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JUDICIAL LEGISLATION AND THE PATIENT
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TAXATION DESPITE REPRESENTATION: JUDICIAL LEGISLATION AND THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

Peter W. Nigra*

Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is “boni judicis est ampliari jurisdictionem,” and their power the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to elective control. The constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves. If the legislature fails to pass laws . . . the judges cannot issue their mandamus to them[.]

Thomas Jefferson¹

INTRODUCTION

In late June 2012, the United States Supreme Court upheld the shared responsibility payment provision (“individual mandate”) of the Patient Protection and Affordable Care Act² (“PPACA” or “Act”) as a valid exercise of Congress’ power to “lay and collect Taxes.”³ The individual mandate requires all individuals to ensure that they maintain “‘minimum essential’ health insurance coverage” each month unless they qualify for specific exceptions provided by the PPACA.⁴ The

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¹ THOMAS JEFFERSON & HENRY AUGUSTINE WASHINGTON, THE WRITINGS OF THOMAS JEFFERSON: CORRESPONDENCE, REPORTS AND OPINIONS WHILE SECRETARY OF STATE 178 (1820).

² Patient Protection and Affordable Care Act, Pub. L. No. 111-148 [hereinafter PPACA] (codified in scattered sections of 26 U.S.C.); Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

³ U.S. CONST. art. I, § 8, cl. 1; *Sebelius*, 132 S. Ct. at 2593.

⁴ *Sebelius*, 132 S. Ct. at 2571 (citing PPACA, 26 U.S.C. § 5000A (2012)).

Court's decision was published as *National Federation of Independent Business v. Sebelius* and the majority opinion was written by Chief Justice Roberts.⁵ The Court began its opinion by holding that the individual mandate is outside the scope of Congress' Commerce and Necessary and Proper powers. The Court reasoned that the mandate "does not regulate existing commercial activity," but instead "compels individuals to *become* active."⁶ Justice Roberts acknowledged in the opinion that "Congress thought it could enact [the individual mandate] under the Commerce Clause."⁷ The Court nonetheless turned to case law allowing the Court to use "every reasonable construction . . . in order to save [the PPACA] from unconstitutionality" as a basis for finding the statute constitutionally permissive pursuant to Congress' power to tax.⁸

This Note provides an analysis of the majority opinion in *Sebelius* and addresses its potential effect on the American political system. It argues that Roberts' opinion sets a precedent of judicial activism that exceeds the limits of the proper separation of powers between the First and Third Branches.⁹ Although Congressional action does not necessarily reflect the temperature of the nation for any given act or issue, a legitimate concern remains where the proper separation of powers is blurred. Part I of this Note provides a brief overview of the individual mandate provision of the Act. Part II gives an analysis of the majority opinion in *Sebelius*, specifically highlighting the use of case law, and includes a discussion of how "tax" is used in the *Sebelius* opinion in comparison to its more common uses. Part III discusses the potential effects of the opinion on the American democratic system, and Part IV concludes the Note with an analysis of how future courts may use the *Sebelius* holding as a tool for continued usurpation of legislative prerogative.

⁵ See *Sebelius*, 132 S. Ct. 2566.

⁶ 26 U.S.C. § 5000A (2012); *Sebelius*, 132 S. Ct. at 2585–87.

⁷ *Sebelius*, 132 S. Ct. at 2593.

⁸ *Sebelius*, 132 S. Ct. at 2593–94 (citing *Blodgett v. Holden*, 275 U.S. 142 (1927) and *Hooper v. California*, 155 U.S. 648 (1895)).

⁹ U.S. CONST. art. I, § 1; U.S. CONST. art. III, § 1; Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL L. REV. 1441, 1471 (2004) ("Judges are labeled judicial activists when they 'legislate from the bench.'").

PART I: OVERVIEW OF THE MANDATE—PURPOSE AND MECHANICS

Purpose of the Individual Mandate Provision of the PPACA

Although there is plenty of controversy about the wisdom and legitimacy of the individual mandate,¹⁰ its purpose is actually quite clear. Between 45 and 50 million people in the United States were not covered by health insurance when President Barack Obama took office in 2008, driving the need for health care insurance reform.¹¹ In the United States, medical costs are highly concentrated in a small percentage of the population, thus insurance expenses must be pooled across a larger population that includes healthy individuals in order to keep coverage affordable for the sick.¹² One problem with deriving funding from a larger group that includes healthy individuals is that many of those individuals choose to save money by taking the risk of not insuring. Risk selection practices by insurance companies, such as medical underwriting, purposefully make coverage for sick individuals more expensive and difficult to obtain.¹³ The PPACA's purpose is to make health care coverage more widely available by prohibiting denial of coverage based on pre-existing conditions,¹⁴ banning annual limits on coverage,¹⁵ and prohibiting rescissions.¹⁶ The role of Section 5000A of the PPACA, in a nutshell, is to force uninsured, healthy individuals to purchase insurance, thereby bolstering the pool of money available to fund care for the unhealthy.

The individual mandate has been characterized as crucial to the efficacy of the PPACA, similar to a leg in the support structure of a “three-legged stool.”¹⁷ That is,

¹⁰ 28 U.S.C. § 5000A.

