a whole. Such adverse selection not only increases premiums, it also leads insurers to engage in various risk-management techniques that limit coverage or increase costs for individuals with poor health histories. These techniques, which include excluding coverage for pre-existing conditions and rescinding coverage for innocent misrepresentations when an individual becomes high risk, also ultimately harm healthy individuals who find coverage unavailable

generally agree that this is a good idea.¹⁵ But not all good ideas are legal.¹⁶ It might be a good idea to put jaywalkers in a pillory for a day as this would likely diminish pedestrian fatalities, but it is not legal under the Eighth Amendment.¹⁷ It might be a good idea to disarm the American people.¹⁸ This could be implemented with house-to-house searches removing all firearms. This would obviously be beyond the scope of the federal government's power under the Second Amendment,¹⁹ the Fourth Amendment,²⁰ and the Takings Clause of the Fifth Amendment.²¹

once it is needed. Group insurance coverage is thought to suffer from less adverse selection than the individual market.

Id. (internal footnotes omitted).

¹⁵ Cf. HAL R. VARIAN, INTERMEDIATE MICROECONOMICS 723 (8th ed. 2010), available at http://lms.unhas.ac.id/claroline/backends/download.php?url=L01pY3JvZWVbm9taWNzX0guVmFyaWFuXzIwMTAucGRm&cidReset=true&cidReq=136A113_004. Professor Varian instructs:

A similar problem [of adverse selection] arises with health insurance—insurance companies can't base their rates on the *average* incidence of health problems in the population. They can only base their rates on the average incidence of health problems in the group of potential purchasers. But the people who want to purchase health insurance the most are the ones who are likely to need it the most and thus the rates must reflect this disparity. In such a situation it is possible that everyone can be made better off by *requiring* the purchase of insurance that reflects the average risk in the population. The high-risk people are better off because they can purchase insurance at rates that are lower than the actual risk they face and the low-risk people can purchase insurance that is more favorable to them than the insurance offered if *only* high-risk people purchased.

Id.

¹⁶ See *NFIB*, 132 S. Ct. at 2650 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“[The Constitution] enumerates not federally soluble *problems*, but federally available *powers*. The Federal Government can address whatever problems it wants but can bring to their solution only those powers that the Constitution confers. . . .”).

¹⁷ See *Weems v. United States*, 217 U.S. 349, 390 (1908) (White, J., dissenting) (observing that the pillory is an illegal punishment).

¹⁸ See, e.g., Editorial, *Fenty, Firearms and the Future*, WASH. TIMES, May 10, 2007, at A14, available at <http://www.washingtontimes.com/news/2007/may/9/20070509-085430-7751r/> (quoting the mayor of Washington, D.C. as stating that the city's absolute gun ban is a “critical part of the District's crime-control strategy”).

¹⁹ See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (“[T]he District's ban on handgun possession in the home violates the Second Amendment.”).

²⁰ U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .”).

Nevertheless, it is logically a good idea based on President Obama's axiom that we must do whatever we can to save lives in the wake of the Newtown tragedy.²² Of course, the President did not really mean that we must do *whatever* we can; he only meant that we should do what he wants done if it could plausibly save a life. Therefore, we should pass more restrictive gun control.²³ But since he has not advocated for life imprisonment without parole for a first conviction of vehicular manslaughter while intoxicated and other potentially lifesaving policies, such as a federal speed limit of ten miles per hour on interstate highways, we cannot take his assertion to be a serious statement about his beliefs.

The federal government has limited powers under the Constitution.²⁴ Constraints necessarily impose costs.²⁵ One of the most obvious costs of constraints is that constraints prohibit the implementation of some good ideas.²⁶ Nevertheless, constraints are rationally put into place because the benefits of having constraints (limiting power) outweigh the costs of constraints (sometimes lacking the power to implement good policy).²⁷ If we are truly a government of law and not individuals,

²¹ U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

²² See Ewen MacAskill & Ed Pilkington, *NRA Promises ‘Fight of the Century’ over Obama’s Bold Gun Control Plan*, THE GUARDIAN (Jan. 17, 2013, 3:34 AM), <http://www.theguardian.com/world/2013/jan/16/obama-gun-control-plan-nra> (quoting President Obama, “If there is even one thing we can do to reduce this violence, if even one life can be saved, we have an obligation to try.”).

²³ See David Sherfinski, *Gun-Control Issue Hits Boiling Point; President Pledges to Act*, WASH. TIMES, Dec. 17, 2012, at A1, available at <http://www.washingtontimes.com/news/2012/dec/16/gun-control-advocates-press-help-obama> (reporting on President Obama’s initiative for more gun control).

²⁴ See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

²⁵ See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 337–38 (1976), available at <http://www.science-direct.com/science/article/pii/0304405X7690026X> (discussing the non-trivial costs of constraints in the context of bond constraints).

²⁶ See, e.g., RICHARD A. BREALEY ET AL., PRINCIPLES OF CORPORATE FINANCE 456 (10th ed. 2011), available at <http://kanellopoulos.files.wordpress.com/2012/08/principles-of-corporate-finance-10th-edition.pdf> (describing how debt covenants impose constraints to protect investors which also impose costs by shutting off some good investment opportunities for the firm).

²⁷ See, e.g., IVO WELCH, CORPORATE FINANCE 899 (8th ed. 2009). Professor Welch explains:

It would be impractical to protect capital providers *perfectly*, because the cost of preventing all managerial opportunism would be prohibitive. It would not maximize firm value if the firm spent \$10 in audits to prevent \$1 in fraud. Thus, by necessity, corporations and capital providers must live with **second-**

the constraints must be binding.²⁸ The holding in *NFIB* raises serious questions as to whether there are any binding constraints on the taxing power of the federal government.²⁹ If the government can tax people for what they do not purchase, can it tax people for not getting married or getting married, or having children or not having children? Can the government use the taxing power to merely take wealth from the affluent and confer wealth on the middle class to maintain popularity with a majority of the electorate?³⁰

In this article I will discuss the economic merits of Obamacare, the Supreme Court's majority and dissenting opinions, uncomfortable questions about requiring the provision of care for those who are uninsured and cannot pay, and some very uncomfortable questions regarding the limits or lack of limits on the federal government's power to levy taxes on income. *NFIB* seems to imply that Congress can tax people for anything they buy or anything they do not buy for any whimsical reason whatsoever.³¹ A serious discussion of the limits of the Sixteenth Amendment to the Constitution is long overdue.³²

best outcomes, in which there is a constant tension between investor protection and managerial self-enrichment.

Id. (emphasis in original).

²⁸ See, e.g., Nimer Sultany, *The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification*, 47 HARV. C.R.–C.L. L. REV. 371, 438 (2012) (discussing the idea that “government by laws, not government by men” is founded on the concept of binding limits on governmental powers).

²⁹ See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2655 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“[W]e must observe that rewriting § 5000A as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. . . . [This] is a question of first impression that deserves more thoughtful consideration. . . .”).

³⁰ See Mark Klock, *The Virtue of Home Ownership and the Vice of Poorly Secured Lending: The Great Financial Crisis of 2008 as an Unintended Consequence of Warm-Hearted and Bone-Headed Ideas*, 45 ARIZ. ST. L.J. 135, 178 (2013). The observation is made that:

For a majority of the population to appropriate an extraordinarily disproportionate fraction of income from a minority of the population to give to themselves is a form of legalized theft. . . . The continuous pressure on the politicians to provide more and more “free” goods such as healthcare, housing, food, and education results in pressure to appropriate increasingly larger sums from the minority.

Id.

³¹ See *NFIB*, 132 S. Ct. at 2648 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). The conservative Justices write:

II. THE ECONOMICS OF HEALTH INSURANCE

A. Adverse Selection

Economists are interested in the allocation of scarce resources.³³ When resources are limited, choices must be made.³⁴ Economists have shown that under certain conditions, competitive free markets will lead to a socially optimal allocation of resources in which resources are put to their highest valued use and no resources are wasted.³⁵ One very important condition for this conclusion is that there is no information asymmetry in the market.³⁶

Several famous economists spent a large portion of their careers studying information asymmetry.³⁷ Nobel Laureate George Akerlof received fame for his use of the market for used cars as a pedagogical innovation to expose the problem

[T]o say that the failure to grow wheat or the refusal to make loans affects commerce, so that growing and lending can be federally compelled, is to extend federal power to virtually everything. All of us consume food, and when we do so the Federal Government can prescribe what its quality must be and even how much we must pay. But the mere fact that we all consume food and are thus, sooner or later, participants in the “market” for food, does not empower the Government to say when and what we will buy. That is essentially what this Act seeks to do with respect to the purchase of [healthcare]. It exceeds federal power.

Id. The argument against regulating Americans for what they do not buy is also an argument against taxing Americans on what they do not buy.

³² Cf. Timothy Sandefur, *So It's a Tax, Now What?: Some of the Problems Remaining After NFIB v. Sebelius*, 17 TEX. REV. L & POL. 203, 216–220 (2013) (explaining that the Sixteenth Amendment only relieves income taxes from the apportionment requirement on direct taxes and that the individual mandate tax is not a tax on income nor an indirect tax, so concluding, “*In short, the PPACA either imposes a direct tax, which must be apportioned, or a tax that the Constitution does not authorize Congress to impose.*”) (emphasis added).

³³ See Mark Klock, *Are Wastefulness and Flamboyance Really Virtues? Use and Abuse of Economic Analysis*, 71 U. CIN. L. REV. 181, 187 (2002) (“One textbook definition of economics is the study of the allocation of scarce resources.”).

³⁴ See JOSEPH E. STIGLITZ, *PRINCIPLES OF MICROECONOMICS* 9 (2d ed. 1997) (“[C]hoices matter because resources are scarce.”).

³⁵ See VARIAN, *supra* note 15, at 719 (explaining that a competitive market is Pareto efficient).

³⁶ See Joseph E. Stiglitz, Nobel Prize Acceptance Speech: Information and the Change in the Paradigm in Economics (Dec. 8, 2001), 92 AM. ECON. REV. 460, 468 (2002) (“Under the imperfect information paradigm, markets are almost never Pareto efficient.”).

³⁷ See *id.*

of adverse selection.³⁸ In Akerlof's model, bad used cars are referred to as lemons.³⁹ Sellers know the quality of the used car they are selling.⁴⁰ Buyers do not know the quality of any individual car but do know the range of quality of cars being offered.⁴¹ Buyers are willing to pay a price based on the average quality of the cars offered for sale.⁴² Sometimes they will pay too much, sometimes too little, but on average, they will pay the right amount if there is no adverse selection.⁴³ However, sellers knowing the actual value of their car will offer it for sale if it is below average quality and withhold it if it is above average quality.⁴⁴ This has the effect of removing the better cars from the market and driving down the average quality of the cars offered for sale.⁴⁵ The cycle will continue until only the worst cars are sold.⁴⁶ The market fails to function in the sense that there are willing buyers and sellers at higher prices for goods of higher quality that do not trade.⁴⁷ In

³⁸ See George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970) ("The example of used cars captures the essence of the problem.").

³⁹ *Id.*

⁴⁰ See *id.* ("After owning a specific car, however, for a length of time, the car owner can form a good idea of the quality of this machine[;] . . . the sellers now have more knowledge about the quality of a car than the buyers.").

⁴¹ See *id.* (explaining that buyers cannot know whether a car is a lemon, but they know the probability that it is a lemon).

⁴² See *id.* ("But good cars and bad cars must still sell at the same price—since it is impossible for a buyer to tell the difference between a good car and a bad car.").

⁴³ See VARIAN, *supra* note 15, at 719 (explaining Akerlof's model).

⁴⁴ See *id.* ("But who would be willing to sell their car at that price? The owners of the lemons certainly would, but the owners of the plums wouldn't be willing to sell their cars. . . .").

⁴⁵ See Akerlof, *supra* note 38, at 489 ("For most cars traded will be the 'lemons,' and good cars may not be traded at all. The 'bad' cars tend to drive out the good. . . .").

⁴⁶ See *id.* at 490. Professor Akerlof explains:

It has been seen that the good cars may be driven out of the market by the lemons. But in a more continuous case with different grades of goods, even worse pathologies can exist. For it is quite possible to have the bad driving out the not-so-bad driving out the medium driving out the not-so-good driving out the good in such a sequence of events that no market exists at all.

Id.

⁴⁷ See *id.* at 491 (describing a scenario in which no trades occur in spite of the fact that there are sellers willing to sell at prices that some buyers are willing to pay).

this market, the very offering of a used car for sale is a signal that the car is a lemon and of poor quality.⁴⁸

Adverse selection is particularly acute in the health insurance industry.⁴⁹ Individuals know a great deal about their overall health, lifestyle, and genetics.⁵⁰ If an insurance company quotes a price for a particular coverage, individuals can calculate the value of the benefits they expect to receive against the cost of the coverage.⁵¹ Those individuals who conclude that they will pay more than they receive will choose not to purchase the coverage, and those who conclude that they will be likely to receive more in benefits than they will pay in premiums will rush to purchase the coverage.⁵² Hence, insurance companies are being set up to lose money.⁵³

B. Moral Hazard

Another manifestation of information asymmetry comes in what economists call moral hazard.⁵⁴ Moral hazard is the situation in which incentives to take reasonable care are reduced.⁵⁵ An insured individual has less incentive to take precautions that will reduce the cost of care and treatment because the individual will not incur the full cost of the care and treatment.⁵⁶ An insured individual is more likely to visit a doctor for a minor discomfort that could be treated over the

⁴⁸ See VARIAN, *supra* note 15, at 720.

⁴⁹ See Akerlof, *supra* note 38, at 492–94 (explaining the adverse selection problem inherent in insurance when more healthy and less healthy people cannot be distinguished).

⁵⁰ See ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 48–49 (6th ed. 2012) (explaining that it is reasonable to believe that the insured know more about their true risks than the insurance company).

⁵¹ See VARIAN, *supra* note 15, at 723 (explaining the situation when potential customers can calculate the value of the insurance payoff and purchase accordingly).

⁵² See FREDERIC S. MISHKIN & STANLEY G. EAKINS, *FINANCIAL MARKETS & INSTITUTIONS* 515 (7th ed. 2012) (“[T]he party more likely to suffer a loss is the party likely to seek insurance.”).

⁵³ See VARIAN, *supra* note 15, at 723 (“[T]he insurance company is likely to go broke quickly!”).

⁵⁴ See *id.* at 724–25 (calling moral hazard another interesting problem in the asymmetric information chapter and distinguishing adverse selection from moral hazard).

⁵⁵ *Id.*

⁵⁶ See COOTER & ULEN, *supra* note 50, at 48 (“*Moral hazard* arises when the behavior of the insured person or entity changes after the purchase of insurance so that the probability of loss or the size of the loss increases.”).

counter because the insurance company pays for the doctor's services.⁵⁷ An insured individual might be more likely to be overweight and develop diabetes because the insurance will pay for the treatment.⁵⁸

"In the insurance context, the moral hazard problem exists wherever the event against which insurance is taken out is at least partially within the control of the individual."⁵⁹ Kenneth Arrow, another economist Nobel laureate who studied the moral hazard problem intensively, wrote:

There is one particular case of the effect of differential information on the workings of the market economy (or indeed any complex economy) which is so important as to deserve special comment: one agent can observe the joint effects of the unknown state of the world and of decisions by another economic agent, but not the state or the decision separately. This case is known in the insurance literature as "moral hazard," but . . . insurance examples are only a small fraction of all the illustrations of this case and . . . the case will be referred to here as the "confounding of risks and decisions." An insurance company may easily observe that a fire has occurred but cannot, without special investigation, know whether the fire was due to causes exogenous to the insured or to decisions of his (arson, or at least carelessness). In general, any system which, in effect, insures against adverse final outcomes automatically reduces the incentives to good decision making.⁶⁰

In the specific context of medical insurance, Professor Arrow further stated:

In fact, it is not a mere empirical accident that not all the contingent markets needed for efficiency exist, but a necessary fact with deep implications for the workings and structure of economic institutions. . . . The very existence of

⁵⁷ See MISHKIN & EAKINS, *supra* note 52, at 516 ("[M]oral hazard plagues the insurance industry. Moral hazard occurs when the insured fails to take proper precautions to avoid losses because losses are covered by insurance.").

