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That is Not the End of the Matter:

Legislative Intent, Judicial Revision, and the Separation
of Powers in the Affordable Care Act

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Dedication

This work is dedicated to my parents. Without your unending sacrifice and compassion, I would be nowhere. Thank you for always being there. Thanks be to God for the opportunity to make a difference.

The best is yet to come.

June 13, 2013

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1.

Introduction

“When I use a word,” Humpty Dumpty said, “it means just what I choose it to mean- neither more nor less.”

“The question is,” says Alice, “whether you can make words mean so many different things.”

“The question is-” said Humpty, “which is to be master- that’s all.”¹

Humpty’s wisdom would have made him uniquely prepared for the extraordinary events of June 28, 2012. The United States had waited breathlessly as the Supreme Court considered the future of the Patient Protection and Affordable Care Act.² As the Court announced its decision in *National Federation of Independent Business v Sebelius* from the bench, reporters were handed a copy of the voluminous 187 page opinion.³ Combing feverishly through the document, newsmen raced to discover whether President Barack Obama’s signature legislative achievement was alive or dead. Scanning to page thirty of the opinion, major news outlets instantly seized upon Chief Justice’s Roberts’ statement that the centerpiece of the Affordable Care Act, the individual requirement to own health insurance, was not a valid exercise of the Commerce Clause of the Constitution.⁴ CNN and Fox News splashed banners across millions of television screens announcing that the Supreme Court had struck down the cornerstone of the Act.⁵ Even President Obama, who did not have advance warning of Court’s decision, saw the reports.⁶ Humpty’s wisdom would have been a

¹ Lewis Carroll, *Alice’s Adventures in Wonderland and Through The Looking Glass* (Oxford, 1982) 190

² Patient Protection and Affordable Care Act, Public Law 111-148

³ *National Federation of Independent Business v Sebelius* (2012) 132 S Ct 1366

⁴ *Ibid*

⁵ Chenda Ngak, ‘Getting It Wrong: Media Rushes to Report on Supreme Court’s Healthcare Decision’ (*CBS News*, 28 June 2012) <http://www.cbsnews.com/8301-501465_162-57462787-501465/getting-it-wrong-media-rushes-to-report-on-supreme-courts-health-care-decision/> accessed June 13, 2013

⁶ Chuck Todd, Shawna Thomas, and Domenico Montanaro, ‘Obama Initially Thought Mandate Had Been Struck Down’ (*NBC News*, June 28, 2012) <http://firstread.nbcnews.com/_news/2012/06/28/12463066-obama-initially-thought-mandate-had-been-struck-down> accessed June 13, 2013

revelation at this moment. Had they merely turned the page, reporters would have been caught immediately by the Chief Justice’s fateful declaration, emphasizing “that is not the end of the matter.”⁷

General consensus in the run up to the decision in *NFIB v Sebelius* expected it to be a landmark case.⁸ The Affordable Care Act, passed by Congress in 2010, sought to build upon four decades of incremental healthcare reform, alleviating issues in access, financing, and preventive care that had caused healthcare costs to explode to 16% of the United States’ Gross National Product (GNP) by 2008.⁹ The scale of this problem drove Congress and President Obama to seek unique policy solutions, such as the individual mandate.¹⁰ This legislation sharply divided the country and brought about a flood of litigation. Most notably, twenty-six states jointly challenged Congress’ authority to enact the individual mandate under the Commerce Clause in Federal courts, renewing the ongoing constitutional debate surrounding Congress’ enumerated Article I powers.¹¹

In considering the fate of the Act, the Supreme Court was presented with normally conclusive statements of Congressional intent through legislative findings, statements, and rejected proposals, each attesting to the construction of the minimum coverage provision as a Commerce Clause regulation and penalty. Though facially unconstitutional under this justification, in the end, the Supreme Court declared that the minimum coverage provision could be upheld alternatively as a tax. The implications of this holding, focused on Congressional intent and the resulting separation of powers consequences will be the primary focus of this work.