¹¹ Janet L. Dolgin & Katherine R. Dieterich, *Social and Legal Debate About the Affordable Care Act*, 80 UMKC L. REV. 45, 49 (2011).

¹² *47 Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the S. Finance Comm.*, 110 Cong. 51 (2008) (statement of Mark A. Hall, J.D., Wake Forest University Health Sciences).

¹³ *Id.* at 5–6.

¹⁴ 26 U.S.C. § 2704.

¹⁵ 26 U.S.C. § 2711.

¹⁶ 26 U.S.C. § 2712.

¹⁷ JONATHAN GRUBER, HEALTH CARE REFORM IS A “THREE-LEGGED STOOL”: THE COSTS OF PARTIALLY REPEALING THE AFFORDABLE CARE ACT 1 (Jan. 2014), available at <http://www.americanprogress.org/issues/healthcare/report/2010/08/05/8226/health-care-reform-is-a-three-legged-stool>.

without support of the individual mandate, the Act would likely serve as an incentive for individuals to wait until they become ill to seek coverage because insurance companies would be bound by the prohibition against exclusions based on pre-existing conditions.¹⁸ Some projections indicate that removal of the mandate would reduce the number of newly insured Americans by about 25 million persons and cause the average insurance premium to rise 27% by 2019 because insurance companies would be covering a significantly increased concentration of sick individuals.¹⁹ Without financial support from healthy individuals, the insurance industry would seem to have no alternative solution than to raise premiums beyond what most Americans can afford, defeating the underlying purpose of the Act.

Mechanics of the Mandate

The “shared responsibility payment” of the PPACA is charged to any individual who fails to meet a minimum health care coverage requirement, unless that individual qualifies for an exception.²⁰ Section 5000A of the Act consistently and exclusively refers to the payment as a “penalty” and unequivocally states that “there is hereby imposed on the taxpayer a *penalty*” for failure to procure healthcare coverage.²¹ Although Section 5000A uses the term “taxpayer” to identify applicable persons and sets boundaries for payment amounts by using terms like “taxable year,” nowhere in the shared responsibility payment provision of the Act is the payment owed referred to as anything other than a penalty. The drafters of the PPACA clearly used tax terms and concepts in implementing the mechanics of the individual mandate, but chose specifically not to continue the trend when it came to the payment itself. In fact, other sections of the PPACA use the term “tax” abundantly to describe and define the law, indicating that Congress was well aware of its option to use the term for the individual mandate, but made a conscious effort not to.²²

The individuals who are required to pay the shared responsibility payment penalty are identified in the statute as all individuals who do not qualify for specific exemptions.²³ Exemptions are recognized for certain religious considerations, those

¹⁸ 26 U.S.C. § 2704; GRUBER, *supra* note 17, at 4–5.

¹⁹ GRUBER, *supra* note 17, at 1.

²⁰ 26 U.S.C. § 5000A(b).

²¹ *Id.* (emphasis added).

²² PPACA, Pub. L. No. 111-148 *passim* (codified in scattered sections of 26 U.S.C.).

²³ 26 U.S.C. § 5000A(d)–(e).

who are not lawfully present in the United States, incarcerated individuals, individuals who cannot afford coverage according to the statute, taxpayers with income below a filing threshold identified by the Act, members of Indian tribes, and for coverage gaps not exceeding three months.²⁴ Thus, the default effect of the Act is to require every citizen to either maintain the minimum essential coverage or pay a “penalty.”

The amount an individual must pay for the shared responsibility payment is calculated under Section 5000A(c) as either a flat dollar amount or a percentage of income. The Act provides that shared responsibility penalties will be collected in the same manner as “assessable penalties” under the Internal Revenue Code (“IRC”), meaning that they will be “assessed and collected in the same manner as taxes.”²⁵ While it is true that the shared responsibility payment is collected in the same manner as a tax, Congress selected a penalty provision of the IRC as a reference for the payment collection method instead of a tax provision. Interestingly, the IRC provides the language “assessed and collected in the same manner as taxes,” indicating that assessable penalties are not themselves taxes.²⁶ That is, there would be no reason for the language “in the same manner” if assessable penalties were a form of tax. In using this provision of the IRC as a reference in the PPACA, Congress effectively avoided use of an actual tax collection method altogether. Thus, when Section 5000A of the PPACA dictates that payments must be made in accordance with the IRC, 26 U.S.C. § 6671, it objectively indicates that payments will be made in accordance with a penalty provision, not a tax provision. Because the penalty provision in the IRC then points to a tax collection method, the ultimate outcome is that the shared responsibility payment is collected in the same manner as taxes. If Congress’ intent is to be inferred by its language, the reference to a penalty payment method illuminates a clear intent to impose a penalty rather than a tax.

Characterization of the Mandate as a Penalty Prior to Sebelius

Concerns that the individual mandate would be construed as a tax are not new. In a now infamous 2009 interview, champion of the PPACA and owner of its namesake, “ObamaCare,” President Barack Obama, stated that the shared responsibility payment was not a tax and that he “absolutely reject[ed] that

²⁴ *Id.*

²⁵ 26 U.S.C. §§ 5000A(g)(1) & 6671(a).