⁵⁸ See *id.* COOTER & ULEN, *supra* note 50, at 238 ("[I]nsurance inevitably undermines the insured's incentives for precaution.").

⁵⁹ Mark Klock, *Is It "The Will of the People" or a Broken Arrow? Collective Preferences, Out-of-the-Money Options, Bush v. Gore, and Arguments for Quashing Post-Balloting Litigation Absent Specific Allegations of Fraud*, 57 U. MIAMI L. REV. 1, 9 (2002).

⁶⁰ KENNETH J. ARROW, *General Economic Equilibrium: Purpose, Analytic Techniques, Collective Choice*, reprinted in 2 COLLECTED PAPERS OF KENNETH J. ARROW 143 (1983).

insurance will change individual behavior in the direction of less care in avoiding risks. The insurance policy that would be called for by an optimal allocation of risk bearing would only cover unavoidable risks and would distinguish their effects from those due to behavior of the individual. But in fact all the insurer can observe is a result, for example, a fire or the success or failure of a business, and he cannot decompose it into exogenous and endogenous components. Contingent contracts, to speak generally, can be written only on mutually observed events, not on aspects of the state of the world which may be known to one but not both of the parties.⁶¹

Explaining how paternalistic regulations can exacerbate underlying moral hazards, Professors Mitchell and Klick write that, “paternalistic interventions may exacerbate irrational tendencies by creating moral and cognitive hazards. Moral hazards arise because paternalistic regulations reduce an individual’s motivation to act deliberately and carefully, and motivation level mediates many psychological biases.”⁶² In other words, there is a second level of harm aside from reducing a rational incentive to actively take care—the moral hazard is exacerbated further because paternalistic regulations train and condition people to be lazy in the belief that the government will not let bad outcomes stand.⁶³ Drawing on their work, I previously explained:

In the terminology of economics, paternalism creates a moral hazard whereby incentives to behave appropriately are removed and subverted with incentives to behave inappropriately. The classic examples of this effect in the economics literature are in the insurance market, where insured individuals are less likely to use reasonable care or accurately report the cause of an insured loss. Conflicts of interest arise whenever incentives diverge. Conflicts of interest are particularly acute in the case of insurance contracts where an insured party would like to

⁶¹ *Id.* at 222.

⁶² Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1625–26 (2006).

⁶³ *See id.* at 1636 (“Ex post paternalism reduces the risk of thoughtless action, because the government will insulate the decision maker from the consequences of the thoughtless choice. Thus, ex post paternalism operates as a form of social insurance for irrational behavior.”).

collect a payoff and an insurance company would like to exclude a loss from coverage.⁶⁴

The reason that a lack of universal participation in the insurance market exacerbates the moral hazard problem is as follows. Insurance companies cannot stay in business if they do not break even.⁶⁵ Therefore, they must charge a premium, which covers the extra costs that will be created by moral hazard.⁶⁶ If people are not perfectly similar in the amount of care they exercise, people who are more careful will realize that the insurance companies are charging them a higher premium to cover the costs associated with people who are less careful.⁶⁷ These more careful people will be likely to rationally choose not to purchase insurance.⁶⁸ With only less careful people wanting to purchase insurance, the insurance premium will need to be higher, and the cycle continues until individual insurance policies become prohibitively expensive.⁶⁹ The mere act of buying insurance becomes a signal that the customer is an undesirable client.⁷⁰

Although the market for insurance does not fit the ideal world with symmetrical information, the pressure of the market to innovate in order to remain profitable and stay in business has resulted in a variety of tools to mitigate moral hazard and adverse selection problems.⁷¹ Insurance companies typically have

⁶⁴ Mark Klock, *Improving the Culture of Ethical Behavior in the Financial Sector: Time to Expressly Provide for Private Enforcement Against Aiders and Abettors of Securities Fraud*, 116 PENN ST. L. REV. 437, 477–78 (2011).

⁶⁵ See Mark Klock, *Price Discrimination and Unconscionability*, 69 TENN. L. REV. 317, 323 (2002) (“[F]irms earning negative profits cannot cover their fixed costs and will eventually go out of business.”).

⁶⁶ See COOTER & ULEN, *supra* note 50, at 48 (“[A] premium that has been set without regard for the increased probability of loss due to moral hazard will be too low and thus threaten the continued profitability of the firm.”).

⁶⁷ See MISHKIN & EAKINS, *supra* note 52, at 527–28 (providing an example of this in the discussion of risk-based premiums).

⁶⁸ See *id.* (making this point through the example).

⁶⁹ See Akerlof, *supra* note 38, at 492–93 (“[T]he average medical condition of insurance applicants deteriorates as the price level rises—with the result that no insurance sales may take place at any price.”).

⁷⁰ See MISHKIN & EAKINS, *supra* note 52, at 515 (“[T]he party more likely to suffer a loss is the party likely to seek insurance.”).

⁷¹ See *id.* at 527–29 (summarizing a variety of tools employed in the insurance industry to minimize adverse selection and moral hazard).

deductibles and copayments that require the insured to pay for some of their treatment at their own expense.⁷² Employers most frequently provide health insurance through group insurance policies.⁷³ Insurance companies can rely on the presumption that companies only hire currently healthy people.⁷⁴ Individual policies are prohibitively expensive with substantially limited benefits because they are selling to those with the greatest adverse selection problem.⁷⁵ Preexisting conditions are excluded from coverage.⁷⁶

An example of the problems with information asymmetry in the insurance market and the use of mitigating tools can be seen by considering dental insurance. Many healthy individuals will still want to have health insurance to cover against the risk of an unexpected and expensive stay in the hospital. However, dental insurance is widely regarded as optional.⁷⁷ Therefore, the asymmetric information problem is particularly acute with dental insurance.⁷⁸ Since most people do not purchase it, the ones who do are typically those with the most severe dental problems. Individuals know their short-term need for dental treatment and can easily calculate the benefits against the costs.⁷⁹ As a result, dental insurance policies have the highest co-pays (fifty percent) and low annual limits on benefits to limit those with the most severe dental problems from exploiting the insurance

⁷² See *id.* at 528–29 (explaining the effect of insurance deductibles).

⁷³ See Akerlof, *supra* note 38, at 493 (“Group insurance . . . is the most common form of medical insurance in the United States. . .”).

⁷⁴ See *id.* at 493–94 (“[G]enerally adequate health is a precondition for employment.”).

⁷⁵ See *id.* at 494 (“[T]his means that medical insurance is least available to those who need it most. . .”).

⁷⁶ See COOTER & ULEN, *supra* note 50, at 49 (“Exclusion of benefits for loss arising from preexisting conditions is another method trying to distinguish high- and low-risk people.”).

⁷⁷ Cf. Jacqueline Fox, *The Epidemic of Children’s Dental Diseases: Putting Teeth into the Law*, 11 YALE J. HEALTH POL’Y L. & ETHICS 223, 241 (2011) (“Private dental insurance policies . . . are less prevalent than health insurance, with only 73% of those with health insurance having dental coverage.”).

⁷⁸ Cf. *id.* (“There is a significant correlation between having dental insurance of some kind and an increased likelihood that a child will see a dentist in any given year.”).

⁷⁹ See Barbara Bloom & Robin A. Cohen, *Dental Insurance for Persons under Age 65 Years with Private Health Insurance: United States, 2008*, CTRS. FOR DISEASE CONTROL & PREVENTION at 1 (June 2010), <http://www.cdc.gov/nchs/data/databriefs/db40.pdf> (“Previous studies have shown that persons with private dental insurance have more dental visits in the previous year than persons without private dental insurance.”).

company (and consequently the other insured customers who would have to pay higher premiums to keep the insurance company from failing).⁸⁰

The economics behind the Affordable Care Act are reasonable but not overwhelmingly one-sided. The idea of requiring everyone to purchase health insurance eliminates the adverse selection problem but not the moral hazard problem.⁸¹ Having everyone covered by health insurance could easily exacerbate the obesity problem and other health problems that are at least partially a function of lifestyle and personal choices.⁸²

Proponents of the universal coverage mandate could make the argument that compelling individuals to contribute to health insurance is like compelling individuals to contribute toward the cost of national defense.⁸³ However, there is a difference: Everyone receives the benefit of a strong military, whether they want it or not.⁸⁴ However, uninsured individuals need not receive the benefit of insurance if they are denied services or required to pay from their own pocket.

III. THE *NFIB* OPINIONS

A. *The Anti-Injunction Act*

Before deciding on the constitutionality of Obamacare in *NFIB v. Sebelius*, the United States Supreme Court had to decide whether it had authority to hear the

⁸⁰ See Fox, *supra* note 77, at 242 (“For example, the most generous benefit provided to federal employees under the Aetna dental plan for 2010 has an in-network cap of \$3,000 a year per patient, with co-payments for any major dental work ranging from 40% to 60% of the cost for in-network providers.”).

⁸¹ See VARIAN, *supra* note 15, at 725–26 (explaining that adverse selection is a hidden information problem, that moral hazard is a hidden action problem, and government intervention cannot improve the market solution for hidden action problems if the government has no better ability to observe the actions of consumers).

⁸² Cf. Stephen B. Young, *Commentary: The Tao of Health Care*, ST. PAUL LEGAL LEDGER CAPITOL REP., July 17, 2013 (arguing that the best treatment for disease is individual responsibility and lifestyle changes).

⁸³ Cf. Akerlof, *supra* note 38, at 494 (stating that the argument for universal insurance is analogous to the argument for public spending for roads).

⁸⁴ See STIGLITZ, *supra* note 34, at 157 (“The standard example of a public good is defense. Once the United States is protected from attack, it costs nothing extra to protect each new baby from foreign invasion. Furthermore, it would be virtually impossible to exclude . . . this protection.”).

case.⁸⁵ One of the government's arguments in support of the law was that the individual mandate is a tax within Congress' power to lay and collect taxes.⁸⁶ The case before the Court originated in Florida, and the Eleventh Circuit held that the individual mandate was severable from the rest of the Affordable Care Act; that the individual mandate was not a tax; and that the individual mandate was invalid.⁸⁷ However, other circuit courts had heard challenges to Obamacare.⁸⁸ The Sixth Circuit and the D.C. Circuit upheld the law.⁸⁹ The Fourth Circuit held that a challenge to the law was premature due to the Anti-Injunction Act.⁹⁰

The Anti-Injunction Act bars challenges to taxes before the payment of the tax.⁹¹ The law "protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes."⁹² Ordinarily, a challenge to a tax law must be brought in an action for a refund after payment of the tax.⁹³ Since no payments were required to be made until 2014 and the case was argued and decided in 2012, it could reasonably have been barred by the Anti-Injunction Act.⁹⁴

No party to the *NFIB* case before the Court supported the proposition that the Anti-Injunction Act barred the challenge.⁹⁵ The Court appointed *amicus curiae* to brief both sides of the argument involving this potential limit on jurisdiction.⁹⁶

⁸⁵ See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2582 (2012) ("Before turning to the merits, we need to be sure we have the authority to do so. . . . *Amicus* contends that the Internal Revenue Code treats the penalty as a tax, and that the Anti-Injunction Act therefore bars this suit.").

⁸⁶ See *id.* at 2593 (describing the Government's alternative argument that the insurance mandate is within Congress' taxing power).

⁸⁷ *Id.* at 2580–81.

⁸⁸ *Id.* at 2581.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *id.* at 2582 (describing the function of the Anti-Injunction Act).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *id.* ("The penalty for not complying with the Affordable Care Act's individual mandate first becomes enforceable in 2014. The present challenge to the mandate thus seeks to restrain the penalty's future collection.").

⁹⁵ *Id.*

⁹⁶ *Id.*

Interestingly, although the government eventually won because the individual mandate is constitutional as a tax, the Supreme Court held that the Affordable Care Act was not a tax for purposes of the Anti-Injunction Act.⁹⁷

The ACA requires most individuals who do not have health insurance to pay a “penalty.”⁹⁸ The penalty is to be paid to the Internal Revenue Service (the “IRS”) with the filing of federal income taxes.⁹⁹ Nothing in the ACA mentions a tax.¹⁰⁰ However, prior cases have found taxes to be penalties, and of course, penalties have been imposed by regulations that could have been imposed by taxes.¹⁰¹ A great deal turns on whether the payment provision of the individual mandate is interpreted as a tax or a penalty.¹⁰² If it is a tax, it is arguably constitutional, but the Anti-Injunction Act bars the action.¹⁰³ If it is a penalty, the Anti-Injunction Act does not bar the case, but the payment is not within Congress’ taxing power.¹⁰⁴

In a creative stroke of ingenuity, Chief Justice Roberts played it both ways. The payment for not having insurance would be a tax for purposes of giving Congress the authority to enact the individual mandate, but it would be a penalty for purposes of deciding whether the Anti-Injunction Act barred hearing the case

⁹⁷ See *id.* at 2594 (“[T]he [Affordable Care] Act describes the payment as a ‘penalty,’ not a ‘tax.’ But while that label is fatal to the application of the Anti-Injunction Act . . . it does not determine whether the payment may be viewed as an exercise of Congress’s taxing power.”).

⁹⁸ See *id.* at 2580 (“The individual mandate requires most Americans to maintain ‘minimum essential’ health insurance coverage.”) (citation omitted).

⁹⁹ *Id.*

¹⁰⁰ See *id.* at 2583 (“Congress, however, chose to describe the ‘[s]hared responsibility payment’ imposed on those who forgo health insurance not as a ‘tax,’ but as a ‘penalty.’”).

¹⁰¹ See *id.* at 2651 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“Of course in many cases what was a regulatory mandate enforced by a penalty *could have been* imposed as a tax upon permissible action; or what was imposed as a tax upon permissible action *could have been* a regulatory mandate enforced by a penalty.”).

¹⁰² See *id.* at 2650–55 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (explaining the distinction between a penalty and a tax and the consequences of a provision being interpreted as one rather than the other).

¹⁰³ See *id.* at 2584 (“The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act. The Anti-Injunction Act therefore does not apply to this suit, and we may proceed. . . .”).

¹⁰⁴ As the conservative dissent noted, “[n]o one seriously contends that any of Congress’ other enumerated powers gives it the authority to enact § 5000A as a regulation.” *Id.* at 2650 n.4 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

before payments were collected.¹⁰⁵ The Chief Justice decided that Congress could constitutionally tax individuals who do not have insurance, so the “penalty” is a valid exercise of the taxing authority.¹⁰⁶ At the same time, the Chief Justice reasoned that since Congress did not call the “tax” a tax, Congress did not intend the Anti-Injunction Act to apply to the ACA.¹⁰⁷

The dissenting conservatives were incredulous at this double-speak.¹⁰⁸ They observed that precedent sets a distinct line between a tax and a penalty,¹⁰⁹ stating that “a tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.”¹¹⁰ They acknowledged that the Court has occasionally held a tax to be an effective penalty but asserted that the Court has never before held a penalty to be a tax.¹¹¹ More persuasively, they observed that the two categories are mutually exclusive—a tax cannot be a penalty and a penalty cannot be a tax.¹¹² The creature must be one or the other. According to the dissent, never before has such an imposition been both a tax and a penalty.¹¹³

¹⁰⁵ *See id.* at 2656 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“The Government and those who support its position on this point make the remarkable argument that § 500A is not a tax for purposes of the Anti-Injunction Act . . . but is a tax for constitutional purposes. . .”).

¹⁰⁶ *See id.* at 2600 (“The Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”).

¹⁰⁷ *See id.* at 2583 (concluding that Congress’ choice of the label “penalty” in the ACA meant that it did not want the Anti-Injunction Act to apply).

¹⁰⁸ *See id.* at 2656 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“[T]he Government would have us believe in these cases is that the very same textual indications that show this is *not* a tax under the Anti-Injunction Act show that it *is* a tax under the Constitution. That carries verbal wizardry too far, deep into the forbidden land of the sophists.”).

¹⁰⁹ *See id.* at 2651 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“Our cases establish a clear line between a tax and a penalty.”).

¹¹⁰ *Id.*

¹¹¹ *See id.* (“In a few cases, this Court has held that a ‘tax’ imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held—*never*—that a penalty imposed for violation of the law was so trivial as to be in effect a tax.”).

¹¹² *See id.* at 2651 (“The two are mutually exclusive.”).

¹¹³ *See id.* (“[W]e know of no case, and the Government cites none, in which the imposition was, for constitutional purposes, both.”).