⁷ n 3

⁸ N C Aizenman, ‘Opponents Present Case Against Obama’s Healthcare Law in 20-State Lawsuit’ (*Washington Post*, September 14, 2010) < <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/14/AR2010091402458.html> > accessed June 13, 2013

⁹ ----- ‘Growth in Healthcare Costs’ (*Congressional Budget Office*, January 31, 2008) <<http://www.cbo.gov/publication/41666>> accessed June 13, 2013

¹⁰ n 2, §1501

¹¹ Art. I, US Constitution; Five other major cases were also litigated and will be discussed sporadically.

2.

Overview

Importance of the Key Issues

The methods used to interpret and give effect to statutes are one of the most impactful elements of our political system. In a similar vein, the volume of statutory law has exploded over the last century in the United States.¹² Noting that we live in an “age of statutes,” Justice Frankfurter commented that “courts have ceased to be the primary makers of law in the sense in which they ‘legislated’ the common law... it is certainly true of the Supreme Court that almost every case has a statute at its heart or close to it.”¹³ Sixty years on, courts’ interpretation and application of legislation has simultaneously become both more complex and decisive. A critical examination of the Supreme Court’s interpretation of the Affordable Care Act’s minimum coverage provision allows us to assess whether Congress’ initial construction of the statute was effectuated, the primary role of courts in statutory interpretation.¹⁴

The soundness of statutory interpretive methodology is crucial as one of the primary bulwarks of separation of powers. Lawmaking is the exclusive responsibility of the legislative branch. Similarly, the judiciary, after the drafting of the Constitution, quickly assumed the role of interpretation and review.¹⁵ Consequently, statutory interpretation must affirm the respective roles of these institutions, allowing an effective defense against

¹² Jesse M Barrett, ‘Legislative History’ (1997-1998) 73 Notre Dame LR 822

¹³ Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard, 1982); Felix Frankfurter, ‘Some Reflections on the Reading of Statutes’ (1947) 47 Columbia LR 527

¹⁴ *Ibid* Frankfurter, 529

¹⁵ *Marbury v Madison* (1803) 1803 WL 893; Judicial review is not mentioned expressly in the Constitution, this power is commonly viewed as having been assumed in *Marbury*, however, a number of the Supreme Court’s decisions in the 1790s underscored this authority.

improper encroachment, preventing legislation outside the constitutional process, and promoting a healthy legislative-judicial partnership.¹⁶

Methodology

The policy setting and legislative history of the Affordable Care Act will be outlined initially in order to provide context. Litigation challenging the Affordable Care Act's constitutionality will then be explored and later contrasted with legislative intent.

This work proceeds from Justice Frankfurter's conclusion that the primary role of courts in statutory interpretation is to give effect to legislative intent.¹⁷ Elements of statutory interpretation- legislative findings, materials and statements, and rejected proposals- will first be explored in depth in order to fully develop the meaning of legislative intent. These important building blocks will then be compared to the text of the Affordable Care Act as evidence establishing Congressional intent. This conclusion of legislative purpose will then be reconciled with the Supreme Court's holding in *NFIB v Sebelius*. This is necessarily crucial. Interpretive methodologies must be scrutinized carefully to ensure each element of legislative intent, when clear, is accounted for and brought to life in decisions from the bench.

Finally, judicial revision and the resulting consequences under the separation of powers will be explored. This work contends that through clear evidence of legislative intent, the United States Congress intended the Affordable Care Act's minimum coverage provision to be a Commerce Clause regulation, and through the Supreme Court's impermissible revision of this statute, Congress' function in the separation of powers has been placed at risk.

¹⁶ Linda D Jellum, "Which Is To Be Master," *The Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers* (2008-2009) 56 UCLA LJ 872

¹⁷ n 13

3.

The Legislative History of the Affordable Care Act

Policy Setting

The United States Constitution does not establish a right to healthcare or other social programs and benefits.¹⁸ Foundationally, the framers of the Constitution were more concerned with the framework restricting the powers of government to areas of absolute necessity, such as interstate commerce and defense.¹⁹ Consequently, healthcare is broadly privately sourced, with a majority of Americans obtaining health insurance through their employer.²⁰ Three major exceptions have been established by Congress in order to facilitate coverage for vulnerable groups:

- Medicare (1965): Federally funded and administered insurance program covering persons over age 65 and the disabled.
- Medicaid (1965): Joint Federal-state insurance program for low-income parents, children, the elderly, and disabled.
- State Children's Health Insurance Program (1997): Joint Federal-state program for children whose parents exceed the Medicaid income threshold but cannot afford insurance.²¹