²⁶ 26 U.S.C. § 6671(a).

notion.”²⁷ Shortly after the Supreme Court’s ruling that the mandate was upheld under taxing power, White House Press Secretary, Jay Carney, openly rejected the Court’s characterization of the shared responsibility payment as a tax by stating that it is “a penalty, because you have a choice. You don’t have a choice to pay your taxes, right?”²⁸

The Obama Administration has consistently construed the payment as a penalty and such vehement opposition to its categorization as a tax is illuminating; the man whose name was chosen to christen the Act did not intend for the individual mandate to operate as a tax. After all, proponents of the bill have good political reason to avoid blame for raising taxes.²⁹ The foundation of the law is exemplified in its intent, and the individual mandate is categorized as a penalty so as to avoid almost certain demise as a tax. That is, it is very likely that the drafters intentionally avoided framing the penalty as a tax in order to make passage of the Act possible. Should drafters have constructed the mandate openly as a tax, the political cost would probably be unaffordable. In fact, Justice Roberts acknowledged in his opinion that “Congress thought it could enact [the mandate] under the Commerce Clause,” but he never stated that Congress attempted to regulate the nation’s health insurance with tax.³⁰

Perhaps the Obama Administration and legislators in support of the PPACA characterized the shared responsibility payment strictly as a penalty and aggressively fought against any suggestion that it was a tax because of the impact that tax platforms have on elections.³¹ One of the more recent and memorable presidential campaign tax platforms was George H.W. Bush’s now infamous words, “Read my lips: no new taxes.”³² President Bush’s subsequent tax increases

²⁷ Chris Good, *Obama in 2009: The Individual Mandate Is Not a Tax*, THE NOTE BLOG & NEWS POSTS (June 28, 2012, 10:32 AM), <http://abcnews.go.com/blogs/politics/2012/06/obama-in-2009-its-not-a-tax/>.

²⁸ Olivier Knox, *White House: Sorry, Roberts, Obamacare Mandate Is a Penalty, Not a Tax* (June 29, 2012), <http://abcnews.go.com/Politics/OTUS/white-house-roberts-obamacare-mandate-penalty-tax/story?id=16679772>.

²⁹ Peter Baker, *Democrats Embrace Once Pejorative ‘Obamacare’ Tag*, N.Y. TIMES, Aug. 3, 2012, at A11.

³⁰ *Sebelius*, 132 S. Ct. 2566, 2593–94 (2012).

³¹ Grover Norquist, President, Am. for Tax Reform, Address at the Tampa Convention Center: The Influence of Tax Reform Policy in the Presidential Election (Aug. 30, 2012), available at <http://fpc.state.gov/197057.htm>.

³² *Top 10 Unfortunate Political One-Liners*, TIME.COM, <http://www.time.com/time/specials/packages/article/>.

severely damaged his credibility; he later admitted that this statement was the “biggest mistake” of his presidency.³³ The head of the National Republican Congressional Committee agreed, and incumbent President Bush lost to Bill Clinton in his next campaign.³⁴

It is well established that tax platforms can make or break a political candidate.³⁵ Construction of the PPACA was similar. Its authors and proponents may have avoided characterizing the shared responsibility payment as a tax so as to avoid the damaging political stigma resulting from passing a new tax. Although sly linguistics can sometimes be useful in compelling ideas or bills that would otherwise fail in the early stages of legislation, the issue in *Sebelius* was whether Congress properly accessed its power to pass the law.³⁶ Where the legislature is clear in its language, and yet the judiciary nonetheless interprets that language, such action codifies acceptance of political semantics games.³⁷ In such a case, the judiciary is tricked at best, and a direct player in deceiving the legislative branch and American people at worst.

PART II: ANALYSIS OF THE HOLDING IN *SEBELIUS*

After first concluding that the individual mandate provision was not a valid exercise of Congress’ Commerce Clause and Necessary and Proper powers, the Court held that the individual mandate was nonetheless a constitutionally proper exercise of Congress’ power to tax.³⁸ This decision was predicated on a functional understanding of tax and leaned heavily on excerpts from case law that grant the judicial branch authority to uphold legislative acts.³⁹ Justice Roberts used these

0,28804,1859513_1859526_1859516,00.html (last visited Jan. 4, 2014).

³³ KITTY KELLEY, *THE FAMILY: THE REAL STORY OF THE BUSH DYNASTY* 493 (2004).

³⁴ *George Bush Sr. on Tax Reform*, ONTHEISSUES.ORG, http://www.ontheissues.org/celeb/George_Bush_Sr_Tax_Reform.htm (last updated July 11, 2013) (“You are going to get killed [in the midterm elections] . . .”); *William J. Clinton*, WHITEHOUSE.GOV <http://www.whitehouse.gov/about/presidents/williamjclinton> (last visited Jan. 4, 2014).

³⁵ *Economy—Taxes*, CNN.COM, <http://www.cnn.com/election/2012/campaign-issues.html#economy-taxes> (characterizing tax as “at the heart of the economic debate”) (last visited Jan. 4, 2014).