B. *The Commerce Clause*

The Obama administration's main argument for upholding the ACA, and the basis for which it was upheld in both the Sixth Circuit and the D.C. Circuit, is that law is a valid exercise of congressional power under the Commerce Clause.¹¹⁴ Article I, § 8 of the Constitution gives Congress the power to regulate commerce among the states.¹¹⁵ The clause is widely considered the legal authority for most federal regulation.¹¹⁶ The Court has generally interpreted the Commerce Clause expansively since the time of Chief Justice Marshall.¹¹⁷ The Court struck down some federal laws as an unconstitutional use of the Commerce Clause during Franklin Roosevelt's push for the New Deal.¹¹⁸ These cases held that there was an insufficient nexus between the commerce regulated and interstate commerce.¹¹⁹ However, since that time the Court has become even more expansive in holding that Congress merely needs a rational basis that "a regulated activity affects interstate commerce" and that the means used by Congress is "reasonably adapted to the end."¹²⁰ The markets for healthcare and health insurance are obviously interstate markets, and there are many federal regulations on these markets undoubtedly authorized under the Commerce Clause.

Notwithstanding the Court's expansive interpretation of the Commerce Clause, the Chief Justice—with the support of the four other conservative justices—held that Obamacare goes too far as a valid regulation of interstate

¹¹⁴ See *id.* at 2581 ("The Sixth Circuit and the D.C. Circuit upheld the mandate as a valid exercise of Congress's commerce power.").

¹¹⁵ U.S. CONST. art. I, § 8, cl. 3.

¹¹⁶ Cf. *NFIB*, 132 S. Ct. at 2586 ("Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time.").

¹¹⁷ See *Wickard v. Filburn*, 317 U.S. 111, 120–22 (1942) (describing Chief Justice John Marshall's early interpretation of the Commerce Clause as very broad and observing that although some subsequent cases limited the power, other subsequent cases again expanded the power as Justice Marshall had envisioned it).

¹¹⁸ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (holding the National Industrial Recovery Act unconstitutional); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (holding the Bituminous Coal Conservation Act unconstitutional).

¹¹⁹ See *Schechter*, 295 U.S. at 543–44 (holding that activity at a slaughterhouse was too indirect to affect interstate commerce directly); *Carter*, 298 U.S. at 311 (holding that there is no power to regulate private activity).

¹²⁰ *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981) (citations omitted).

commerce.¹²¹ The reasoning, simply put, is that there must be commerce to regulate.¹²² The Commerce Clause does not grant Congress the power to create commerce by dictating that it happens in order to regulate it.¹²³ A decision not to purchase something is not commerce, and it is beyond the scope of Congress' power to regulate.¹²⁴ The Chief Justice observed that, "[i]f the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous."¹²⁵ He noted the power to "coin Money" and "raise and support Armies" as examples.¹²⁶ He also asserted that the Commerce Clause cases "uniformly describe the power as reaching 'activity.'"¹²⁷ According to the decision, the Commerce Clause does not provide the power to create activity, which is what the individual mandate attempts to do.¹²⁸ The Court properly observed that upholding Obamacare as a valid exercise of the Commerce Clause would effectively make congressional power limitless.¹²⁹ Congress could attack the poor state of health and the rising cost of healthcare by compelling "everyone to buy vegetables."¹³⁰

In an effort to bolster the Commerce Clause argument, the Government also invoked the Necessary and Proper Clause.¹³¹ The Court rebuked that argument with

¹²¹ *NFIB*, 132 S. Ct. at 2593.

¹²² *See id.* at 2586 ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated.").

¹²³ *See id.* at 2587 ("Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and *potentially* vast domain to congressional authority.").

¹²⁴ *See id.* ("Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and . . . empower Congress to make those decisions for him.").

¹²⁵ *Id.* at 2586.

¹²⁶ *Id.*

¹²⁷ *Id.* at 2587.

¹²⁸ *See id.* ("The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.").

¹²⁹ *See id.* at 2588 ("Indeed, the Government's logic would justify a mandatory purchase to solve almost any problem.").

¹³⁰ *Id.*

¹³¹ *See id.* at 2591 ("The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate. . . .").

a reminder that the Necessary and Proper Clause applies only to certain enumerated powers in the Constitution and does not grant any “great substantive and independent power[s].”¹³² The Necessary and Proper Clause is better interpreted as a statement “that the means of carrying into execution those [powers] otherwise granted are included in the grant.”¹³³

The liberal dissent took exception to the Court’s holding concerning the Commerce Clause.¹³⁴ Justice Ginsburg’s attack began with the accusation that the Chief Justice’s “reading of the Clause makes scant sense and is stunningly retrogressive.”¹³⁵ She further attacked the Chief Justice with a historical comparison to the Justices who attempted to thwart Franklin Roosevelt’s progressive agenda, writing: “[t]he Chief Justice’s crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress’ efforts to regulate the national economy in the interest of those who labor to sustain it.”¹³⁶ Justice Ginsburg cited a 1935 case invalidating a compulsory retirement and pension plan for employees of carriers in interstate commerce to support this accusation.¹³⁷

The liberal dissent provided no authority for the position that the Commerce Clause applies in the absence of activity.¹³⁸ The first portion of the liberal dissent attacking the Commerce Clause holding is a litany of statistics supporting the position that high healthcare costs and many uninsured individuals are a national problem.¹³⁹ This is not a point of contention with anyone. The legal question is, of

¹³² *Id.* (citation omitted).

¹³³ *Id.*

¹³⁴ *See id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision.”).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* (citing *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330, 362, 368 (1935)).

¹³⁸ *See id.* at 2642 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“This case is in one respect difficult: it presents two questions of first impression. The first of those is whether failure to engage in economic activity . . . is subject to regulation under the Commerce Clause.”).

¹³⁹ *See id.* at 2610–15 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (reciting various statistics about the American healthcare industry and concluding, “In sum, Congress passed the minimum coverage provision as a key component of the ACA to address an economic and social problem that has plagued the Nation for decades: the large number of [United States] residents who are unable or unwilling to obtain health insurance.”).

course, whether the Constitution gives Congress the power to compel individuals to purchase health insurance. Justice Ginsberg used page after page to criticize the Chief Justice for even discussing the Commerce Clause arguments given the fact that he upheld the law under the taxing power.¹⁴⁰ Chief Justice Roberts responded to this attack, observing that without discussion of the Commerce Clause—and a finding that it could not provide authority for the Individual Mandate—there would be no need to search for an alternative basis of authority such as the taxing power.¹⁴¹

Justice Ginsburg's analysis suggests a lack of familiarity with economics—the study of how people allocate resources under conditions of scarcity. Scarcity is a fact of life.¹⁴² Questions about how people behave when resources are not scarce are not interesting.¹⁴³ If resources are not scarce, people take whatever they want.¹⁴⁴ When resources are scarce, however, people must set priorities and select the most important goods and services within their budget constraints.¹⁴⁵ Justice Ginsburg wrote, “[n]ot all [United States] residents . . . have health insurance . . . either by choice, or more likely, because they could not afford private insurance and did not qualify for government aid.”¹⁴⁶ Justice Ginsburg's statement reflects a lack of understanding that when people represent that they do not make a purchase because they cannot afford that purchase, they are making a choice to purchase other items on which they place a higher value.¹⁴⁷ In Justice Ginsburg's view of the world, it is

¹⁴⁰ See *id.* at 2609–29 (criticizing the Chief Justice throughout for his Commerce Clause jurisprudence).

¹⁴¹ See *id.* at 2600–01 (majority opinion) (“[I]t is only because we have a duty to construe a statute to save it, if fairly possible, that § 5000A can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction.”).

¹⁴² See STIGLITZ, *supra* note 34, at 24 (“Having more of one thing requires giving up something else. Scarcity is a basic fact of life.”).

¹⁴³ See Klock, *supra* note 33, at 243 (explaining the role of scarcity in economic models).

¹⁴⁴ See Mark Klock, *Contrasting the Art of Economic Science with Pseudo-Economic Nonsense: The Distinction Between Reasonable Assumptions and Ridiculous Assumptions*, 37 PEPP. L. REV. 153, 160 (2010) (explaining that if “investors have infinite wealth . . . [t]hey would not have to make any choices. They could have everything without sacrificing anything.”).

¹⁴⁵ See *id.* at 157 (“For a model to be part of the subject matter of economics, the decision makers *must* make sacrifices. That is, they must choose between alternatives.”) (internal citations omitted).

¹⁴⁶ *NFIB*, 132 S. Ct. at 2610 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (emphasis added).

¹⁴⁷ Cf. Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1575 (1998) (“It seems then that the politically insulated corps of experts that [behavioral

acceptable for Congress to tackle a problem either by compelling people to purchase something they have chosen not to so they would have more money for items they value higher, or, alternatively, by taking other people's money away to provide a private benefit to others in the form of something that the others have chosen not to purchase.

The second half of Justice Ginsburg's attempt to expand the Commerce Clause is an argument that all people eventually need healthcare, so no one can be out of the market for healthcare.¹⁴⁸ In her mind, insurance is just a method of financing healthcare, which everyone will need.¹⁴⁹ Again, economists will disagree. Insurance is a distinct product.¹⁵⁰ Everyone will die, but we do not compel everyone to have life insurance. States, but not the federal government, do compel individuals to have auto insurance. However, that is not to cover car owners' own needs but to guarantee that there are means of compensating others the car owner might injure.¹⁵¹ Additionally, everyone needs food to sustain life, yet we do not compel individuals to purchase meal plans.¹⁵² The liberal dissent's argument for an expanded Commerce Clause is based on policy arguments and is not grounded in legal authority.¹⁵³

Justice Ginsberg does inadvertently put her finger on a major cause of the national healthcare problem. In arguing that healthcare is distinct from other items and that everyone will someday need healthcare, she writes:

scholars] favor would be charged with determining the populace's authentic preferences, which sounds totalitarian to me.”).

¹⁴⁸ See *NFIB*, 132 S. Ct. at 2618 (arguing that since everyone will need healthcare at unpredictable times, everyone is in the market for healthcare).

¹⁴⁹ See *id.* at 2620 (“Health insurance is a means of paying for this care, nothing more.”).

¹⁵⁰ See MISHKIN & EAKINS, *supra* note 52, at 514 (“Insurance companies are in the business of assuming risk on behalf of their customers in exchange for a fee. . . .”).

¹⁵¹ See, e.g., CONN. GEN. STAT. § 14-112 (2013) (requiring proof of financial responsibility to register a motor vehicle and accepting minimal required insurance as such proof).

¹⁵² However, the dissenting conservative Justices argue that under Justice Ginsburg's reasoning the federal government could compel people to purchase certain foods at certain times. *NFIB*, 132 S. Ct. at 2648.

¹⁵³ See *id.* at 2609–15 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (laying the foundation for the opinion on policy arguments about a national healthcare problem in sections I A & B).

Although an individual *might* buy a car or a crown of broccoli one day, there is no certainty she will ever do so. And if she eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment. She will get no free ride or food, at the expense of another consumer forced to pay an inflated price.¹⁵⁴

Justice Ginsberg has identified that a major factor in high healthcare costs is due to the fact that Congress passed the Emergency Medical Treatment and Labor Act (EMTLA), which requires hospitals to provide free healthcare to a large class of people.¹⁵⁵ Since hospitals must cover their own costs or go bankrupt, free healthcare is not really free—it is just charged to other customers through higher rates,¹⁵⁶ mainly to customers who have insurance.¹⁵⁷ Congress could potentially authorize payment to hospitals for the “free” treatment they provide, but this would necessitate increased government spending and higher taxes. What Congress chose to do was to subsidize healthcare for the uninsured through regulation rather than tax, for purposes of keeping the subsidy off the books and making the cost of the subsidy nontransparent.¹⁵⁸ The national healthcare problem that Justice Ginsburg cites as a rational reason for Congress to act is actually a problem that Congress created with the EMTLA.¹⁵⁹

¹⁵⁴ *Id.* at 2619–20.

¹⁵⁵ Emergency Medical Treatment and Labor Act of 1986, 42 U.S.C. § 1395dd (2012).

¹⁵⁶ *See NFIB*, 132 S. Ct. at 2617 (“Not only do those without insurance consume a large amount of [healthcare] each year; critically, as earlier explained, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability.”).

¹⁵⁷ *See id.* at 2620. The liberal dissent states:

Under the current health-care system, healthy persons who lack insurance receive a benefit for which they do not pay: They are assured that, if they need it, emergency medical care will be available, although they cannot afford it. . . . Those who have insurance bear the cost of this guarantee.

Id.

¹⁵⁸ *Cf.* Kenneth E. Scott, *The Financial Crisis: Causes and Lessons*, 22 J. APPLIED CORP. FIN. 22, 28 (2010) (“[The housing crisis] came about because Congress desired to subsidize particular groups without direct on-budget expenditures but indirectly through regulation and guarantees, thereby allowing legislators to deny the existence of any subsidization until the whole scheme collapsed.”).

¹⁵⁹ *Cf.* Klock, *supra* note 30, at 137–38 (blaming Congress for causing the Financial Crisis of 2008 through the unintended consequences of pushing home ownership programs).

The conservative dissent to the decision reiterated the Chief Justice's view: "[O]ne does not regulate commerce that does not exist by compelling its existence."¹⁶⁰ The conservative dissent began by stating their belief that the ACA goes beyond the powers granted to Congress in the Constitution.¹⁶¹ Observing general principles, they wrote:

What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.¹⁶²

With respect to the Commerce Clause specifically, the conservative Justices noted that *Wickard v. Filburn* has "always been regarded" as the outer limits of the expansive Commerce Clause powers.¹⁶³ *Wickard* held that growing wheat for one's own consumption had a sufficient effect on interstate commerce to be subject to regulation.¹⁶⁴ However, that case did not assert that not growing wheat affected commerce, as the conservative dissenters explained:

To go beyond [*Wickard*], and to say the *failure* to grow wheat (which is *not* an economic activity, or any activity at all) nonetheless affects commerce and

¹⁶⁰ *NFIB*, 132 S. Ct. at 2644.

¹⁶¹ *See id.* at 2643 ("The Act before us here exceeds federal power. . . .").

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *See Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942). The Court held:

Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

Id.

therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity).¹⁶⁵

Justice Ginsburg called that statement “outlandish” but provided no explanation as to what about a clear and logical statement makes it so outlandish.¹⁶⁶

The conservative dissent noted that the government’s argument regarding the Necessary and Proper Clause relied primarily on one case, *Gonzales v. Raich*.¹⁶⁷ This case decided that Congress could ban private cultivation and possession of marijuana to restrain interstate commerce.¹⁶⁸ The dissent distinguished this case, noting that intrastate marijuana is indistinguishable from interstate marijuana, so prohibiting all possession is necessary to banning interstate transactions in marijuana.¹⁶⁹ Furthermore, Congress is clearly authorized to regulate, and to ban, interstate commerce.¹⁷⁰ This is far different from directing interstate commerce to exist.¹⁷¹

The conservative Justices did not object to Congress’ attempt to reduce the moral hazard problem in the insurance market, only the method of commanding individuals to buy insurance.¹⁷² Suggesting constitutionally appropriate tools, they wrote:

[T]here are many ways other than this unprecedented Individual Mandate by which the regulatory scheme’s goals of reducing insurance premiums and

¹⁶⁵ See *NFIB*, 132 S. Ct. at 2643.

¹⁶⁶ *Id.* at 2625.

¹⁶⁷ *Id.* at 2646 (citing *Gonzales v. Raich*, 545 U.S. 1 (2005)).

¹⁶⁸ *Gonzales*, 545 U.S. at 15–22.

¹⁶⁹ *NFIB*, 132 S. Ct. at 2647.

¹⁷⁰ See *Andrus v. Allard*, 444 U.S. 51, 62–64 (1979) (holding that Congress can ban commerce in protected species parts, even when acquired legally before the protection became law).

¹⁷¹ See *NFIB*, 132 S. Ct. at 2646–47 (citing *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)) (“The mandating of economic activity does [represent the expansion of the federal power to direct into a broad new field], and since it is a field so limitless that it converts the Commerce Clause into a general authority to direct the economy, that mandating is not ‘consist[ent] with the letter and spirit of the [C]onstitution.’”).