In spite of these programs, an estimated 51 million Americans, especially lower-income adults, did not have health insurance in 2008, contributing to an estimated \$56 billion in uncompensated care by providers.²² Five percent of the country's population accounted for half of all healthcare spending in 2007.²³ Considering these factors, it is unsurprising that costs have increased sharply, from around 5% of GNP in 1965, to 16% in 2008, with

¹⁸ n 11; Kathleen S Swendiman, *Healthcare: Constitutional Rights and Legislative Powers* (Congressional Research Service, 2010) 1

¹⁹ *Ibid* Swendiman

²⁰ Bernadette Fernandez, *Health Insurance: A Primer* (Congressional Research Service, 2011) 11-12

²¹ *Ibid*; These programs are voluntary in the sense that participation is not mandatory, and in the case of Medicaid and the State Children's Program are not funded with an independent tax.

²² *Ibid* 8

²³ *Ibid* 2

projections predicting this number to double to 32% by 2032.²⁴ In order to control these staggering rises, many experts claimed that the national risk pool for health insurance needed to be broadened, with more individuals contributing to healthcare costs through private insurance plans, lowering the effects of uncompensated care.²⁵

Two major policy alternatives competed to address this issue: tax incentives and mandated coverage. Tax incentives would allow both individuals and employers to deduct premium costs from their income and employment taxes, with additional benefits for health savings accounts.²⁶ Conversely, mandated coverage proponents sought to broaden the risk pool by legally requiring coverage and subsidizing purchase for lower-income individuals and families.²⁷

In 1993, Congressional Democrats and President Bill Clinton introduced the “Health Security Act,” legislation designed to enact a comprehensive Federal regulatory framework of the national health insurance market.²⁸ This bill mandated the universal purchase of insurance and prohibited disenrollment until alternative coverage was obtained.²⁹ A civil penalty enforced this requirement.³⁰ Criticism from all sides of the political spectrum meant that the legislation ultimately failed to pass.³¹

Healthcare reform then stalled broadly until 2006, when the Massachusetts General Assembly, at the urging of Governor Mitt Romney, enacted sweeping legislation that required the purchase of health insurance for the first time nationally.³² Two years later, healthcare reform played a major, but secondary role in the 2008 presidential campaign.

²⁴ n 9; These projections occurred before the Affordable Care Act’s passage.

²⁵ n 21, 3

²⁶ Jennifer Jenson and Bernadette Fernandez, *Health Insurance Basics* (Congressional Research Service, 2007)

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²⁷ Scott E Harrington, ‘The Health Insurance Reform Debate’ (2010) 77 J of Risk & Insurance 16

²⁸ HR 3600 (1993)

²⁹ *Ibid* §1002

³⁰ *Ibid* §1323 (i)

³¹ Mark E Rushefsky and Kant Patel, *Politics, Power, and Policy Making: The Case of Healthcare Reform in the 1990s* (Sharpe, 1998) 107-108

³² Michael T Doonan and Katherine R Tull, ‘Healthcare Reform in Massachusetts’ (2010) 88 The Milbank Quarterly 56

Senator John McCain favored increased tax incentives of \$2,500 for individuals and \$5,000 for families, as well as introducing a ‘Guaranteed Access Plan’ for individuals with disqualifying preexisting conditions.³³ Senator Barack Obama’s competing plan at that time emphasized universal healthcare, establishing a government-run public option to compete in the insurance market with private plans, but neither garnered much attention because of the 2008 financial crisis.³⁴

The Patient Protection and Affordable Care Act

After the immediate threat of economic collapse abated, newly elected President Barack Obama turned toward healthcare reform in mid-2009. Senator Max Baucus (Democrat, Montana) took the leading role in formulating the healthcare reform proposal in Congress as Chairman of the Senate Finance Committee.³⁵ Many Members of Congress introduced competing proposals around this time, but they can be broadly classified into three categories:

- Single-Payer: Replace existing coverage with a mandatory government health insurance program.³⁶
- Incentivize Private Coverage: Broad tax incentives for private insurance.³⁷
- Expanded Private and Public Options: Mandated purchase to enlarge the risk pool and reduce costs, tax incentives, and an expansion of eligibility for Medicaid to lower-income adults.³⁸