³⁶ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2651 (2012) (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting).

³⁷ *Id.* at 2593–94 (alteration in original) (“Congress thought it could enact [the mandate] under the Commerce Clause.”).

³⁸ *Id.* at 2594–95.

³⁹ *Id. passim*.

tools to uphold the individual mandate as a tax, ultimately expanding the application of case law precedent beyond its reasonable limits.

Although the shared responsibility payment section of the PPACA consistently uses the term “penalty” rather than “tax,” it is the “purpose and operation” of the payment, and not its terminology, that is dispositive.⁴⁰ The law is such that labeling is not dispositive as to whether a payment is a tax or a penalty. Justice Roberts reasoned that the shared responsibility payment is actually a tax, however this construction is problematic even with the aid of precedent. Justice Roberts’ opinion determined that the shared responsibility payment is a tax because the payment does not impose an “exceedingly heavy burden” on those who must pay it, does not contain a scienter requirement, and is collected by the Internal Revenue Service by normal tax means.⁴¹ Further, the majority in *Sebelius* agreed that a “penalty” punishes unlawful acts or omissions and the shared responsibility payment is not intended to punish.⁴²

Although Roberts cites to the functional approach to taxes in *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) for his analysis, Roberts’ conclusion does not stand up to scrutiny. First, not all penalties impose exceedingly heavy burdens on offenders. For example, under Pennsylvania law, any person convicted of littering anywhere other than on certain easements or in an agricultural security area cannot be fined more than \$300.⁴³ The penalty provision of the shared responsibility payment in the year 2015 is \$325.⁴⁴ Further, the mandate includes a scienter requirement when it charges individuals with the responsibility to make affirmative actions or be subjected to the penalty.⁴⁵ The requirement to maintain minimum coverage is no less a scienter requirement that imposes sanctions on omissions than is the responsibility to feed one’s children. In addition, as discussed *supra*, payment of the penalty is collected pursuant to a penalty provision of the IRC, rather than a tax provision.⁴⁶ Finally, the drafters of Section 5000A felt it necessary to include a “special rules” subsection that specifically waived any criminal penalties for failure

⁴⁰ *E.g.*, *United States v. Constantine*, 296 U.S. 287, 294 (1935).

⁴¹ *Sebelius*, 132 S. Ct. at 2595–96 (citing *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922)).

⁴² *Id.* at 2597.

⁴³ 75 PA. CONS. STAT. § 3709(d) (2006).

⁴⁴ PPACA, 26 U.S.C. § 5000A(c)(3)(B) (2012).

⁴⁵ 26 U.S.C. § 5000A(b)(1).

⁴⁶ 26 U.S.C. § 5000A(g)(1); 26 U.S.C. § 6671(a).

to make the shared responsibility payment.⁴⁷ Thus, it is clear that the legislature included these special rules because it was their express contemplation that, without them, failure to pay the penalty would give rise to at least the appearance of a criminal act. The legislature would not need such a subsection if failure to make the shared responsibility payment amounted to a failure to pay taxes, as consequences for such omissions are already well established.

Additionally, the shared responsibility payment does not fit common definitions of “tax” and is most appropriately characterized as a “penalty.” According to *Black’s Law Dictionary*, a tax is “a charge . . . imposed by the government on persons . . . to yield public revenue,” and thus the shared responsibility payment seemingly fits nicely into its framework.⁴⁸ However, *Black’s* defines penalty as a “punishment imposed on a wrongdoer” that is “sometimes imposed for civil wrongs” and cites Charles T. McCormick’s *Handbook on the Law of Damages*, which states that penalties can be “fixed, not as a pre-estimate of actual damages, but as *punishment*, the threat of which is designed to prevent breach.”⁴⁹ The shared responsibility payment is best characterized as a penalty in light of these two choices when its purpose is to provide money where it otherwise would not be paid, i.e., to prevent or rectify breach of the requirement to maintain minimum essential coverage. In addition, the shared responsibility payment is intended to finance specific goals set out by the PPACA, whereas other taxes, as is evident by their definition, finance a plethora of governmental goals.⁵⁰ With the broad goal of the PPACA in mind, it is clear that the individual mandate provision serves the purpose of compelling compliance rather than yielding revenue in the general sense that normal taxes are employed. Further, penalties often attempt to deter certain activity, and the shared responsibility payment penalty serves such a purpose by making it practically impossible to escape compliance with the PPACA. This is not to say that non-compliance with the PPACA is criminal in nature, but it illuminates the clear reality that the shared responsibility payment does not operate like a tax; it operates like a penalty.

⁴⁷ 26 U.S.C. § 5000A(g)(2)(A).

⁴⁸ BLACK’S LAW DICTIONARY 1594 (9th ed. 2009).

⁴⁹ *Id.* at 1247; CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 146, at 600 (1935).

⁵⁰ *Your Federal Taxpayer Receipt*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/2012-taxreceipt> (last visited Jan. 4, 2014).