¹⁷² *NFIB*, 132 S. Ct. at 2647 (suggesting constitutional methods by which Congress could address the problem).

ensuring the profitability of insurers could be achieved. For instance, those who did not purchase insurance could be subjected to a surcharge when they do enter the health insurance system. Or they could be denied a full income tax credit given to those who do purchase the insurance.¹⁷³

The conservative dissent moved on to criticize the government's secondary Commerce Clause theory.¹⁷⁴ Mainly, they argued that the individual mandate is merely a regulation of activities that substantially affect interstate commerce.¹⁷⁵ They contended that everyone is in the healthcare market, and Congress is merely regulating how people finance their healthcare by requiring them to use insurance.¹⁷⁶ The conservative Justices summarily dismissed this by stating that it is simply not true that everyone is an active participant in the healthcare market.¹⁷⁷ Just because young people are likely to need healthcare years into the future does not make them active participants in the healthcare market.¹⁷⁸ The conservative Justices claim that "[s]uch a definition of market participants is unprecedented, and were it to be a premise for the exercise of national power, it would have no principled limits."¹⁷⁹

An argument not made by the dissent, but which illustrates the limitless power of the liberal justices' interpretation of the Commerce Clause would be as follows: If Congress can mandate that individuals finance their healthcare through insurance and select a suite of products covering, for example, hospital stays, prescriptions, and doctor visits on the theory that everyone will probably someday

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *See id.* at 2648. The Justices write:

[T]he [healthcare] "market" . . . principally consists of goods and services that the young people primarily affected by the Mandate *do not purchase*. They are quite simply not participants in that market, and cannot be made so (and thereby subjected to regulation) by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance.

Id.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

participate in the market, then Congress could also mandate that individuals provide for the disposal of their remains using a particular method of financing and internment on the theory that everyone will certainly die. I have no authority for this, but I conjecture that the American public would find such a mandate far too intrusive to be an allowable power for Congress to possess.

The conservative dissenters concluded their discussion of the Commerce Clause with “[a] few respectful responses to Justice Ginsburg’s dissent on the issue of the Mandate. . . .”¹⁸⁰ Justice Ginsburg argued that the inactivity of not purchasing insurance is actually the activity of participating in the self-insurance market and, hence, subject to federal regulations.¹⁸¹ The conservative justices dismissed this as wordplay and noted that this argument means “commerce becomes everything.”¹⁸² They further reasoned that Justice Ginsburg’s “application rest[ed] upon a theory that everything is within federal control simply because it exists.”¹⁸³

Justice Ginsburg also argued that the expansive interpretation given to the Commerce Clause has enabled Congress to achieve great things such as the provision of old-age and survivors benefits through the Social Security Act.¹⁸⁴ According to Justice Ginsburg’s dissent, joined by the other more liberal Justices, the Court is moving backward by limiting the Commerce Clause so that Congress cannot find authority there to solve national problems.¹⁸⁵ The conservative Justices pointed out that the Constitution is not an enabling device for solving national problems.¹⁸⁶ The conservative dissent wrote that the Constitution “enumerates not federally soluble *problems*, but federally available *powers*. . . . Article I contains no whatever-it-takes-to-solve-a-national-problem power.”¹⁸⁷

¹⁸⁰ *Id.* at 2648.

¹⁸¹ *See id.* at 2622 (“An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance.”).

¹⁸² *Id.* at 2649.

¹⁸³ *Id.*

¹⁸⁴ *See id.* at 2609 (“In the Social Security Act, Congress installed a federal system to provide monthly benefits to retired wage earners and, eventually, to their survivors [upheld by an expansive Commerce Clause].”).

¹⁸⁵ *See id.* (“This rigid reading of the Clause . . . is stunningly retrogressive.”).

¹⁸⁶ *Id.* at 2650.

¹⁸⁷ *Id.*

C. *The Power to Lay and Collect Taxes*

The conservative segment of the Court won the battle over the Commerce Clause but lost the war on the individual mandate.¹⁸⁸ Chief Justice Roberts bought the government's second argument.¹⁸⁹ "According to the Government, even if Congress lacks the power to direct individuals to buy insurance, the only effect of the individual mandate is to raise taxes on those who do not do so, and thus the law may be upheld as a tax."¹⁹⁰ The liberal Justices, having wanted to uphold the ACA under the Commerce Clause, were only too happy to endorse the Chief Justice's alternative reasoning for upholding the ACA.¹⁹¹

The Chief Justice's most concise statement of reasoning is his summary of the government's position, which reads:

[T]he mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax.¹⁹²

The Chief Justice made a great deal out of the fact that under the ACA, uninsured individuals must pay their penalty to the IRS when they file their federal income tax returns.¹⁹³ He further argued that although the payments are called

¹⁸⁸ *See id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("I agree with the Chief Justice . . . that the minimum coverage provision is a proper exercise of Congress' taxing power. . . . Unlike the Chief Justice, however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision.").

¹⁸⁹ *See id.* at 2600 ("The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.").

¹⁹⁰ *Id.* at 2584.

¹⁹¹ *See id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (stating that since a majority of Justices would not uphold the mandate under the Commerce Clause, she would agree with the Chief Justice to uphold it under Congress' taxing power).

¹⁹² *Id.* at 2594.

¹⁹³ *See id.* at 2596 ("[T]he payment is collected solely by the IRS through the normal means of taxation. . . .").

penalties and that term is controlling for application of the Anti-Injunction Act, the interpretation of the penalties as taxes is required out of deference to Congress.¹⁹⁴ Quoting Justice Holmes, the Chief Justice wrote, “the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.”¹⁹⁵

After discussing why the uninsured penalty payment can be regarded as a tax, the Chief Justice gave some attention to the question of whether it is a legal tax.¹⁹⁶ “Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution.”¹⁹⁷ The plaintiffs in *NFIB* advanced the argument that the payments should be regarded as direct taxes and, thus, invalid under Article I, § 9, clause 4, which requires direct taxes to be apportioned among the states based on population.¹⁹⁸

The Chief Justice responded to this argument with the statement that direct taxes have never been clearly defined and that they have always been interpreted narrowly.¹⁹⁹ Additionally, the Sixteenth Amendment removed some restrictions on the Direct Tax Clause, which states that the Direct Tax Clause does not bar taxes on income.²⁰⁰ Chief Justice Roberts concluded that “[t]he shared responsibility payment is thus not a direct tax that must be apportioned among the several States.”²⁰¹

To this point, I believe everything the Chief Justice wrote is reasonable. However, the Chief Justice next argued that Congress has the power to impose a

¹⁹⁴ *See id.* at 2594 (“[T]he Act describes the payment as a ‘penalty,’ not a ‘tax.’ But while that label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress’s taxing power.”) (internal citation omitted).

¹⁹⁵ *Id.* at 2593 (concurring opinion) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)).

¹⁹⁶ *See id.* at 2598–99 (discussing plaintiffs’ argument that the tax is an unconstitutional direct tax because it is not apportioned among the states).

¹⁹⁷ *Id.* at 2598.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 2599.

not-apportioned tax for doing nothing. I believe this portion of the opinion is unpersuasive, incomplete, and with out support from the Constitution.

The Chief Justice asserted that “three considerations allay” questions about the constitutionality of Congress taxing someone for not doing something.²⁰² Justice Roberts wrote, “First, and most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity.”²⁰³ This is because the Constitution authorizes head taxes, which are taxes for merely existing.²⁰⁴ But the Chief Justice already determined that the uninsured penalty tax is not a direct tax, so using the existence of a direct tax on doing nothing is not compelling support for another type of tax on doing nothing. The Chief Justice’s point that direct taxes on doing nothing are permitted (subject to apportionment) more reasonably suggests that the tax on not having insurance is indeed a direct tax.

The Sixteenth Amendment authorizes taxes on income without apportionment.²⁰⁵ So, could a person be legally subjected to a not-apportioned tax when they have no income? In what language is a penalty for being uninsured equal to a tax on income? It is true that the ACA provides for penalties that vary with income, but it is common practice to adjust fines based on income, and it is difficult to reconcile penalties for being uninsured with “taxes on income.”²⁰⁶ The terse discussion of the mandate as a constitutional tax raises more questions than it answers.²⁰⁷

The Chief Justice’s second of three arguments is that Congress’ taxing power can be used to influence behavior.²⁰⁸ This is true, but all examples given are tax

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *See id.* (“A capitation, after all, is a tax that everyone must pay simply for existing, and capitations are expressly contemplated by the Constitution.”).

²⁰⁵ U.S. CONST. amend. XVI.

²⁰⁶ *See NFIB*, 132 S. Ct. at 2654 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (citing various provisions of the U.S. Code) (“[V]arying a penalty according to ability to pay is an utterly familiar practice.”).

²⁰⁷ *See id.* at 2655 (“[T]he meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration. . . .”).

²⁰⁸ *See id.* at 2599 (“Congress’s use of the Taxing Clause to encourage buying something is, by contrast, not new.”).

incentives for doing something actively.²⁰⁹ There are no examples of taxes imposed for not doing something. The Chief Justice does acknowledge limits to the taxing power, but the only example of a forbidden tax is one that “loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.”²¹⁰

The Chief Justice’s third argument is that taxing people for not doing something does not give Congress as much control as Congress has under a valid exercise of Commerce Clause power.²¹¹ A valid exercise of Commerce Clause power enables Congress to mandate that individuals do something and be subjected to imprisonment if they do not comply.²¹² Taxing people for not doing something gives individuals a choice: to act a certain way, or to not act and pay the tax.²¹³ Here, it is abundantly clear that the conclusion does not logically follow from the premise. That Congress cannot mandate that people buy insurance under the Commerce Clause clearly does not imply that Congress can tax individuals for not buying insurance. The reasoning is circular. The Chief Justice is correct that the control provided by the Commerce Clause is more direct than the control provided by the taxing power, but that is still no argument for applying the taxing power. This argument is analogous to asserting that we can punish someone for not buying insurance by imposing a financial penalty because that is not as severe as executing someone for not buying insurance.

There simply is no authority in the Constitution or case law for the position that Congress can tax people for not doing something other than by a capitation tax to be apportioned among the States.²¹⁴ The Chief Justice even admits that a poll tax

²⁰⁹ *See id.* (“Tax incentives already promote, for example, purchasing homes and professional educations.”).

²¹⁰ *Id.* (citation omitted).

²¹¹ *See id.* at 2600 (“Third, although the breadth of Congress’s power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior.”).

²¹² *See id.* (“Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions.”).

²¹³ *See id.* (“If a tax is properly paid, the Government has no power to compel or punish individuals subject to it.”).

²¹⁴ *See Sandefur, supra* note 32, at 216. The commentator wrote:

But even if § 5000A only imposes a tax, that tax must nevertheless comply with the constitutional rules for taxes. Here, the *NFIB* decision falls short.

is a direct tax.²¹⁵ A tax on not having insurance resembles a tax on going to the polls more than it resembles any other type of tax, whether it is income or property.²¹⁶

The Chief Justice has essentially asserted that nearly all taxes are not capitation taxes, and that anything that is not a capitation tax is constitutional as long as it does not rise to the level of a penalty, meaning that it is not constructed to raise revenue but is constructed principally to coerce behavior.²¹⁷ I seriously doubt that the individuals who ratified the Sixteenth Amendment in 1913 to permit taxes on income, from whatever source derived, meant to say taxes on anything and everything—including nothing at all.

The liberal dissent, authored by Justice Ginsburg, has scant little to say about Congress' taxing power. The dissent began, "I agree with The Chief Justice that the Anti-Injunction Act does not bar the Court's consideration of this case, and that the minimum coverage provision is a proper exercise of Congress' taxing power."²¹⁸ The only other mention of the taxing power comes at the conclusion of Section IV in the liberal dissent, which concluded their discussion of the Individual Mandate.²¹⁹ Justice Ginsburg concluded, "[u]ltimately, the Court upholds the individual mandate as a proper exercise of Congress' power to tax and spend. . . . I concur in that determination. . . ."²²⁰

In my opinion, the five Justices who upheld the ACA as a constitutional exercise of Congress' taxing power have not offered a legal justification for taxing something that is not purchased, not used, and not carried out.

Although the *NFIB* Court declared that the tax is not an unapportioned "direct tax" forbidden by the Constitution, the analysis of this question makes little logical sense.

Id. (internal citations omitted).

²¹⁵ See *NFIB*, 132 S. Ct. at 2598 ("Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a 'head tax' or a 'poll tax'), might be a direct tax.").

²¹⁶ See Sandefur, *supra* note 32, at 220 ("[T]he PPACA seems much more like a direct than an indirect tax.").

²¹⁷ See *NFIB*, 132 S. Ct. at 2598–99 (explaining that direct taxes have been construed narrowly and that taxes cannot be punitive exactions).

²¹⁸ *Id.* at 2609.

²¹⁹ See *id.* at 2629 (concluding that the Court upholds the individual mandate as a tax).

²²⁰ *Id.*

The conservative dissent also had little to say about Congress' power to tax, although they did offer a good reason for not discussing the issue.²²¹ The conservatives focused on their interpretation of the ACA as providing a penalty, not a tax.²²² They offered some compelling arguments in support aside from the plain language of the statute.²²³ They observed “the fact that some are exempt from the tax who are not exempt from the mandate—a distinction that would make no sense if the mandate were not a mandate.”²²⁴ They further labeled the argument that the penalty is in fact a tax because it is paid to the IRS as flimsy.²²⁵ The conservative Justices argued: “The manner of collection could perhaps suggest a tax if IRS penalty-collection were unheard-of or rare. It is not.”²²⁶

The conservatives' final argument against the tax theory is clear:

[T]o say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it. Judicial tax-writing is particularly troubling. Taxes have never been popular, see, e.g., Stamp Act of 1765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. See Art. I, § 7, cl. 1. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. . . . Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.²²⁷

In concluding their discussion of the Individual Mandate, the conservative Justices explained their reluctance to consider limits to the taxing ability of Congress:

²²¹ See *id.* at 2655–56 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (discussing the interpretation of the ACA as a tax).

²²² See *id.* at 2651–55 (discussing reasons why the ACA is a mandate with a penalty that cannot be interpreted alternatively as a tax).

²²³ See *id.* at 2655 (citing *Parsons v. Bedford*, 28 U.S. 433, 448 (1830) (“In sum, ‘the terms of [the ACA] rende[r] it unavoidable’ . . . that Congress imposed a regulatory penalty, not a tax.”)).

²²⁴ *Id.* at 2653.

²²⁵ *Id.* at 2654.

²²⁶ *Id.*

²²⁷ *Id.* at 2655.

Finally, we must observe that rewriting § 5000A as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. Art. I, § 9, cl. 4. Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. The Government's opening brief did not even address the question—perhaps because, until today, no federal court has accepted the implausible argument that § 5000A is an exercise of the tax power. And once respondents raised the issue, the Government devoted a mere 21 lines of its reply brief to the issue. . . . At oral argument, the most prolonged statement about the issue was just over 50 words. . . . One would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression.²²⁸

In other words, the dissent would not address limits on Congress' taxing power because in their view, the ACA is not a tax but a mandate with a penalty provision.²²⁹ We have only the Chief Justice's weakly defended assertion that the Individual Mandate is not subject to the Direct Tax Clause in support of that position.

D. Medicaid Expansion

The other provision of Obamacare that was challenged by the petitioners is a requirement that the states expand Medicaid and adopt changes mandated by Congress or face the loss of all federally funded Medicaid grants.²³⁰ This provision of the law was challenged as a coercive use of federal power to force states to administer a federal program.²³¹ Again, only small minorities of the Justices reach the Court's holding. Seven Justices felt the law unconstitutional as written.²³² The

²²⁸ *Id.*

²²⁹ *See id.* at 2656 (“[T]he dispositive question whether the minimum-coverage provision is a tax is more appropriately addressed in the significant constitutional context of whether it is an exercise of Congress' taxing power. Having found that it is not. . .”).

²³⁰ *See id.* at 2656–57 (“We now consider respondents' second challenge to the constitutionality of the ACA, namely that the Act's dramatic expansion of the Medicaid program exceeds Congress' power to attach conditions to federal grants to the States.”).

²³¹ *See id.* at 2657 (“The States challenging the constitutionality of the ACA's Medicaid Expansion contend that, for these practical reasons, the Act really does not give them any choice at all.”).