³³ Robert E Moffitt and Nina Owcharenko, ‘The McCain Health Plan: More Power to Families’ (Heritage Foundation, 2008) <<http://www.heritage.org/research/reports/2008/10/the-mccain-health-care-plan-more-power-to-families>> accessed June 14, 2013

³⁴ ----- ‘Remarks of Senator Barack Obama’ (*NY Times*, May 29, 2007) <<http://www.nytimes.com/2007/05/29/us/politics/28text-obama.html>> accessed June 14, 2013

³⁵ Karen Tumulty, ‘Max Baucus Is Mr. Healthcare’ (*Time*, March 26, 2009) <<http://www.time.com/time/magazine/article/0,9171,1887843,00.html>> accessed June 14, 2013

³⁶ HR 15, National Health Insurance Act (2009); HR 1200/S.703, The American Health Security Act of 2009; HR 2399, The American Health Benefits Program Act (2009)

³⁷ HR 198, Healthcare Tax Deduction Act of 2009; HR 879 Affordable Healthcare Expansion Act of 2009; S.207, Health Insurance Tax Relief Act (2009)

³⁸ HR 3200, America’s Affordable Health Choices Act of 2009; HR 3962, Affordable Healthcare for America Act (2009); HR 3590, Patient Protection and Affordable Care Act; S.1796, America’s Healthy Future Act of 2009

The nature of Congress' legislative bargain means that compromise is a *de facto* requirement for passage.³⁹ Diffusion of power among committee chairmen and individual members, weak party discipline, a broad right of introduction, the filibuster, and presidential veto are Congressional watchwords.⁴⁰ Understanding these factors, the third option began to garner the most support during extensive Congressional hearings in 2009. The House of Representatives passed HR 3962, The Affordable Healthcare for America Act, on November 7 of that year.⁴¹ Similarly, the Senate combined two proposals by the Health, Education, Labor, and Pensions Committee (S. 1679) and Senator Baucus' Finance Committee (S. 1796), into a single vehicle by amending HR 3590, then a tax relief bill for military members.⁴² The Senate passed the amended HR 3590, now entitled the Patient Protection and Affordable Care Act, on December 24, 2009 by a 60-39 vote, overcoming a potential filibuster by one vote.⁴³ Each of these three pieces of legislation included an individual requirement to maintain health insurance, and a monetary imposition for failing to do so, the so-called "minimum coverage provision."⁴⁴

Senator Ted Kennedy (Democrat, Massachusetts) died after a months-long battle with cancer in August 2009. As a result, one Senate seat was vacant during the December 24 vote, and Senate Democrats were able to overcome the sixty vote threshold needed to end debate and avoid a Republican filibuster. However, Scott Brown (Republican, Massachusetts), was chosen in a special election on January 19, 2010, and the Act was in significant danger of failure. That was because the House, though controlled by Democrats, initially refused to

³⁹ See generally, Graham K Wilson, 'Congress in Comparative Perspective' 89 Boston Univ LR 835; McKay and Charles Johnson, *Parliament & Congress* (Oxford, 2012)

⁴⁰ *Ibid*

⁴¹ n 39

⁴² *Ibid*; Interestingly, HR 3590 is an example of how the Senate escapes the Origination Clause of the US Constitution. With no germanity requirement, the Senate can attach new taxation proposals to unrelated House revenue legislation. HR 3590 was previously entitled the 'Service Members Home Ownership Tax Act of 2009'

⁴³ 'Roll Call 396' (*US Senate*, December 24, 2009)

<http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396> accessed June 14, 2013

⁴⁴ n 39

agree to the same text of HR 3590, a constitutional requirement.⁴⁵ Lamenting that “the Senate bill clearly is better than nothing,” House Democrats agreed to accept the Senate bill, making separate amendments via a special budgetary process called reconciliation, which required a new piece of legislation, but only a simple majority in the Senate.⁴⁶

The House approved the Senate’s Affordable Care Act and the reconciliation bill, HR 4872 by a 219-212 vote, with 34 Democrats and all 178 Republicans voting against.⁴⁷

President Obama signed the Affordable Care Act into law on March 23.⁴⁸ Healthcare reform was seemingly complete after the Senate approved the reconciliation bill and the President signed it days later.⁴⁹ The lynchpin of this legislation, §5000(a) set off a flurry of litigation challenging its constitutionality:

“SEC. 5000A. Requirement to Maintain Minimum Essential Coverage.