The *Oxford American Dictionary* defines tax as “a compulsory contribution to state revenue, levied by the government on workers’ income and business profits or added to the cost of some goods, services, and transactions,” and defines penalty as “a punishment imposed for breaking a law, rule, or contract.”⁵¹ These definitions give rise to the same conclusion; the shared responsibility payment is best defined as a penalty rather than a tax. The shared responsibility payment is not by its intrinsic nature a “compulsory contribution” when the Act provides that an individual may avoid it by procuring minimum essential coverage, and the payment is not levied on income when the payment can be avoided regardless of income.⁵²

The Act is written specifically to characterize the payment of the penalty as a means of satisfying the law when an individual has failed to maintain coverage, rather than to characterize coverage as a tax deduction or exemption. This distinction is crucial because, according to the *Oxford Dictionary*, the tax is compulsory, rather than its exemptions. In the case of the PPACA, it is clear that coverage is compulsory and the penalty is simply a means of satisfying a legal obligation. This is because the shared responsibility payment is imposed on any individual who “fails to meet the requirement of subsection (a),” the requirement to maintain minimum essential coverage.⁵³ Thus, the payment is best described as a punishment imposed for noncompliance with a law and labeled as a penalty. Even though the judicial branch of government has the authority to uphold acts of Congress by characterizing them to fit within the proper framework of legislative powers, rather than adjudicating with motivation to strike legislative acts down, the judicial branch is also charged with a constitutional mandate to strike down those acts that would violate the limitations of power that the Constitution demands the American government work within.⁵⁴ The Court should observe clear and common linguistic definitions when doing so.

Proposed Treasury Regulations

According to Section 7805(a) of the IRC, the Secretary of the Treasury Department is vested with the power to “prescribe all needful rules and regulations

⁵¹ *Tax*, OXFORDDICTIONARIES.COM, available at http://www.oxforddictionaries.com/us/definition/american_english/tax?q=tax (last visited Jan. 4, 2014); *Penalty*, OXFORDDICTIONARIES.COM, available at http://www.oxforddictionaries.com/us/definition/american_english/penalty?q=penalty (last visited Jan. 4, 2014).

⁵² 26 U.S.C. § 5000A(a).

⁵³ 26 U.S.C. § 5000A(b)(1).

⁵⁴ *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

for the enforcement of” the IRC.⁵⁵ The Department of the Treasury took advantage of this power by issuing proposed regulations and scheduling a public hearing for May 29, 2013.⁵⁶ The seventy-three-page document described the shared responsibility payment as a “sum of monthly penalty amounts.”⁵⁷ It also noted that the “shared responsibility payment is generally assessed and collected in the same manner as an assessable penalty under subchapter B of Chapter 68 (Sections 6671 through 6725),” the only differences being the government’s inability to file notice of lien or levy on the taxpayer’s property or undertake a criminal prosecution against a taxpayer for failure to pay timely.⁵⁸ The Treasury Department’s characterizations of the PPACA and the shared responsibility payment indicate that the payment is a penalty or sum thereof. Further, the Treasury Department’s admission that the payment is different from other penalties only in the government’s ability to punish those who do not comply makes clear that only the measures of enforcement, and not the foundation of the payment itself, differ. Thus, the Treasury Department moved forward in an attempt to pass regulations on the implementation of the PPACA by continuing to characterize and understand the shared responsibility payment as a penalty and not a tax.

The proposed regulations also note that,

Section 5000A(d)(4) provides that an individual is exempt for a month for which the individual is incarcerated (other than incarceration pending the disposition of charges). The proposed regulations clarify that an individual confined for at least one day in a jail, prison, or similar penal institution or correctional facility after the disposition of charges is exempt for the month that includes the day.⁵⁹

Taxpayers are exempt from the shared responsibility payment wholly and solely because they are incarcerated. This is significant because there is no exemption founded only on imprisonment for federal income taxes; an incarcerated individual who does not have income clearly will not pay taxes, but this is not an *exemption*. The legislature framed the shared responsibility payment as a “penalty” rather than

⁵⁵ 26 U.S.C. § 7805(a).

⁵⁶ Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage, 1 Fed. Reg. 148500-12 (proposed May 25, 2013) (to be codified at 26 C.F.R. § 1.5000A-3).

⁵⁷ *Id.* at 11–12.

⁵⁸ *Id.* at 16.

⁵⁹ *Id.* at 23.

a tax from the beginning, and the Treasury Department has continued to treat the payment as a penalty in its proposed regulations.

PART III: EFFECTS OF THE *SEBELIUS* HOLDING ON THE DEMOCRATIC PROCESS AND SETTING PRECEDENT FOR JUDICIAL LEGISLATION

There are broad repercussions of the *Sebelius* holding that characterized the shared responsibility payment as a tax, and these effects drive into the heart of democracy and the proper separation of powers. Specifically, the *Sebelius* decision stands for an unprecedented usurpation of legislative powers that attacks the democratic process at its representative foundations. Although the Supreme Court may use every *reasonable* construction in order to save a statute from unconstitutionality, the *Sebelius* holding is wholly unreasonable where it ignores clear Congressional intent and leans on case law that simply allows for general linguistic manipulation.⁶⁰

Precedent Set by the Court: Judicial Legislation Broadened and Separation of Powers Blurred

The Court's majority relied on creating its own legislative intent that is directly contrary to the express terminology used in the Act.⁶¹ As the dissent in *Sebelius* correctly pointed out, "the issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did* so."⁶² Congress is clearly aware of how to access its proper taxing powers but specifically chose not to do so in this instance.⁶³ Although the judiciary should not enter into evaluations of legislative acts with the intent to find those acts unconstitutional or adjudicate with an eye towards their wisdom, the judiciary nonetheless oversteps its bounds by re-inventing legislative intent.⁶⁴ When the Court endeavors to re-label the shared

⁶⁰ *Sebelius*, 132 S. Ct. 2566, 2593–94 (2012) (citing *Blodgett v. Holden*, 275 U.S. 142 (1927) and *Hooper v. California*, 155 U.S. 648 (1895)).