²³² *Id.* at 2666–67.

four conservative Justices wanted the Medicaid Expansion struck down as unconstitutional and not judicially repairable.²³³ Justices Ginsburg and Sotomayor concluded that the Medicaid Expansion was constitutional as written.²³⁴ Chief Justice Roberts, joined by Justices Breyer and Kagan, believed the unconstitutional provisions of the Medicaid Expansion could be severed to preserve much of the law, and naturally, Justices Ginsburg and Sotomayor were willing to support the preservation of as much of the law as Justices Roberts, Breyer, and Kagan would allow.²³⁵

There is a basic tension between the Spending Clause of the Constitution and the federal system of government in which some powers are given to the federal government and the powers not specifically enumerated are reserved for the States and the people.²³⁶ The Spending Clause grants Congress the power “to pay the Debts and provide for the . . . general Welfare of the United States.”²³⁷ The Supreme Court has consistently held that Congress may use this authority to give money to the States conditioned on the States agreeing to take actions that Congress could not compel them to take.²³⁸ However, the Supreme Court has also held that there must be limits to this authority—otherwise the federal government could compel the States to act as administrators of federal programs, and the two-government system established by the Constitution would be subverted.²³⁹

²³³ See *id.* at 2643 (“In our view it must follow that the entire statute is inoperative.”).

²³⁴ See *id.* at 2642 (Ginsburg & Sotomayor, JJ., dissenting in part) (“I would uphold the Eleventh Circuit’s decision that the Medicaid expansion is within Congress’ spending power.”).

²³⁵ See *id.* at 2630 (“A majority of the Court, however, buys the argument that prospective withholding of funds formerly available exceeds Congress’ spending power. Given that holding, I entirely agree with The Chief Justice as to the appropriate remedy. It is to bar the withholding found impermissible—not . . . to scrap the expansion altogether. . . .”).

²³⁶ See D. Brooks Smith, *Federalism in the United States*, 43 DUQ. L. REV. 519, 530 (2005) (“Another source of tension for our federalism is the Constitution’s General Welfare Clause, or the so-called Spending Clause, of Article I, Section 8.”).

²³⁷ U.S. CONST. art. I, § 8, cl. 1.

²³⁸ *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

²³⁹ See, e.g., *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”)).

The Supreme Court with the position that conditional federal grants are to be interpreted like contracts has resolved this tension.²⁴⁰ The legitimacy of these grants “rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”²⁴¹ The Chief Justice, joined by Justices Breyer and Kagan, as well as the four dissenting conservatives, all took the view that the withholding of all of a state’s federal Medicaid funds for refusing to expand the coverage as required by the ACA would be an unconstitutional coercion of the sovereignty of the States.²⁴² In the words of Chief Justice Roberts:

[T]he financial “inducement” Congress has chosen is much more than “relatively mild encouragement”—it is a gun to the head. . . . The threatened loss of over 10 percent of a State’s overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.²⁴³

Justices Roberts, Breyer, and Kagan decided that the Medicaid Expansion provisions of the ACA could be salvaged through severability.²⁴⁴ However, they did not actually sever sections of the law; they changed it.²⁴⁵ These Justices held that the federal government cannot “withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion.”²⁴⁶ The law as written required states to comply with the new requirements or lose all federal Medicaid funding.²⁴⁷ The law as revised by the Court gives states the choice to refuse to

²⁴⁰ See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (“[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.”).

²⁴¹ *Id.*

²⁴² See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2666–67 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional.”).

²⁴³ *Id.* at 2604–05.

²⁴⁴ See *id.* at 2607 (applying the severability clause).

²⁴⁵ See *id.* at 2671 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (explaining “why the Act’s major provisions are not severable from the Mandate and Medicaid Expansion.”).

²⁴⁶ *Id.* at 2607.

²⁴⁷ See *id.* at 2608 (“[The States] must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding.”).

expand Medicaid coverage while keeping their existing federal funds, or to expand Medicaid coverage according to the terms of the ACA and receive additional incremental funding.²⁴⁸

Justices Ginsburg and Sotomayor were willing to accept this compromise adjustment to the ACA²⁴⁹ but dissented because they viewed the ACA as a permissible modification of the existing program rather than a new program that threatens “[s]tates with the loss of funds from an old program in an effort to get them to adopt another program.”²⁵⁰ In the liberal dissent, two of the four liberal Justices (Justices Breyer and Kagan) did not join the portion of the opinion pertaining to Medicaid expansion.²⁵¹ Justices Ginsburg and Sotomayor argued that Congress could have repealed the existing Medicaid program and replaced it with the new one.²⁵² These dissenters asserted that a “ritualistic requirement that Congress repeal and reenact spending legislation in order to enlarge the population served by a federally funded program would advance no constitutional principle and would scarcely serve the interests of federalism.”²⁵³ These Justices appeared especially troubled by the fact that the Court has never before found an exercise of Congress’ spending power unconstitutional.²⁵⁴ This concern, however, ignores the Court’s prior opinions that clearly contemplated the possibility of Congress stepping over the boundaries of its legitimate spending power.²⁵⁵

²⁴⁸ See *id.* (“The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act.”).

²⁴⁹ See *id.* at 2630 (Ginsburg & Sotomayor, JJ., dissenting in part). Justice Ginsburg wrote:

A majority of the court, however, buys the argument that prospective withholding of funds formerly available exceeds Congress’ spending power. Given that holding, I entirely agree with The Chief Justice as to the appropriate remedy. It is to bar the withholding found impermissible—not, as the joint dissenters would have it, to scrap the expansion altogether. . . .

Id.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 2609.

²⁵² *Id.* at 2629.

²⁵³ *Id.*

²⁵⁴ See *id.* at 2630 (dissenting from The Chief Justice’s finding for the first time that Congress has exceeded its spending authority).

²⁵⁵ See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937) (“Our decisions have recognized that in some circumstances the financial

The conservative dissent sharply disagreed with the dissent of Justices Ginsburg and Sotomayor.²⁵⁶ They wrote a lengthy portion of their dissent addressing the Medicaid Expansion and elaborated on the reasons given by the Chief Justice for holding the withdrawal of Medicaid grants unconstitutional.²⁵⁷ Citing prior cases, they remarked, “Our cases have long held that the power to attach conditions to grants to the States has limits.”²⁵⁸ They explained that although Congress has power to provide incentives for state involvement in federal programs, it cannot cross the line and compel state involvement.²⁵⁹ The conservatives separately argued that the Medicaid Expansion is coercive.²⁶⁰ Perhaps in response to Justice Ginsburg’s alarm that the Court “*for the first time ever*—finds an exercise of Congress’ spending power unconstitutionally coercive,”²⁶¹ Justice Scalia wrote:

Whether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear. In this case, however, there can be no doubt. In structuring the ACA, Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion. If the anticoercion rule does not apply in this case, then there is no such rule.²⁶²

inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”)).

²⁵⁶ See *NFIB*, 132 S. Ct. at 2649–50 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (criticizing Justice Ginsburg’s dissent).

²⁵⁷ See *id.* at 2657–67 (explaining why the Medicaid Expansion as written is unconstitutional).

²⁵⁸ *Id.* at 2659.

²⁵⁹ *Id.* (citing *Steward Machine*, 301 U.S. 548 at 590).

²⁶⁰ See *id.* at 2666 (“[I]t is perfectly clear from the goal and structure of the ACA that the offer of the Medicaid Expansion was one that Congress understood no State could refuse. The Medicaid Expansion therefore exceeds Congress’ spending power and cannot be implemented.”).

²⁶¹ *Id.* at 2630.

²⁶² *Id.* at 2662.

The conservative dissent was especially unhappy with the Court's decision to revise the Medicaid Expansion to preserve it.²⁶³ They argued that the Court does not have the authority to revise the law "to say what it does not say."²⁶⁴ Their displeasure can be read in the statement, "[t]he Court severs nothing, but simply revises § 1396c to read as the Court would desire."²⁶⁵

In further support of their position that severability is an inappropriate remedy for the unconstitutional coercion, the conservative dissent invoked "well established" two-part severability analysis:²⁶⁶

First, if the Court holds a statutory provision unconstitutional, it then determines whether the now truncated statute will operate in the manner Congress intended. If not, the remaining provisions must be invalidated. . . .
Second, even if the remaining provisions can operate as Congress designed them to operate, the Court must determine if Congress would have enacted them standing alone and without the unconstitutional portion. If Congress would not, those provisions, too, must be invalidated.²⁶⁷

The conservatives argued that the ACA fails this test because Congress was enacting a scheme that presumed near universal healthcare coverage.²⁶⁸ By giving states a choice to stay in the old Medicaid program and opt out of Medicaid

²⁶³ See *id.* at 2667 ("We should not accept the Government's invitation to attempt to solve a constitutional problem by rewriting the Medicaid Expansion so as to allow States that reject it to retain their pre-existing Medicaid funds.").

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ See *id.* (citing *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987)).

²⁶⁷ *Id.* (citation omitted).

²⁶⁸ See *id.* The conservative dissenters wrote:

The [ACA] seeks to achieve "near universal" health insurance coverage. The two pillars of the Act are the Individual Mandate and the expansion of coverage under Medicaid. In our view, both these central provisions of the Act—the Individual Mandate and Medicaid Expansion—are invalid. It follows, as some of the parties urge, that all other provisions of the Act must fall as well.

Id. (citation omitted).

expansion, the Court imposed “unknowable risks that Congress could neither measure nor predict.”²⁶⁹

The conservatives explained these risks in more detail.²⁷⁰ The unconstitutional provision of the ACA was Congress’ means of assuring near universal healthcare coverage, thus nearly eliminating unreimbursed healthcare, “which will increase hospitals’ revenues, which will offset the government’s reductions in Medicare and Medicaid reimbursements to hospitals.”²⁷¹ Without the mechanism for guaranteeing near universal coverage, the dynamic that Congress intended to balance burdens and benefits did not exist, and Congress could not have intended those results.²⁷² Furthermore, the healthcare exchanges that the ACA requires cannot operate as intended without the universal coverage.²⁷³ A part of the ACA prohibits charging higher insurance premiums for preexisting conditions, but forcing healthy people to get coverage finances this.²⁷⁴ The conservatives argued that the provisions cannot be severed because the interactions that Congress intended breakdown without the full-blown Medicaid Expansion.²⁷⁵

²⁶⁹ *Id.* at 2673.

²⁷⁰ *See id.* at 2673–75 (providing reasons that the ACA must be invalidated based on congressional intent to balance costs and benefits which will not materialize given that the compulsory component of the Medicaid Expansion has been invalidated).

²⁷¹ *Id.* at 2672.

²⁷² *See id.* at 2672–73 (observing the important dynamic interaction of the ACA’s design and concluding that Congress could not have intended to give the states the option to choose between retaining existing Medicaid funds or accepting incremental funds subject to additional terms).

²⁷³ *See id.* at 2673 (“The exchanges cannot operate in the manner Congress intended if the Individual Mandate, Medicaid Expansion, and insurance regulations cannot remain in force.”).

²⁷⁴ *See id.* at 2670 (finding that insurers are required “to give coverage regardless of the insured’s [preexisting] conditions; but the insurers benefit from the new, healthy purchasers who are forced by the Individual Mandate to buy the insurers’ product. . .”).

²⁷⁵ *See id.* at 2671. The conservative dissent states:

Major provisions of the Affordable Care Act—*i.e.*, the insurance regulations and taxes, the reductions in federal reimbursements to hospitals and other Medicare spending reductions, the exchanges and their federal subsidies, and the employer responsibility assessment—cannot remain once the Individual Mandate and Medicaid Expansion are invalid. That result follows from the undoubted inability of the other major provisions to operate as Congress intended without the Individual Mandate and Medicaid Expansion.

Id.

There are also minor provisions contained in the ACA that the conservatives argued must be invalidated.²⁷⁶ Some are “provisions that provide benefits to the State of a particular legislator.”²⁷⁷ These are viewed as the price paid for support of the major provisions of the ACA, and it is argued that Congress would not have passed such minor provisions without the major provision.²⁷⁸ Other provisions do not benefit a particular state, such as requiring chain restaurants to display nutritional content, but again, it is unlikely that Congress would have passed such legislation independently.²⁷⁹ The conservatives compared the law to a “Christmas tree” with many irrelevant ornaments attached to it, and they argued, “that when the tree no longer exists the ornaments are superfluous.”²⁸⁰

In their concluding section, the conservative dissenters summarized their criticism of the Court’s reasoning:

The Court today decides to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax. And it changes the intentionally coercive sanction of a total cut-off of Medicaid funds to a supposedly noncoercive cut-off of only the incremental funds that the Act makes available.

The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect. It makes enactment of sensible [healthcare] regulation more difficult, since Congress cannot start afresh but must take as its point of departure a jumble of now senseless provisions, provisions that certain interests favored under the Court’s new design will struggle to retain. And it leaves the public and the States to expend vast sums of money on requirements that may or may not survive the necessary congressional revision.

The Court’s disposition, invented and textual as it is, does not even have the merit of avoiding constitutional difficulties. It creates them. The holding that the Individual Mandate is a tax raises a difficult constitutional question (what is a direct tax?) that the Court resolves with inadequate deliberation. And the judgment on the Medicaid Expansion issue ushers in new federalism concerns

²⁷⁶ See *id.* at 2675–76 (arguing that the ACA’s other provisions must be invalidated).

²⁷⁷ *Id.* at 2675.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 2675–76.

and places an unaccustomed strain upon the Union. Those States that decline the Medicaid Expansion must subsidize, by the federal tax dollars taken from their citizens, vast grants to the States that accept the Medicaid Expansion. If that destabilizing political dynamic, so antagonistic to a harmonious Union, is to be introduced at all, it should be by Congress, not by the Judiciary.²⁸¹

IV. THE PROBLEM OF UNREIMBURSED HEALTHCARE

The problem that motivated Congress to pass the ACA is that large unreimbursed healthcare costs incurred by the healthcare system require exorbitant charges to the segment of the population that either pays for medical services or has insurance coverage for their healthcare.²⁸² This is, however, a problem that Congress created.²⁸³ In 1986, Congress passed the EMTLA.²⁸⁴ An unintended consequence of this legislation was dramatic escalation in the cost of healthcare.²⁸⁵ Hospitals were legally required to provide healthcare to uninsured people who lacked the ability to pay for it.²⁸⁶ Since Congress imposed this as an unfunded mandate, this could only be accomplished by raising the charges imposed on insurance companies and self-insured individuals paying for their own treatment.

The EMTLA essentially requires hospitals to provide any individual who comes to a hospital with an emergency condition the medical treatment needed to stabilize the condition.²⁸⁷ This is arguably an unconstitutional taking of private

²⁸¹ *Id.* at 2676.

²⁸² *See id.* at 2610–11 (Ginsburg, Sotomayor, Breyer & Kagen, JJ., dissenting in part) (“As a group, uninsured individuals annually consume more than \$100 billion in [healthcare] services. . .”).

²⁸³ *Cf.* Scott, *supra* note 158, at 28 (arguing that the financial crisis “came about because Congress desired to subsidize particular groups without direct on-budget expenditures but indirectly through regulation and guarantees, thereby allowing legislators to deny the existence of any subsidization until the whole scheme collapsed”).

²⁸⁴ 42 U.S.C. § 1395dd (2012).

²⁸⁵ *See The Uninsured: Access to Medical Care*, AM. C. OF EMERGENCY PHYSICIANS, <http://www.acep.org/News-Media-top-banner/The-Uninsured--Access-To-Medical-Care/> (last visited Dec. 31, 2014) (observing that fifty-five percent of emergency room treatment is uncompensated and that in the past hospitals shifted “uncompensated care costs to insured patients to make up the difference.”).

²⁸⁶ *See EMTALA*, AM. C. OF EMERGENCY PHYSICIANS, <http://www.acep.org/Content.aspx?id=25936> (last visited Dec. 31, 2014) (“The [EMTALA] is a federal law that requires anyone coming to an emergency department to be stabilized and treated, regardless of their insurance status or ability to pay, but since its enactment in 1986 has remained an unfunded mandate.”).