(a) Requirement to Maintain Minimum Essential Coverage. – An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) Shared Responsibility Payment.-

*(1) In General.- If an applicable individual fails to meet the requirement of subsection (a) for 1 or more months during any calendar year beginning after 2013, then, except as provided in subsection (d), there is hereby imposed a penalty with respect to the individual in the amount determined under subsection (c).”*⁵⁰

⁴⁵ Janet Adami and Naftali Bendavid, ‘Democrats Ponder Triage on Healthcare’ (*Wall Street Journal*, January 19, 2010) <<http://online.wsj.com/article/SB10001424052748704561004575013550592114376.html>> accessed June 14, 2013

⁴⁶ Carrie Budoff Brown and Patrick O’Connor, ‘No Easy Rescue Plan for Healthcare’ (*Politico*, January 18, 2010) <<http://www.politico.com/news/stories/0110/31635.html>> accessed June 14, 2013; Robert Keith and Bill Hennith Jr, *The Budget Reconciliation Process: House and Senate Procedures* (Congressional Research Service, 2005)

⁴⁷ ‘Roll Call 165’ (*US House of Representatives*, March 21, 2010) <<http://clerk.house.gov/evs/2010/roll165.xml>> accessed June 15, 2013

⁴⁸ Sheryl Gay Stolberg and Robert Pear, ‘Obama Signs Healthcare Overhaul Bill, With a Flourish’ (*NY Times*, March 23, 2010) <<http://www.nytimes.com/2010/03/24/health/policy/24health.html>> accessed June 15, 2013

⁴⁹ Associated Press, ‘Obama Signs Healthcare Reconciliation Bill’ (*Seattle Times*, March 30, 2010) <http://seattletimes.com/html/politics/2011476026_apusobamapreview.html> accessed June 15, 2013

⁵⁰ n 2

4.

*“The Most Significant Case of My Lifetime”*⁵¹

Litigation

The words of Florida Attorney General Bill McCollum underscore the constitutional issues that surrounded the Affordable Care Act. On March 23, 2010, literally moments after President Obama signed the Act into law, McCollum and twelve other state attorneys-general filed an action in Federal district court challenging the constitutionality of the minimum coverage provision.⁵² This case and each of the five other constitutional challenges that were filed in other Federal courts considered all, or part, of the following issues:

- Anti-Injunction Act: Applicability of an 1867 law prohibiting Federal courts, with exceptions, from considering Federal tax cases until the taxes have been collected under protest⁵³
- Constitutionality of the minimum coverage provision⁵⁴
- Constitutionality of the Medicaid expansion: Whether Congress’ expansion of the Medicaid program represented coercion of the states⁵⁵
- Severability of the minimum coverage provision⁵⁶

In his January 2011 ruling, Senior District Judge Roger Vinson held that Congress’ enactment of the individual mandate under the Commerce Clause was not constitutionally authorized.⁵⁷ Accepting the government’s contention that the mandate was “necessary” and “essential” for the legislation to operate as intended by Congress, Judge Vinson declined to

⁵¹ n 8

⁵² ‘Complaint’ (*Florida v Dept of Health and Human Services*) 2010 WL 1038209 (Northern District of Florida)

⁵³ 26 USC §7421 (a); *Florida v Dept of Health and Human Services* (2011) 780 F Supp 2d 1256 (Northern District of Florida); *Florida v Dept of Health and Human Services* (2011) 648 F 3d 1235 (Eleventh Circuit); *Thomas More v Obama* (2010) 720 F Supp 2d 882 (Eastern District of Michigan); *Thomas More v Obama* (2011) 651 F 3d 529 (Sixth Circuit); *Liberty University v Geithner* (2010) 753 F Supp 2d 611 (Western District of Virginia); *Mead v Holder* (2011) 766 F Supp 2d 16 (District of Columbia); *Liberty University v Geithner* (2011) 671 F 3d 691 (Fourth Circuit); *Seven-Sky v Holder* (2011) 661 F 3d 1 (DC Circuit); n 3