⁶¹ *Id.* at 2594 (the Act describes the payment as a "penalty," not a "tax").

⁶² *Id.* at 2651 (Scalia, J., Kennedy, J., Thomas, J., & Alito, J., dissenting).

⁶³ U.S. CONST. art. I, § 8.

⁶⁴ *United States v. Harris*, 106 U.S. 629, 635 (1883) ("Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated. While conceding this, it must, nevertheless, be stated that the government of the United States is one of delegated, limited, and enumerated powers.").

responsibility payment and instructs Congress on which legislative power it accessed, the judiciary usurps legislative prerogative and effectively passes its own tax on the American people. That is, the Court has taken Congress' taxing powers for its own and unilaterally applied them to the PPACA.

When the judiciary is able to alter a law post-enactment through “interpreting” its clear and unambiguous language to mean something outside its clear meaning (i.e., “penalty” means “tax”), the judiciary has done the same kind of harm that the unconstitutional Line Item Veto Act sought to do to the “legislative power of the Federal government . . . exercised in accord with a single, finely wrought and exhaustively considered . . . procedure.”⁶⁵ The Line Item Veto Act was held unconstitutional because it gave the President “unilateral power to change the text of duly enacted statutes” and offended the Presentment Clause of the Constitution; thus the judiciary’s holding, which does no less than direct readers to read the word “tax” where “penalty” appears, offends the Constitution in largely the same way.⁶⁶ Although the judiciary used a functional approach, and was not eliminating or editing actual text in *Sebelius*, the effect of *Sebelius* is not pragmatically different than changing the text of the PPACA.⁶⁷

The Court in *Sebelius* relied on *United States v. Sotelo* for support in its “functional approach.”⁶⁸ However, in *Sotelo*, the issue was whether a taxpayer who willfully failed to pay federal taxes was able to discharge the penalty that was equal to the exact amount owed as unpaid taxes.⁶⁹ The payments due were held to be “unquestionably ‘taxes’ at the time they were ‘collected or withheld from others,’” thus the subsequent demand for payment of the exact amount owed in taxes was no different than assessing the proper tax.⁷⁰ The PPACA does not purport to collect overdue payment that is undoubtedly an owed tax.

The Court also cited *United States v. Constantine* for support, but the constitutionality of this payment was not threatened by its characterization as a

⁶⁵ *I.N.S. v. Chada*, 462 U.S. 919, 951 (1983); *Clinton v. City of N.Y.*, 524 U.S. 417, 440 (1998).

⁶⁶ *Clinton*, 524 U.S. at 447; U.S. CONST. art. I, § 7, cl. 2.

⁶⁷ *Sebelius*, 132 S. Ct. at 2595.

⁶⁸ *Id.* at 2595.

⁶⁹ *United States v. Sotelo*, 436 U.S. 268, 268 (1978).

⁷⁰ *Id.* at 275 (citing Bankruptcy Act § 17a(1)(e); see 26 U.S.C. §§ 3102(a), 3402(a)) (“That the funds due are referred to as a “penalty” when the Government later seeks to recover them does not alter their essential character as taxes”).

“penalty” or “tax” in the same way the shared responsibility payment was threatened because the payment in *Constantine* was exacted over individuals who could be legally penalized for their choice to act in selling alcohol.⁷¹ In contrast, the *Sebelius* Court rejected use of the Commerce Clause to uphold the PPACA specifically because regulating “individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.”⁷² Thus, the function of the penalty in *Constantine* served a specifically different purpose than that of the shared responsibility payment, as the *Constantine* payment was imposed on actions and the individual mandate is not.

In fact, none of the cases cited for the proposition that the Court has the authority to alter “tax” labels are comparable to the facts of *Sebelius*; the cases either involved regulation of individuals engaged in actions or dealt with issues that were rooted in tax independently from the characterization of the payment itself.⁷³ *Sebelius* specifically rejected constitutionality of the shared responsibility payment as a penalty upon those who are inactive and necessarily needed to be construed as a tax at its core in order to be upheld. Thus, the Court’s reliance on these cases to authorize re-characterizing the shared responsibility payment as a tax is unreasonable.