²⁸⁷ 42 U.S.C. § 1395dd(b)(1)(A).

property for private use. Amazingly, the constitutionality of this act does not appear to have been challenged. If appropriation of hospital resources is classified as a mere regulation rather than a taking, and the regulation pertains to an authorized power of the government, it can withstand constitutional scrutiny under the precedents set by the Court.²⁸⁸ A regulation would ordinarily involve a prohibition on a use of property, such as a residential zoning regulation that prohibits a commercial use of property.²⁸⁹ A mandate to provide free services does not fall under recognized categories of regulations.

If the EMTLA is not a mere regulation, the question arises as to whether it is an unconstitutional taking. Constitutional takings must both be compensated and for public use.²⁹⁰ The Takings Clause of the Fifth Amendment prohibits the government from taking property for private use.²⁹¹ Providing healthcare resources for the treatment of an individual (who is not a member of the military on active duty) is unquestionably a private use. It is also unquestionably uncompensated. Thus, if the EMLTA is a taking rather than a regulation, it is without question an illegal taking.

What would be the result of holding that the EMTLA is an unconstitutional taking? There are two possibilities. One would be that hospitals could refuse emergency treatment to the uninsured. Competitive market forces would push all hospitals in this direction since if some chose to refuse treatment while others provided treatment, those providing treatment would be overwhelmed by patients without insurance and means to pay and would lose money until driven into bankruptcy.²⁹² The other possibility is that Congress could induce hospitals to provide treatment by offering to pay for the treatment. The result of this would be

²⁸⁸ See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

²⁸⁹ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (citing *Mahon*, 260 U.S. 393 at 414–15) (“[I]f the protection against physical appropriations of private property was to be meaningfully enforced, the government’s power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.”).

²⁹⁰ U.S. CONST. amend. V.

²⁹¹ See *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (“The taking by a State of the private property of one person or corporation, without the owner’s consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.”).

²⁹² See *Klock*, *supra* note 65, at 323 (“[F]irms earning negative profits cannot cover their fixed costs and will eventually go out of business.”).

lower insurance premiums and hospital fees for the insured and paying public, as they would no longer have to pay rates calculated to subsidize those who cannot afford to pay or elect to not purchase insurance. Of course, Congress would need to provide funds to compensate the hospitals for treating the uninsured individuals without means to pay. This will make the subsidy to the uninsured and the resulting higher taxes most transparent.

The fundamental problem with the EMTLA is that it is a method for subsidizing the uninsured off the public books and avoiding accountability for the implicit taxes that the insured pay to treat the uninsured.²⁹³ If society wants to subsidize those who elect not to purchase insurance, that is fine, but the amount of the subsidy should be explicit, so the electorate can make an informed choice based on the facts.²⁹⁴ Hiding the costs of the subsidy is a method for manipulating public support for something the public might very well not be willing to pay for if they knew the true cost and could directly translate those costs into the higher taxes they must pay.²⁹⁵ People will want health insurance if it is free; they will not want to pay for it if it is not free.²⁹⁶

Another problem with subsidizing healthcare off the books through regulation is that it is inefficient.²⁹⁷ There are unintended consequences and higher costs

²⁹³ See *EMTLA*, *supra* note 286 (calling the EMTLA an unfunded mandate).

²⁹⁴ Cf. Mark Klock, *Lighthouse or Hidden Reef? Navigating the Fiduciary Duty of Delaware Corporations' Directors in the Wake of Malone*, 6 STAN. J.L. BUS. & FIN. 1, 18 (2000). The commentator wrote:

[D]irectors have a duty not to deceive shareholders because such deception constitutes an interference with shareholder rights. First of all, shareholder rights—specifically the right to vote on directors, the right to remove directors, and the right to vote with their feet—are not meaningful rights if the directors can deliberately deceive the shareholders about the corporate business.

Id. (footnote omitted).

²⁹⁵ Cf. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 146 (1995) (criticizing healthcare legislation for “hidden subsidies” and the massive dislocations they cause).

²⁹⁶ See Posner, *supra* note 147, at 1575 (“If you give a worker childbirth coverage, she’ll like it (endowment effect); but if you don’t give it to her, she’ll dislike it (more precisely, won’t want to pay for it in lower wages).”).

²⁹⁷ See VARIAN, *supra* note 15, at 453–54 (explaining that government regulators often lead to inefficiency).

associated with indirectly dealing with the problem.²⁹⁸ A fundamental conclusion of economic theory is that subsidies distort the economy and create waste.²⁹⁹

Why a hospital has not challenged the legality of the EMTLA is a question that could be asked. The answer could simply be that the current system serves the interests of hospital administrators and medical professionals. Because they have to provide treatment, they have to enlarge their hospitals, buy more equipment, and hire more staff. Their empires have grown.³⁰⁰ Additionally, no hospital acting alone would want to endure the negative public reaction that would come with efforts to seek the right to refuse emergency treatment to the poor.

If one wishes to argue that the EMTLA is a constitutional regulation, there are no real limits on the government's ability to take private property through regulation and give it to individuals.³⁰¹ We could pass the Emergency Thirst and Hunger Act of 2014 requiring that any individual who is in need of nourishment cannot be refused food by restaurants or grocers. We could also pass an Emergency Clothing and Shelter Act requiring clothiers and hotels to provide for people in need. The predictable consequences of such legislation would be to create another

²⁹⁸ See STIGLITZ, *supra* note 34, at 152 (describing the unintended consequences of meddling with high prices). Professor Stiglitz writes:

If the price of oil is high, it is because oil is scarce and the high price reflects that scarcity. . . . [E]conomists regard such situations not as market failures but as the hard facts of economic life. Much as everyone would like to live in a world where all individuals could have almost everything they wanted at a price they could afford, this is simply unrealistic. Those calling on government to "solve" the problem of scarcity by passing laws about prices simply shift the problem. They reduce prices for some and cause shortages for everyone else.

Id.

²⁹⁹ See VARIAN, *supra* note 15, at 309–10 (explaining problems with subsidies).

³⁰⁰ Cf. Dennis C. Mueller, *A Theory of Conglomerate Mergers*, 83 Q. J. ECON. 643, 644 (1969) (explaining that corporate managers might engage in unprofitable expansions to build empires and increase their prestige and perk consumption).

³⁰¹ Cf. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). Justice Holmes wrote:

In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Id. (citation omitted).

crisis requiring more congressional legislation such as the Affordable Food, Shelter, and Clothing Act that mandates that all individuals purchase meal plans and housing or else pay a tax (or is it a penalty?).

V. ARE THERE LIMITS ON TAXING AND SPENDING?

A. *The Taxing Question: Are There Any Limits?*

The Sixteenth Amendment simply reads: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”³⁰² If there is no limit on this power, then Congress could in theory collect at least 100 percent of income and distribute it evenly as done under the philosophy of Communism.³⁰³ Arguably, Congress could, at least for a finite period, tax more than 100 percent of income and require people to turn over all their income and their assets. *Of course private property cannot be taken without compensation under the Takings Clause, but according to the logic of Chief Justice Roberts in NFIB, such a taking could still be upheld if the agency authorized by Congress to collect the payments is the IRS.*³⁰⁴ I take it as an axiom that the American people in 1913 did not intend to give such limitless power in passing the Sixteenth Amendment.

Without any substantive discussion of the Sixteenth Amendment—not even by the eight dissenters—the Court in *NFIB* held that the mandatory coverage provision of Obamacare was a tax and was not a direct tax limited by the apportionment requirement in Article I, § 2.³⁰⁵ The Court went on to hold that Congress is free to tax individuals for failing to purchase health insurance.³⁰⁶ Specifically, Chief Justice Roberts wrote “if the mandate is in effect just a tax hike

³⁰² U.S. CONST. amend. XVI.

³⁰³ Assuming equal needs among the population, for as Marx said, “[f]rom each according to his abilities, to each according to his needs.” KARL MARX, CRITIQUE OF THE GOTHA PROGRAMME, pt. 1 (1875), reprinted in 3 MARX/ENGELS SELECTED WORKS 13 (1970), available at <https://www.marxists.org/archive/marx/works/1875/gotha/>.

³⁰⁴ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2654 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (calling the argument that the penalty is a tax because it is payable to the IRS “flimsiest of indications to the contrary”).

³⁰⁵ See *id.* at 2599–600 (finding that the mandatory coverage could be fairly characterized as a tax and is not a direct tax).

³⁰⁶ See *id.* at 2601 (“The Federal Government does have the power to impose a tax on those without health insurance.”).

on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax."³⁰⁷ The Court further suggested that Congress could tax people for not buying broccoli.³⁰⁸

This interpretation suggests that Congress can tax individuals for anything they buy or do, and for anything, they do not buy or do.³⁰⁹ People could be taxed for getting married, or not getting married, for having children, or for not having children, for going to church, or even for writing books.

But wait. Surely, the Court would find a tax on going to church or writing books an unconstitutional infringement on the First Amendment. Clearly, other constitutional protections limit an otherwise infinite taxing power. The First Amendment protects expression.³¹⁰ Expression need not be verbal,³¹¹ and not buying health insurance could be a means of expressing one's self as a free spirit, willing to take risks and choosing to live for the moment. Religious beliefs that require the use of prayer over healthcare could easily be interpreted as a holy command not to purchase health insurance.³¹² The ACA has an exemption related to religion that indicates that Congress did contemplate at least this limitation on its taxing power.³¹³ Not buying broccoli could be a method of expression stating that I hate broccoli. *Roe v. Wade* limits states' ability to interfere with reproductive choices,³¹⁴ and a tax on having or not having children might be held

³⁰⁷ *Id.* at 2594.

³⁰⁸ *See id.* at 2650 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("The dissent dismisses the conclusion that the power to compel entry into the health-insurance market would include the power to compel entry into the new-car or broccoli markets." (citing the partial dissent by Justices Ginsburg and Sotomayor)).

³⁰⁹ *See id.* at 2608 ("[I]t is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax.").

³¹⁰ *See Stromberg v. California*, 283 U.S. 359, 368–69 (1931) (holding a display of a flag to be protected free speech).

³¹¹ *See Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 514 (1969) ("[O]ur Constitution does not permit officials of the State to deny their form of expression [wearing black armbands].").

³¹² *See* Kristin M. Lomond, Note, *An Adult Patient's Right to Refuse Medical Treatment for Religious Reasons: The Limitations Imposed by Parenthood*, 31 U. LOUISVILLE J. FAM. L. 665, 670 (1993) ("[T]he Christian Scientist Church, believes in 'faith healing'—that spiritual means alone can heal all sickness. Christian Scientists oppose any medical treatment whatsoever.").

³¹³ 26 U.S.C. § 5000A(d)(2)(A) (2012).

³¹⁴ *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

unconstitutional on that basis. There are other provisions of the Court's constitutional jurisprudence at odds with extreme unfettered taxing power.³¹⁵

In particular, the Takings Clause has been interpreted to prohibit taking private property for private use.³¹⁶ Our current tax structure has developed into something much more than raising revenue to support public needs such as roads, parks, and armies.³¹⁷ It has become a vehicle for redistributing income and wealth.³¹⁸ No use of property could be more private than giving money to another person to spend. Taxing incomes unequally for purposes of giving one person's money to another is at odds with the Court's interpretation of the Takings Clause.³¹⁹

The Sixteenth Amendment states: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."³²⁰ It does not state that Congress can tax what people do not buy, nor even that

³¹⁵ See, e.g., *United States v. Munoz-Flores*, 495 U.S. 385, 395–96 (1990) (holding an act that levied an assessment on persons convicted of a federal crime unconstitutional because the bill did not originate in the House in violation of the Origination Clause).

³¹⁶ See *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) ("The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.").

³¹⁷ See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2643 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). The Justices stated:

The Court has long since expanded that beyond (what Madison thought it meant) taxing and spending for those aspects of the general welfare that were within the Federal Government's enumerated powers, see *United States v. Butler*, 297 U.S. 1, 65–66, 56 S. Ct. 312, 80 L. Ed. 477, 1936-1 C.B. 421 (1936). Thus, we now have sizable federal Departments devoted to subjects not mentioned among Congress' enumerated powers, and only marginally related to commerce: the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development.

Id.

³¹⁸ See PAUL WONNACOTT & RONALD J. WONNACOTT, *ECONOMICS* 743 (3d ed. 1986) ("When all programs are considered, the overall picture is one of a government that is making substantial transfers of income to the poor, in the process eliminating roughly a third of the nation's income inequality.").

³¹⁹ See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (suggesting that we cannot put the burden of one person's needs on another person).

³²⁰ U.S. CONST. amend. XVI.

Congress has the power to grant tax credits, income deductions, or exemptions.³²¹ It especially does not state that Congress has power to tax some incomes at higher rates than other incomes. In 1913, the issue was not too severe: The maximum marginal tax rate was 7 percent, and most Americans were taxed very lightly because the first \$20,000 was taxed at a rate of just 1 percent³²²—much more than the average income of the time.³²³ Additionally, income distributions are heavily skewed to the right,³²⁴ which means that the median income level was even lower than the average level of income.³²⁵ Even for those few wealthy Americans subject to income taxation, the marginal tax rate began at a mere 1 percent—not something, most wealthy people would miss. Furthermore, there were no payroll taxes piled on top of the federal income tax in 1913.³²⁶ It is inconceivable that people in 1913 could have expected the system to mushroom into one in which middle class families surrender 40 percent of their income to support massive entitlement programs.³²⁷

Not all taxes are constitutional.³²⁸ Direct taxes that are not apportioned among the states according to their population are unconstitutional.³²⁹ Income taxes do not

³²¹ *Id.*

³²² See *History of Federal Individual Income Bottom and Top Bracket Rates*, RUSH LIMBAUGH SHOW (Mar. 26, 2007), www.rushlimbaugh.com/daily/2007/03/26/history_of_federal_individual_income_bottom_and_top_bracket_rates.

³²³ In 1929, per capita annual income was \$705. HISTORICAL STATISTICS OF THE UNITED STATES 225 (bicentennial ed. 1975). That means that the average family of four had an annual income of \$2,820 in 1929. Clearly the average household income in 1913 was well below \$20,000.

³²⁴ See Sherwin Rosen, *Mincering Labor Economics*, 6 J. ECON. PERSP. 157, 160 (1992) (“[E]arnings distributions are skewed right.”).

³²⁵ See MICHAEL O. FINKELSTEIN & BRUCE LEVIN, *STATISTICS FOR LAWYERS* 4 (2d ed. 2001) (“In right-skewed distributions, such as an income distribution, it is common to find that the mean exceeds the median. . . .”).

³²⁶ The Social Security Act was part of Franklin Roosevelt’s “New Deal” program. See JESSE H. CHOPPER ET AL., *CONSTITUTIONAL LAW* 77–78 (10th ed. 2006) (describing expansion of the commerce power after 1936).

³²⁷ Cf. *How Much Taxes Do We Really Pay?*, NOWANDFUTURES.COM, <http://www.nowandfutures.com/taxes.html> (last visited Dec. 31, 2014) (estimating the potential total tax rate that could be paid by the well-above-average United States citizen at 58.5% of income for 2013, including state and federal taxes).

³²⁸ See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2598 (“[A]ny tax must still comply with other requirements in the Constitution.”).

³²⁹ See *id.* (“[A]ny ‘direct tax’ must be apportioned so that each State pays in proportion to its population.”).

have to be apportioned.³³⁰ But that does not mean that all income taxes are constitutional. A tax on the incomes of only non-Christians would be unconstitutional, for example. Another important question is, what is a tax on income? It is not at all obvious that a penalty for not having health insurance, which the Court has interpreted to be a tax for constitutional purposes, is necessarily a tax on income.³³¹

Suppose Congress sought to use its taxing power to address the national problem of obesity. Suppose Congress sought to assess an annual tax of \$1,000 on each obese person on December 31. Such a tax would seem to be a direct tax on obese people, which would be unconstitutional under Article I, § 2 because there would be no way to apportion a fixed tax per obese individual among the states. However, Congress could fashion a direct tax on obesity in a constitutional manner by assessing obese individuals in each state a tax of \$1,000 times the proportion of obese people in the nation, divided by the proportion of obese people in that state. Under such a scheme, the taxes collected would be apportioned among the states in proportion to their population, and in states where there are fewer obese people, such as Colorado, the obese individuals would have to pay a larger tax. One could question the wisdom of a motivational tax that puts a weaker incentive on obese people in states with a larger obese population, but the system would pass constitutional limits on direct taxes.