⁵⁴ *Ibid Florida, Thomas More, Liberty University, Mead, Seven-Sky*

⁵⁵ *Ibid Florida*

⁵⁶ *Ibid; Virginia v. Sebelius* (2010) 702 F Supp 2d 598 (Eastern District of Virginia)

⁵⁷ *Ibid Florida* (Northern District of Florida)

sever the mandate, holding “the entire Act must be declared void.”⁵⁸ Before this ruling, many legal commentators believed that the Supreme Court would eventually find the mandate constitutional by a significant majority.⁵⁹ In the aftermath of Judge Vinson’s “extremely deep...discussion of principles and constitutional doctrine,” however, commentators began to recognize that the eventual Supreme Court decision would be complex and split the court closely. On appeal to the Eleventh Circuit, the Court upheld Judge Vinson’s ruling that the mandate was unconstitutional, but severed it from remainder of the Act.⁶⁰

Similarly, five other major lawsuits were considered in 2010-2011. Federal trial and appellate courts in Virginia, Michigan, and the District of Columbia issued a range of decisions, some finding the mandate constitutional, others unconstitutional, with others holding that standing did not exist because of the Anti-Injunction Act.⁶¹ Resolving disagreement between lower courts on points of law is one of the most important functions of the United States Supreme Court.⁶² As a result, the Court decided to grant certiorari to the Florida case and cross-appeals (*NFIB*) from the Eleventh Circuit on November 14, 2011, scheduling a record five and a half hours of oral argument over three days in March 2012.⁶³

⁵⁸ *Ibid*

⁵⁹ Alexander Bolton, ‘Lawmakers Press Supreme Court for Decision on Healthcare Law’ (*The Hill*, February 2, 2011) <<http://thehill.com/homenews/administration/141631-lawmakers-press-court-for-verdict>> accessed June 15, 2013

⁶⁰ n 54, *Florida* (Eleventh Circuit)

⁶¹ n 54, *Thomas More, Liberty, Mead, Seven-Sky*; n 57

⁶² Edward T Roehner and Sheila M Roehner, ‘Certiorari- What is a Conflict Between Circuits?’ (1952-1953) 20 Univ of Chicago LR 656

⁶³ ‘Grant of Certiorari’ (*US Supreme Court*, November 14, 2011) <<http://www.supremecourt.gov/docket/PDFs/111411zr.pdf>> accessed June 15, 2013; By this time, a total of twenty-five states had joined Florida as parties to this case. Certiorari is a commonly used writ used by United States courts to review lower decisions on matters of law.

The System of Enumerated Powers

“We start with first principles. The Constitution creates a Federal Government of enumerated powers.”

-Chief Justice William Rehnquist, *United States v Lopez* ⁶⁴

A discussion of the issues surrounding Congress’ enumerated legislative powers is necessary to understand the issues surrounding the minimum coverage provision. The Framers created the Constitution to fundamentally restrict the powers of the Federal government, while at the same time allowing it to be effective in a few specifically defined areas. The Framers’ desire to place strict boundaries on the newborn government resulted from their experiences with the plenary powers of the British parliament and colonial officials in the years prior to the revolution.⁶⁵ Similarly, however, they sought to provide an effective, capable government in the areas in which they delegated authority, knowing full well the funding issues experienced by the national ‘government’ under the Articles of Confederation.⁶⁶

Affirming the notion that “the powers delegated by the proposed Constitution to the Federal government are few and defined” and “those which are to remain in the State governments are numerous and indefinite,” the Constitution establishes distinct areas in which Congress may act.⁶⁷ Article I, §VIII states that Congress may:

- “Constitute tribunals inferior to the supreme court”
- “Raise and support armies”
- “Regulate commerce with foreign Nations, and among the several states”
- “Lay and collect Taxes, Duties, Imposts, and Excises”

⁶⁴ (1995) 514 US 549

⁶⁵ Alison L LaCroix, ‘What If Madison Had Won? Imagining a Constitutional World of Legislative Supremacy’ (2011-2012) 45 *Indiana LR* 41; Plenary authority, or the police power, is general legislative authority to regulate any area of human conduct. The individual states are the holders of the police power in our constitutional framework, whereas the British Parliament, and many other unitary states’ national legislatures possess this power. Enumeration is a facet of federal systems.