The third branch’s proper posture is to determine whether Congress acted in accordance with the Constitution.⁷⁴ The undeniable outcome is that when Congress attempted to utilize its Commerce powers, Congress did not act properly.⁷⁵ The judiciary’s proper role ends with this analysis, even in light of precedent that charges it with attempting to find legislative acts constitutional rather than attacking them.⁷⁶ That is, Congress cannot have properly legislated if its obvious and express intent is not aligned with one of its enumerated powers. The process of

⁷¹ *United States v. Constantine*, 296 U.S. 287, 293 (1935) (“[C]ollection was lawful whether the demand was for a tax or a penalty; and the classification by the administrative officers was therefore immaterial. Congress then had power, in the enforcement of prohibition, to impose penalties for violations of national prohibitory laws.”).

⁷² *Sebelius*, 132 S. Ct. at 2587.

⁷³ *License Tax Cases*, 72 U.S. 462 (1866); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *New York v. United States*, 505 U.S. 144 (1992).

⁷⁴ *United States v. Harris*, 106 U.S. 629, 635 (1883).

⁷⁵ *Sebelius*, 132 S. Ct. at 2593 (“The commerce power . . . does not authorize the mandate.”).

⁷⁶ *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 841 (1986) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), in turn quoting *Scales v. United States*, 367 U.S. 203 (1961)).

passing a bill into law, memorialized in legislative history and the statute's clear adopted language, should be given powerful effect in the analysis of the constitutionality of any law, and the judiciary has no legitimate role in re-creating the intent of any piece of legislation. If the Supreme Court finds it necessary to draft its own legislative intent in order to uphold an act of the legislature, it becomes clear that the legislature has not acted in accordance with its legitimate powers.⁷⁷

Effects of Judicial Activism on the Democratic Process

The will and desires of voting citizens are intended to filter upwards through elected representatives in the American political system.⁷⁸ The re-election of those representatives is the control mechanism that citizens expect to be able to utilize in the face of unhappiness. In *Sebelius*, the Court flattened this control mechanism by applying its own intent to the Act, effectively removing the will of the people that is properly embodied in the elected members of Congress and the President.⁷⁹

Congressional representatives, and politicians generally, have often been the target of a sweeping characterization as liars.⁸⁰ Although negative perceptions of politicians are often derived from failures to deliver on promises made during campaigns, politicians have also made use of each other's statements, typically out of context, to accuse opponents of "flip flopping" or telling falsehoods.⁸¹ Voters typically do little or nothing to challenge politicians charged with lying. In fact, some believe that "[m]any voters have become so cynical that they really don't expect candidates to speak the verifiable truth, and they accept these . . . falsifications, as just part of the [political] game."⁸² Even so, "[i]n Congress, Members are elected to represent the interests of the people in their congressional

⁷⁷ *Sebelius*, 132 S. Ct. at 2651 (Scalia, J., Kennedy, J., Thomas, J., & Alito, J., dissenting).

⁷⁸ U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. art. I, § 4, cl. 1; U.S. CONST. amend. XV; ERIC PETERSON, CONG. RESEARCH SERV., RL 33686, ROLES AND DUTIES OF A MEMBER OF CONGRESS: BRIEF OVERVIEW (Nov. 9, 2012).

⁷⁹ *I.N.S. v. Chadha*, 462 U.S. 919, 966 (1983) ("The only effective constraint on Congress' power is political.").

⁸⁰ See, e.g., Brian Montopoli, *Lying Politicians: A Fact of Life*, CBSNEWS.COM (Aug. 3, 2012, 5:25 AM), http://www.cbsnews.com/8301-250_162-57485776/lying-politicians-a-fact-of-life/.

⁸¹ See, e.g., Matt Negrin, *Political Flip-Flops vs. Evolution: Is There a Difference?*, ABCNEWS.COM (May 11, 2012), <http://abcnews.go.com/Politics/OTUS/political-flip-flops-evolution-difference/story?id=16323217>.

⁸² Montopoli, *supra* note 80.

district or state,” and “serve as advocates for the views and needs of their constituents.”⁸³ One method of control over legislators and other politicians is impeachment; this method is rarely used.⁸⁴

The more common and accessible control mechanism is simply voting in a new representative.⁸⁵ However, the Court’s holding in *Sebelius* makes the use of voting an ineffective mechanism of accountability for those legislators who supported the PPACA and ran for office on tax platforms that promised not to increase taxes. This is because these legislators may have believed they were voting for a bill that would impose a *penalty* and did not foresee the judiciary recharacterizing the law post-enactment.⁸⁶ Thus, one effect of *Sebelius* on the American political system is an elimination of the accountability mechanism that citizens rely upon to check the power of their representatives.⁸⁷ If the judiciary can alter an enacted law to create a tax (one of the most powerful and important political platforms, as discussed *supra* Part I), the judiciary is effectively turning honest representatives into liars.⁸⁸ This effect cannot be over-emphasized, as the judiciary has not only usurped the powers of the legislature; it has taken the American people’s voice by retroactively attributing incompatible meaning to enacted law. It is likely that the PPACA would not have garnered the necessary support to pass into law if those representatives knew it would be construed as a tax due to the almost certain backlash from voters.