The question to ask from this hypothetical is whether Congress can circumvent the requirements of Article I, § 2 by making the tax \$1,000 on obese individuals with an income under \$50,000 per year and \$2,000 on obese individuals with an income over \$50,000 per year where the tax is to be collected by the IRS with the regular federal income tax return. This hypothetical is identical to the individual mandate.³³² It seems to me that the Court did not consider this hypothetical in *NFIB* and that the issue was not adequately researched, briefed, argued, and deliberated. It also seems to me that the intent of the Sixteenth Amendment was to permit the financing of modern government through income

³³⁰ U.S. CONST. amend. XVI.

³³¹ See *NFIB*, 132 S. Ct. at 2655 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“[W]e must observe that rewriting § 5000A as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population.”).

³³² *Id.* at 2654.

taxes, not to enable Congress to easily convert otherwise unconstitutional direct taxes into constitutional direct taxes.

B. Are There Limits on Spending?

An analysis of taxing power necessarily requires an analysis of spending power. The two are intertwined in the same clause: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . .”³³³ This clause is referred to as the Spending Clause, although the word used in the Constitution is “provide.”³³⁴ The Constitution does not authorize Congress to spend “on any Whim it chooses” but to spend “for the common Defence and general Welfare of the United States.”³³⁵ Admittedly, the term “general welfare” is intrinsically very broad,³³⁶ but it does not cover anything and everything.³³⁷

My assertion that the Spending Clause does not cover everything is not without foundation. Seven Justices in *NFIB* indicated that Congress did in fact violate the Spending Clause.³³⁸ The analysis was based on coercion, and it “was the first time that the Court treated coercion as an issue of more than theoretical possibility under the Spending Clause.”³³⁹ Indeed, the treatment alarmed Justice Ginsburg who complained, “The Chief Justice therefore—for the first time ever—finds an exercise of Congress’ spending power unconstitutionally coercive.”³⁴⁰

³³³ U.S. CONST. art. I, § 8, cl. 1.

³³⁴ See, e.g., Eloise Pasachoff, *Conditional Spending after NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 581 (2013) (“The Supreme Court’s new coercion analysis under the Spending Clause is sure to lead to much litigation over the constitutionality of a wide variety of statutes.”).

³³⁵ See *United States v. Butler*, 297 U.S. 1, 65–66 (1936) (adopting a broad interpretation of the phrase “to provide for the general welfare”); see also U.S. CONST. art. I § 8, cl. 1.

³³⁶ See *Butler*, 297 U.S. at 66 (“But the adoption of the broader construction leaves the power to spend subject to limitations.”).

³³⁷ See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 155 (16th ed. 2007) (discussing the existence of real constitutional questions about the scope of the spending power).

³³⁸ See Pasachoff, *supra* note 334, at 580 (“[S]even justices were apparently interested in revisiting Congress’s spending power. [They] concluded that the Medicaid expansion violated the Spending Clause by coercing the states into accepting its terms.”).

³³⁹ *Id.* at 580.

³⁴⁰ *NFIB v. Sebelius*, 132 S. Ct. 2566, 2630 (2012) (Ginsburg & Sotomayor, JJ., dissenting in part).

In addition to the fact that the term “general welfare of the United States” is very broad, the Court would undoubtedly give Congress a large degree of deference in deciding what is within the general welfare.³⁴¹ However, *NFIB* informs us that it is not impossible for Congress to overstep its bounds with respect to spending.³⁴²

What is included in providing for the general welfare aside from the common defense? Certainly interstate roads, air traffic control systems, air quality standards, and national parks must be included.³⁴³ What might exceed the general welfare? I suggest that spending on individual households that does not confer a benefit on the public could, in certain circumstances, not be for the general welfare of the United States but for the specific welfare of individual households. Additionally, spending on programs that compel the States to act as administrators of federal programs violates Congress’ spending power.³⁴⁴

This is not an attack on Social Security. Social Security taxes workers and confers benefits on the same people who pay the taxes.³⁴⁵ It is not a system for redistributing wealth. It is a system of requiring individuals to give up a portion of their income now in exchange for future benefits.³⁴⁶ No one receives social security benefits unless they either paid social security taxes or are the surviving dependent of someone who paid social security taxes.³⁴⁷ Furthermore, social security is

³⁴¹ See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citing *Helvering v. Davis*, 301 U.S. 619, 640, 645 (1937) (“In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.”)).

³⁴² See *NFIB*, 132 S. Ct. at 2607 (“What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”).

³⁴³ See STIGLITZ, *supra* note 34, at 157 (describing public goods such as highways and parks).

³⁴⁴ See *NFIB*, 132 S. Ct. at 2602 (“Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system.”).

³⁴⁵ See Peter Diamond, *Social Security*, 94 AM. ECON. REV. 1, 7 (2004) (describing social security as a mandatory retirement income system).

³⁴⁶ See STIGLITZ, *supra* note 34, at 525 (“Revenues from the payroll tax are intended to finance the Social Security (retirement income) and Medicare (medical care for the aged) programs.”).

³⁴⁷ See Diamond, *supra* note 345, at 9 (describing benefits for workers and survivors of workers).

administered at the federal level.³⁴⁸ Obamacare is administered by the states, except for the collection of penalties for noncompliance.³⁴⁹

There is a particularly important reason for preventing the taking of private property for private use far beyond protection of property rights. Taking from one to give to another undermines the democratic political process. It opens the door to vote buying where the property of a small minority of affluent people can be appropriated to make a large majority of voters marginally better off.³⁵⁰ Economic laws dictate that successful politicians will be those with the best intuitive understanding of this economic principle: Since all votes are equal; purchase a majority of the cheapest votes.³⁵¹ The cheapest votes belong to those in society who have the least, as it takes less to make them marginally better off.³⁵² However, income and wealth are proxies for education, savings, and work.³⁵³ Therefore, a system that permits taking private property to give for private use—redistribution of income and wealth—underweights the positions of the most educated voters

³⁴⁸ See 42 U.S.C. § 401 (2012) (creating a trust fund account in the United States Treasury for social security benefits).

³⁴⁹ See *NFIB*, 132 S. Ct. at 2601 (“The Medicaid provisions of the Affordable Care Act . . . require States to expand their Medicaid programs. . .”).

³⁵⁰ See Pamela S. Karlan, *Not By Money But By Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455, 1462 (1994). Professor Karlan wrote:

A candidate who pledges to extend public sanitation services to a currently unserved part of the county has essentially promised to relieve each of the voters in that jurisdiction of the expense of private trash collection. If that promise is the deciding factor in some voters’ decisions to support the candidate, then the candidate has functionally “bought” these votes for the price of collecting the garbage. Even when the monetary value of a promise is not directly calculable, as long as it is targeted at a voter’s self-interest—rather than, say, his civic republican concern for the general welfare—the vote in effect has been bought with public funds.

Id.

³⁵¹ See Klock, *supra* note 30, at 179 (“Since it is logically impossible for politicians to give everyone more for free than they pay for in taxes, politicians concentrate the gifts on those voters who are cheapest to buy.”); cf. John Lott, Jr., *Should the Wealth Be Able to “Buy Justice”?*, 95 J. POL. ECON. 1307, 1314 (1987) (stating that rational prosecutors with budget constraints will pursue the cases that are the cheapest to prosecute).

³⁵² See Klock, *supra* note 30, at 179 (“The poor with no assets, no savings, and no investment in education can be bought for cheap.”).

³⁵³ See Richard A. Posner, *Equality, Wealth, and Political Stability*, 13 J. L. ECON. & ORG. 344, 345 (1997) (explaining that differences in income proxy for differences in wellbeing and educations).

who perform the highest valued work and save the most.³⁵⁴ Once we started down the road of taxing the few a lot to give a little more to the majority, it was inevitable that successful politicians would be those who pushed the margins to take more from the minority and give more to the majority.³⁵⁵ But of course, this is not sustainable, as the French exemplify.³⁵⁶

The fundamental assumption made in economics is that people want more.³⁵⁷ This assumption appears reasonable and supported by empirical data.³⁵⁸ If you offer free health insurance to people, they will accept it.³⁵⁹ If you offer improved coverage at no additional cost, they will accept that as well.³⁶⁰ If you offer them

³⁵⁴ *Cf.* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 684–85 (1966) (Harlan & Stewart, JJ., dissenting). The dissent argues:

Similarly with property qualifications, it is only by fiat that it can be said, especially in the context of American history, that there can be no rational debate as to their advisability. Most of the early Colonies had them; many of the States have had them during much of their histories; and, whether one agrees or not, arguments have been and still can be made in favor of them. For example, it is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay \$1.50 or thereabouts a year for the exercise of the franchise. It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.

Id. (internal footnotes omitted).

³⁵⁵ See Klock, *supra* note 30, at 178 (“The continuous pressure on the politicians to provide more and more ‘free’ goods such as healthcare, housing, food, and education results in pressure to appropriate increasingly larger sums from the minority.”).

³⁵⁶ See Hugh Carnegie & Scheherazade Daneshkhu, *Business Joins Exodus Over French Tax Rises*, FIN. TIMES (London), Dec. 22, 2012, World News, at 8 (reporting on mass exodus of wealthy French to avoid new seventy-five percent income tax rate on high incomes).

³⁵⁷ See Klock, *supra* note 33, at 243 (explaining the role of the assumption in economic models that people want more).

³⁵⁸ See generally *id.* at 221–26 (discussing empirical evidence that people and animals behave rationally in accordance with economic models).

³⁵⁹ See Posner, *supra* note 147, at 1575 (stating that if workers are given more benefits, they will be happier).

³⁶⁰ *Id.*

higher wages with no offset, they will likely take those too.³⁶¹ Of course, none of these goods are actually free—someone must bear the costs.³⁶² By definition, a good—i.e., something that people want—requires costs to produce.³⁶³ Things that are infinitely abundant have no value.³⁶⁴ Things that cost something require making choices between different opportunities.³⁶⁵

Although people always want more, they have budget constraints, and they must, therefore, prioritize and exclude some items to have the money for those they most need or desire.³⁶⁶ This is not true of the government.³⁶⁷ There is always more that the government can do, always more that the government could spend more money on.³⁶⁸ An ideal government might set a budget based on a fixed percentage of national income and then select the highest priorities to fund. However, our system of government is continuously working to increase its size relative to the private sector.³⁶⁹ The fundamental problem is that there is, then, no incentive to set

³⁶¹ *Id.*

³⁶² See Mark Klock, *Financial Options, Real Options, and Legal Options: Opting to Exploit Ourselves and What We Can Do About It*, 55 ALA. L. REV. 63, 98 (2003) (“The problem with free options is that they are not free. Although they may be free to the individual with the option, they are costly to the organization providing the option.”).

³⁶³ See Stiglitz, *supra* note 34, at 41 (“To apply a resource to one use means that it cannot be put to any other use. Thus, we should consider the next-best alternative use of any resource when we think about putting it to any particular use. This next-best use is the formal measurement of opportunity cost.”).

³⁶⁴ See VARIAN, *supra* note 15, at 23 (explaining the opportunity cost of consuming more of a good).

³⁶⁵ See Klock, *supra* note 33, at 188 (“[C]hoices must be made about how to use scarce resources.”).

³⁶⁶ See STIGLITZ, *supra* note 34, at 35–36 (explaining the concepts of budget constraints and opportunity sets).

³⁶⁷ See Klock, *supra* note 30, at 173. The commentator wrote:

The fundamental problem with government decision making is that it is decision making by committee, and committees operate according to how they want the world to be rather than accepting the world as it exists. Markets allow goods and services to flow to their highest-valued use unabated. Committees try to impede and redirect forces.

Id. (internal footnotes omitted).

³⁶⁸ Cf. W. Mark Crain et al., *Legislator Specialization and the Size of Government*, 46 PUB. CHOICE 311, 311 (1985) (“[M]ore committees allow legislators to mirror interest groups and their concerns better, and hence lead to more rather than less government. In this case more committees mean that the legislature is more easily captured by special-interest groups. Government programs increase in number and size as a result.”).

³⁶⁹ See *id.* at 314. The authors conclude:

priorities.³⁷⁰ There is no need to prioritize when one can spend other people's money without any limits.³⁷¹

Indeed, the beauty of private markets is that they set priorities and channel resources to the highest-valued use.³⁷² There are just three basic assumptions required for market rationality: limited withdrawals from the storage of wealth (i.e., one cannot borrow against the future without collateral); limited asset liability (e.g., one cannot collect more than the size of the estate from the deceased); and markets must clear (i.e., prices adjust so that supply equals demand).³⁷³ There is a serious problem with an unconstrained government that faces no limit whatsoever on its taxing power. Resources will be taken away from the services valued most by society and channeled into services that are valued less.³⁷⁴ This occurs because those making the decisions are detached from constraints and preferences.³⁷⁵

As a simple example of a situation where society displays one set of preferences and the government wastes resources, consider the Obama

The idea that more committees lead to closer scrutiny of government operations by more specialized watchdogs of the public purse is not a realistic empirical conjecture. What appears to be happening instead is that more specialized subgroups of legislators are conduits through which laws and programs that increase the size of government pass more easily.

Id.

³⁷⁰ See generally Gordon Tullock, *Problems of Majority Voting*, 67 J. POL. ECON. 571, 571–79 (1959) (explaining that majority voting is not conducive to creating a rational ordering of public policy decisions).

³⁷¹ See Klock, *supra* note 144, at 160 (explaining that with unlimited wealth, no choices need to be made).

³⁷² See VARIAN, *supra* note 15, at 639 (“[A]ll competitive equilibria are welfare maxima. . .”).

³⁷³ See Mark Lowenstein & Gregory A. Willard, *The Limits of Investor Behavior*, 61 J. FIN. 231, 232 (2006) (“[I]f one believes that limited asset liability, market clearing, and limited storage withdrawals are reasonable economic assumptions, then one must regard the implied properties of asset prices as inviolable since they are independent of investor rationality.”).

³⁷⁴ See STIGLITZ, *supra* note 34, at 547 (“As long as the government has the discretion to grant rents and other special favors, firms and individuals will find it pays to engage in rent-seeking behavior—that is, to persuade government to grant them tariffs or other benefits—and the decisions of government accordingly get distorted.”).

³⁷⁵ See Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371, 396 (1983) (“Since deadweight costs to taxpayers fall as the tax per person falls, the opposition of taxpayers to subsidies decreases as the number of taxpayers increases. Therefore, groups can more readily obtain subsidies when they are small relative to the number of taxpayers.”).

administration's efforts to provide universal high speed internet services.³⁷⁶ Only a minority of households that have high speed internet available to them elect to purchase it.³⁷⁷ This proves that they prefer to spend their income on other services, yet the administration is intensely pressing to expand the availability of high speed internet.³⁷⁸ Resources expended on expanding coverage are resources Americans would prefer to have in their own pockets, but some bureaucrats push the agenda in any case so that they can claim to have built a bigger sandbox.

VI. EXECUTIVE ENFORCEMENT DISCRETION—A STICK IN THE SPOKES OF THE ACA

The method of making healthcare less expensive under the ACA is to get everyone to purchase healthcare, eliminating the adverse selection problem that tends to drive only the people who are most expensive to cover into the insurance market.³⁷⁹ That some states have the option to opt out of Medicare expansion undercuts universal coverage.³⁸⁰ Another factor that undercuts universal coverage is the broad enforcement discretion given to Executive agencies along with the fact that the IRS already has insufficient resources to enforce the tax laws.

³⁷⁶ See FCC, EIGHTH BROADBAND PROGRESS REPORT 3 (2012), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-12-90A1.pdf (“The efforts to bring broadband to all Americans are significant. . .”).

³⁷⁷ See *id.* at 54 (“American households—only 40 percent—adopt fixed broadband meeting the speed benchmark.”).

³⁷⁸ See *id.* at 59; see also FCC, EIGHTH BROADBAND PROGRESS REPORT, <http://www.fcc.gov/reports/eighth-broadband-progress-report> (“Because millions still lack access to or have not adopted broadband, the Report concludes broadband is not yet being deployed in a reasonable and timely fashion.”).

³⁷⁹ See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2646 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). The conservative dissent explains this:

Congress has impressed into service third parties, healthy individuals who could be but are not customers of the relevant industry, to offset the undesirable consequences of the regulation. Congress' desire to force these individuals to purchase insurance is motivated by the fact that they are further removed from the market than unhealthy individuals with [preexisting] conditions, because they are less likely to need extensive care in the near future.

Id.

³⁸⁰ See *id.* at 2665 (“[T]he achievement of that goal obviously depends on participation [in expanded Medicaid] by every single State.”).

In 2006, the IRS estimated that the tax gap—the difference between federal income taxes owed and collected—was \$385 billion.³⁸¹ Other more recent studies have estimated the gap at upwards of \$600 billion.³⁸² The actual amount of federal income tax collected in 2011 was about \$1 trillion.³⁸³ The proportion of uncollected taxes to total taxes owed is about 38 percent ($\$600 \text{ billion} / \{\$1,000 \text{ billion} + \$600 \text{ billion}\}$). If the IRS lacks the resources to collect something in the neighborhood of 40 percent of the income taxes owed, how can it have the resources to collect all penalties that can be legally assessed on those who do not purchase insurance? It cannot provide perfect enforcement of the Obamacare tax penalty provisions on the uninsured, and there will thus be an additional wedge between universal coverage and actual coverage, leaving an adverse selection problem in the insurance market.

There are two obvious reasons for the IRS to enforce the tax laws. One is to collect money owed in any specific enforcement action.³⁸⁴ The other is to improve voluntary compliance with tax payments through a deterrent effect.³⁸⁵ Given the size of the tax gap, it seems the IRS is not very successful at deterring tax evasion, most of which occurs by the self-employed.³⁸⁶ To make matters even more alarming, the majority of the United States House of Representatives favors austerity measures for federal agencies, and Congress is closely scrutinizing the

³⁸¹ *IRS Releases New Tax Gap Estimates; Compliance Rates Remain Statistically Unchanged From Previous Study*, INTERNAL REVENUE SERVICE (Jan. 6, 2012), available at <http://www.irs.gov/uac/IRS-Releases-New-Tax-Gap-Estimates;-Compliance-Rates-Remain-Statistically-Unchanged-From-Previous-Study>.

³⁸² Christopher Mathews, *The \$600 Billion the IRS Can't Collect*, TIME (Mar. 27, 2013), available at <http://business.time.com/2013/03/27/the-600-billion-the-i-r-s-cant-collect/>.

³⁸³ Kyle Pomerleau, *Summary of Latest Federal Income Tax Data*, TAX FOUNDATION (Dec. 18, 2013), available at <http://taxfoundation.org/article/summary-latest-federal-income-tax-data>.

³⁸⁴ See *Fiscal Year, 2013 Enforcement and Service Results*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/PUP/newsroom/FY%202013%20Enforcement%20and%20Service%20Results%20--%20WEB.pdf> (last visited Dec. 31, 2014) (showing that IRS enforcement collected more than \$50 billion in fiscal year 2013).

³⁸⁵ See *Criminal Investigations*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/uac/Criminal-Investigation-%28CI%29-At-a-Glance> (last visited Dec. 31, 2014) (“Publicity of these convictions provides a deterrent effect that enhances voluntary compliance.”).

³⁸⁶ See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *Tax Gap: Sources of Noncompliance and Strategies to Reduce It* (GAO-12-651T; Published: Apr. 19, 2012, Publicly Released: Apr. 19, 2012), available at <http://www.gao.gov/products/GAO-12-651T> (“For example, nearly 40 percent, or \$179 billion, of the 2006 gross tax gap is due to misreporting of non-corporate business income and related self-employment taxes. Much of this misreporting can be attributed to sole proprietors underreporting receipts or over-reporting expenses.”).

IRS currently.³⁸⁷ Thus, there is little hope for the IRS to receive more resources to direct toward enforcement, and it will, therefore, lack the ability to effectively enforce the penalty provisions of the individual mandate under the ACA. Indeed, given that the penalties for not having insurance are modest, it may well be rational for the IRS to not devote resources to enforcing the ACA penalties and to use all their resources to target higher payoff tax evasion.

To better understand the magnitude of the problem, it is helpful to review the breadth of enforcement discretion. The foundation for extremely broad Executive discretion was set forth in *Heckler v. Chaney*.³⁸⁸ Chaney was a death row inmate with creative counsel who attempted to use the Food, Drug, and Cosmetic Act (FDCA) to halt his execution.³⁸⁹ The drugs to be used to administer lethal injection had not been approved by the FDA for that purpose, and hence they were technically adulterated illegal drugs under the FDCA.³⁹⁰ Chaney petitioned the FDA to take enforcement measures against Ohio to prevent using the drugs for lethal injection.³⁹¹ The FDA refused, claiming enforcement discretion.³⁹²

The Court of Appeals found that the FDA did have jurisdiction over the drug; that the FDA's refusal to exercise its enforcement power was judicially reviewable; and that the FDA's basis for refusing was irrational.³⁹³ The Court of Appeals remanded the case to the District Court to order the FDA to comply with its statutory duties.³⁹⁴ A unanimous Supreme Court reversed and upheld the FDA's action but also went so far as to state that Executive agencies enjoy a rebuttable presumption of unreviewability in their decisions not to take enforcement action.³⁹⁵

³⁸⁷ Cf. Tom Hamburger & Sarah Kliff, *For Beleaguered IRS, a Crucial Test Still Awaits After Troubled Rollout of Health-Care Law*, LEGAL MONITOR WORLDWIDE, Nov. 25, 2013 (“[T]he increased workload [from Obamacare] comes as the IRS is suffering from high turnover of senior managers, years of budget cuts[,] and congressional inquiries into the alleged politicization of the agency.”).

³⁸⁸ 470 U.S. 821 (1985).

³⁸⁹ *Id.* at 823.

³⁹⁰ *Id.* at 823–24.

³⁹¹ *Id.* at 824.

³⁹² *Id.* at 824–25.

³⁹³ *Id.* at 825–27.

³⁹⁴ *Id.* at 827.

³⁹⁵ *Id.* at 837–38.

Federal agencies repeatedly use *Chaney* to justify remarkable discretion not to enforce clear statutes.³⁹⁶ In writing about the FDA's refusal to enforce the FDCA in the context of certain markets for animal drugs, I wrote:

This is a study in administrative pathology. It documents an agency that has stretched its broad enforcement discretion beyond rational limits and perverted congressional intent by blessing illegal markets for hazardous products that it is supposed to regulate. This article documents a federal agency that completely disregards statutory deadlines. If we cannot compel an executive agency to follow clear and simple instructions given by Congress, perhaps we can at least change its name to more accurately reflect its activities. I propose that the [FDA] be renamed Apologists for Carcinogens, Teratogens, and Adulterated Drugs ("ACTAD").

For the moment, assume the existence of toxic substances known to cause cancer and genetic mutation that are so hazardous that they have been banned in the workplace. Further assume that Congress made it illegal to sell these substances as drugs without collecting data and providing scientific evidence demonstrating safety and efficacy to the FDA, and dictated factors which the FDA must consider (without discretion) before granting approval. Finally, assume that the FDA publicly takes the position that it can circumvent all of these nondiscretionary requirements merely by stating that it will publicize its intention to exercise its broad discretion to set enforcement priorities, rather than consider drug approval applications and announce that it will not enforce the congressional mandate in a large market with over a billion dollars in annual sales. Suppose that the resulting consequence is a multi-billion dollar unregulated market in which these hazardous substances are sold over the counter to children, without warning labels. This study documents that such a tale is true.³⁹⁷

The irony in the unlimited discretion claimed under *Chaney* is readily apparent. Congress clearly makes the sale of drugs without FDA approval illegal, and Congress clearly requires that the FDA have scientific evidence demonstrating

³⁹⁶ See, e.g., *Dina v. Att'y Gen. of United States*, 793 F.2d 473, 476 (2d Cir. 1986) (government arguing that *Chaney* gives it unreviewable discretion); *Arnow v. United States Nuclear Regulatory Comm'n*, 868 F.2d 223, 228 (7th Cir. 1989) ("Here, the NRC specifically argues that the presumption against judicial review of agency nonenforcement decisions, which the Supreme Court set forth in *Chaney*, applies to the NRC's decision not to undertake the enforcement proceedings requested by the petition.").

³⁹⁷ Mark Klock, *A Modest Proposal To Rename the FDA: Apologists for Carcinogens, Teratogens, and Adulterated Drugs*, 36 ARIZ. ST. L.J. 1161 (2004) [hereinafter Klock, *A Modest Proposal*].

safety and efficacy before conferring approval.³⁹⁸ Yet, a federal agency can grant *de facto* approval without any evidence whatsoever by merely claiming that it is exercising its enforcement discretion.³⁹⁹ Indeed, the FDA took its discretion to another level by not merely refusing to enforce the law but by prospectively publicizing that it does not intend to enforce the law in certain markets.⁴⁰⁰

Note that I am not the only commentator to have criticized the FDA for asserting such broad discretion. Another commentator was critical of the FDA's refusal to take enforcement action in the market for reconditioning and reselling medical devices that were only approved as single-use devices:

To analogize the situation, FDA's non-enforcement of the FDCA is like a traffic officer allowing a car in a 55 m.p.h. speed zone to travel at 90 m.p.h. without issuing a citation for breaking the law and jeopardizing the lives of other drivers. The activity is illegal. Both the officer and the driver know that it is illegal and potentially dangerous. Nonetheless, without proper enforcement this driver has little incentive to drive safely. Similarly, FDA's non-enforcement of the FDCA against reprocessors of single-use medical devices allows reprocessors to disregard their regulatory responsibilities and jeopardize patient health by exploiting the narrow safety margins designed into single-use devices. . . .⁴⁰¹

The FDA is not the only federal agency to use *Chaney* as a basis to refuse to enforce laws. The EPA has successfully defended its refusal to act as an unreviewable discretionary enforcement decision.⁴⁰² The FERC⁴⁰³ and the FCC

³⁹⁸ 21 U.S.C. § 360b(b)(1) (2012).

³⁹⁹ See Klock, *A Modest Proposal*, *supra* note 397, at 1175 (observing the FDA's position that it "has absolute discretion to set priorities for discharging its duties").

⁴⁰⁰ See *id.* at 1173 ("FDA has asserted that the concept of executive discretion allows it to set and publicize enforcement priorities to the point that it can and has publicly advertised that it will not enforce the statutory requirement for new animal drug applications in the aquarium market.").

⁴⁰¹ Kurt R. Karst, *Going 90 in a 55 M.P.H. Speed Zone: Reprocessing of Used Single-Use Medical Devices and the Food and Drug Administration's Non-Enforcement of the Food, Drug and Cosmetic Act*, 56 FOOD & DRUG L.J. 57, 58 (2001).

⁴⁰² See *Sierra Club v. Whitman*, 268 F.3d 898, 902 (9th Cir. 2001) (holding EPA has discretion not to enforce law under *Chaney*); *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1032–33 (D.C. Cir. 2007) (holding that the EPA has discretion under *Chaney*).

⁴⁰³ See *Balt. Gas & Elec. Co. v. Fed. Energy Regulatory Comm'n*, 252 F.3d 456, 457 (D.C. Cir. 2001) ("FERC's decision to settle is committed to the agency's nonreviewable discretion under *Heckler v. Chaney*. . .").

have both done so as well.⁴⁰⁴ The Nuclear Regulatory Commission and INS are yet other examples.⁴⁰⁵ In addition, of course, the Department of Justice must be on the list.⁴⁰⁶ A comprehensive list of agencies successfully defending decisions not to enforce acts of Congress with a citation to *Chaney* would be much longer.

Given the broad enforcement discretion that Executive agencies have and assert, and given the limited resources the IRS has to enforce existing collections of hundreds of billions in annual taxes, it might well be rational for the IRS to devote little in the way of resources to promote Obamacare. It might also be reasonable for individuals to test the IRS's resolve and skip both insurance and the associated penalty. This will lead to a failure in the objective of the ACA and might simply cause law-abiding households to end up paying higher prices for their insurance.⁴⁰⁷

Some of the cases citing *Chaney* are analogous to the IRS announcing that it is setting enforcement primacies to prioritize collecting taxes on unreported income and will exercise its enforcement discretion to not enforce ACA penalties. Such an action would clearly damage the effectiveness of the ACA, but even a perception by households that the agency lacks the resources to collect ACA penalties could hamper the effort to attain something close to universal coverage, which is needed to mitigate the adverse selection problem in the health insurance market.

A handful of lower court decisions and dissenting opinions have attempted to limit the scope of enforcement discretion under *Chaney*.⁴⁰⁸ Until the Supreme

⁴⁰⁴ See *Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 788 (D.C. Cir. 2000) (“The FCC responds that this court has no jurisdiction to review its decision not to permit discovery. It asserts that discovery is agency action ‘committed to agency discretion by law’ . . . and thus is not subject to judicial review.”).

⁴⁰⁵ *Dina v. Att’y Gen. of United States*, 793 F.2d 473, 474 (2d Cir. 1986); *Arnow v. United States Nuclear Regulatory Comm’n*, 868 F.2d 223, 228 (7th Cir. 1989).

⁴⁰⁶ See *Caldwell v. Kagan*, 865 F. Supp. 2d 35, 44 (D.C. Cir. 2012) (“Defendants argue that their decisions are not subject to judicial review because prosecutorial and other law enforcement discretion is ‘committed to agency discretion by law.’”).

⁴⁰⁷ See *Hamburger & Kliff*, *supra* note 387 (“If healthy citizens think there is little likelihood of credible enforcement of a dubious new law, many may decide to flout the insurance requirement, which could lead to a dangerous concentration of elderly and sick people in the insurance pools.”).

⁴⁰⁸ See *Cook v. FDA* at 11 (D.C. Cir. Memorandum opinion, July 23, 2013) (finding that FDA does not have presumptively unreviewable enforcement discretion where the statute commands that it must act); Kurt R. Karst, *FDA Takes Another Hit in Court in Animal Feed Antibiotics Litigation*, FDA LAW BLOG (June 6, 2012), http://www.fdalawblog.net/fda_law_blog_hyman_phelps/2012/06/fda-takes-another-hit-in-court-in-animal-feed-antibiotics-litigation-court-says-agencys-petition-den.html (reporting that a Magistrate Judge for the United States District Court for the Southern District of New York rejected the

Court revisits *Chaney* and narrows the scope of enforcement discretion, an overly ambitious act such as the ACA is unlikely to accomplish its objectives.

Ultimately, one must contemplate how we arrived at such a position at which agencies lack the resources to enforce laws yet have resources to waste on unnecessary duplication.⁴⁰⁹ The answer is almost certainly as simple as observing that the federal government is simply too big.⁴¹⁰ The federal government has consistently sought to expand its powers and intrude into areas historically regulated by state and local government.⁴¹¹ The lesson of the 2008 Financial Crisis was that large institutions create systemic risk.⁴¹² A super-powerful federal government that relies on increasing revenues and expenditures in a world without growth is a crisis in the making.

VII. CONCLUSION

One hundred years after ratification of the Sixteenth Amendment, the world is drastically different, and our economy has changed. A repeal of the income tax could cripple the government and cripple the economy, but that does not mean that there are no limits. There must be and are limits to the federal taxing power. The Court has avoided addressing them, and this approach might succeed if Congress can rewrite the tax code with a simplified flat tax. If Congress does not succeed in that endeavor, and we continue on the trajectory of trying to raise more money from fewer people to support more spending, there will eventually be a mass migration or a legal challenge that compels the Court to define some limits. The

FDA's claim of enforcement discretion and granted a motion for summary judgment file by the National Resources Defense Council and other plaintiffs).

⁴⁰⁹ See, e.g., John B. Horrigan, *Broadband Adoption and Use in America*, OBI WORKING PAPER SERIES NO. 1, 11 (2009), available at <http://online.wsj.com/public/resources/documents/FCCSurvey.pdf> ("The FCC's survey results compare favorably to a similar survey conducted in the fall of 2009 by the Census Bureau. . . .").

⁴¹⁰ Cf. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 286–88 (1965) (describing a spiraling effect where government grows as special interests organize to secure special advantages from the government).

⁴¹¹ See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2643 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("The Court has long since expanded that beyond (what Madison thought it meant) taxing and spending for those aspects of the general welfare that were within the Federal Government's enumerated powers. . . .").

⁴¹² See MISHKIN & EAKINS, *supra* note 52, at 428–29 (discussing problems with financial institutions that are too big to fail).

Court should have set more limits in the Obamacare case because, no matter how you parse it, a penalty on going without health insurance is not a tax on income.