PART IV: FUTURE EFFECTS OF *SEBELIUS*

The judiciary’s legislation from the bench sets a new precedent for judicial power that in the future can be wielded in opposition to the proper separation of powers and against the foundation of the American democratic system.⁸⁹ Although the Court misused precedent in *Sebelius*, it nonetheless set a new controlling

⁸³ PETERSON, *supra* note 78, at 5.

⁸⁴ *Impeachment*, United States House of Representatives: History, Art & Archives, HOUSE.GOV, <http://history.house.gov/Institution/Origins-Development/Impeachment/>.

⁸⁵ PETERSON, *supra* note 78, at 9–10.

⁸⁶ *Sebelius*, 132 S. Ct. 2566, 2593–94 (2012) (“Congress thought it could enact [the mandate] under the Commerce Clause.”); Good, *supra* note 27; Knox, *supra* note 28.

⁸⁷ PETERSON, *supra* note 78, at 9.

⁸⁸ *See supra* Part I.

⁸⁹ *Clinton*, 524 U.S. at 450 (“Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.”).

precedent upon which future courts can perpetuate this same kind of harm.⁹⁰ That is, the judiciary now has access to language that makes re-characterizing the intent of Congress a valid method of interpretation. This is adverse to the proper separation of powers, because where “the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.”⁹¹

Of course, the most obvious consequence of the *Sebelius* holding is that American citizens will now be subjected to a “tax” that operates on inactive persons.⁹² The Court’s reliance on a single line from *Woods v. Cloyd W. Miller Co.* for the proposition that “constitutionality . . . does not depend on recitals of power” is misleading when the Court in *Woods* looked to legislative history and found that Congress had intended to act, and in fact acted, in accordance with its proper “war power.”⁹³ Thus, in *Woods*, the Court used vitally different interpretative tools in its conclusion; it looked to actual legislative intent through legislative history rather than brushing clear intent aside and using a “functional” approach.⁹⁴ The effect of the precedent laid down by the *Sebelius* Court directs future interpretation of legislation to an extreme that was not contemplated or used in any way by the *Woods* Court.⁹⁵

In addition to the potential for continued assault on the proper separation of powers, the effect of changing the intent of Congress post-enactment would result in the same offense to the rights of American voters, as discussed *supra*.⁹⁶ Although the particular harm in *Sebelius* may seem amplified because of the importance of tax platforms in politics, the damage done in eliminating transparency of representatives is equally as important in less politically charged topics. That is, regardless of the subject of legislation, the Constitution dictates a more strict separation of powers than the judiciary has observed, and one of the

⁹⁰ Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1 (2001) (“American courts of last resort recognize a rebuttable presumption against overruling their own past decisions.”).

⁹¹ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

⁹² *Sebelius*, 132 S. Ct. 2566, 2599 (2012).

⁹³ *Id.* at 2598; *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) (“Here it is plain from the legislative history that Congress was invoking its war power.”).

⁹⁴ *Sebelius*, 132 S. Ct. at 2593–95, 2595; *Woods*, 333 U.S. at 144.

⁹⁵ *Woods*, 333 U.S. at 146.

⁹⁶ *See supra* Part III (discussing democratic effects).

most damaging aspects of violating this structure by legislating from the bench is a seizure of power from the hands of the people.⁹⁷

CONCLUSION

The *Sebelius* Court usurped the powers of the Legislative Branch in a way that not only offends the core structure of the American system of government, but also deprives voters of transparency in the representative political system.⁹⁸ Not only did Congress not intend to pass a tax, the Court's use of a "functional" approach is fundamentally flawed in its application to the PPACA's shared responsibility payment.⁹⁹ The shared responsibility payment shares few characteristics with typical taxes and fails to meet the standards laid out by the Court to establish it as a tax.¹⁰⁰ Even the Proposed Treasury Regulations treat the shared responsibility payment as a penalty and the mechanism by which the payment is collected is that of a penalty, rather than a tax.¹⁰¹

Perhaps the most devastating harm done by *Sebelius* is to the American people. When the judiciary alters the fundamental nature of an enacted law, voters have no way of adequately holding their elected legislators responsible for the outcome.¹⁰² The precedent set by the *Sebelius* Court is a dangerous expansion of judicial power. In fact, the Court has expanded its power beyond the proper limits set out by the Constitution and should have been precluded from doing so.¹⁰³ The obvious consequence of this holding is that the American people will be subject to the shared responsibility payment in 2014, but the legal ramifications will echo far into the future where courts may cite this decision as authority to continue to usurp legislative powers.¹⁰⁴ There exists a legitimate concern where the Constitutional

⁹⁷ *Clinton*, 524 U.S. 417, 450 (1998) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

⁹⁸ See U.S. CONST. art. I, § 1; U.S. CONST. art. III, § 1.

⁹⁹ See *supra* Part II.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Clinton*, 524 U.S. at 450–51.

¹⁰³ U.S. CONST. art. I, § 1; U.S. CONST. art. III, § 1; Kmiec, *supra* note 9, at 1471 ("Judges are labeled judicial activists when they 'legislate from the bench.'").

¹⁰⁴ *Sebelius*, 132 S. Ct. 2566, 2571 (2012) (the mandate takes effect in 2014).

separation of powers is blurred via judicial legislation; the *Sebelius* holding is now the face of that concern.