⁶⁶ *Ibid* 43

⁶⁷ James Madison, ‘Federalist No 45’ (*Independent Journal*, 1788)

<http://thomas.loc.gov/home/histdox/fed_45.html> accessed June 17, 2013

- “Make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”⁶⁸

The simple act of enumerating authority prohibits Congress from exercising powers not expressly listed.⁶⁹ As a result, unlike many legislative bodies worldwide, Congress does not possess a constitutional “police power.”⁷⁰ This is the basis on which the Affordable Care Act was challenged in Federal courts, that Congress improperly departed from its enumerated powers in enacting the minimum coverage provision, specifically in the context of its authority to “regulate commerce with...the several states” and to “lay and collect Taxes.”⁷¹

The Commerce Clause

In many scenarios, it is often the simple things that you dismiss as harmless that end up causing the most trouble. The Constitution is no exception. Madison, in ‘Federalist 45’, noted that “the regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained.”⁷² Madison’s judgment of the Commerce authority in Article I would seem to underscore the narrow original intent of this power as limited to removing barriers to effective commerce between the states. However, the Congress’ use of the Commerce Clause as the basis of legislation has not remained within this limited, original role.

In the midst of severe economic depression, Congress passed the Agricultural Adjustment Act in 1938 in order to control national wheat prices.⁷³ The Supreme Court later found that Congress could penalize farmers for growing wheat in excess of their quota for solely private use under the Commerce Clause.⁷⁴ In this case, Congress expanded its authority under the Commerce Clause to its greatest historical extent, regulating indirect

⁶⁸ n 11

⁶⁹ Gil Seinfeld, ‘Article I, Article III, and the Limits of Enumeration’ (2009-2010) 108 Michigan LR 1394

⁷⁰ Benjamin D Barros, ‘The Police Power and the Takings Clause’ (2003-2004) 58 Univ of Miami LR 474

⁷¹ n 11, §VIII

⁷² n 68

⁷³ 7 USC §1281, 1340

⁷⁴ *Wickard v. Filburn* (1942) 317 US 111

individual commerce behavior in light of their national, aggregated effects- establishing, at the time, that the Commerce Clause had no outer boundary.⁷⁵

The Gun-Free School Zones Act would change all of this.⁷⁶ In 1995, Congress passed a statute prohibiting firearms in schools.⁷⁷ Government advocates argued that Congress enacted the statute as an exercise of its Commerce authority because of the effect of school violence on education, and the effects education has on the economy.⁷⁸ The Supreme Court rejected this long-standing view of the Commerce Clause as a limitless instrument in *United States v Lopez*, noting that the delegation of a specific commerce power to regulate “among the Several states” implies that the Commerce power has an outer boundary and that direct “substantial effects” on commerce or the economy must be shown in order to exercise this authority.⁷⁹ However, in spite of this, every case that the Court had considered in its 225 year history before *NFIB* was about the regulation of commercial *activity*; no precedent existed on the compulsion of private commercial activity by the government. As a result, a genuine issue of first impression existed.

The Commerce Power and the Minimum Coverage Provision

In its opinion, the Supreme Court noted that “legislative novelty is not necessarily fatal,” but that sometimes “the most telling indication of [a] severe constitutional problem...is the lack of historical precedent.”⁸⁰ Neither side in the litigation disputed the premise that the health insurance market was commerce and could be regulated under the

⁷⁵ *Ibid*; See also *United States v Darby* (1941) 312 US 100; In that way, it could be argued at that time that the Commerce Clause had become a *de facto* police power.

⁷⁶ n 65

⁷⁷ 18 USC §922 (g)

⁷⁸ n 65

⁷⁹ *Ibid*; See also *United States v Morrison* (2000) 528 US 598

⁸⁰ n 3, citing *Free Enterprise Fund v Public Company Accounting Oversight Board* (2010) 130 S Ct 3138

Commerce Clause, but disputed the constitutionality of the mandated purchase found in the minimum coverage provision.⁸¹

The Court held that previous Commerce Clause doctrine established voluntary commercial activity as the predicate to Congress' legislative authority, accepting the States' argument.⁸² The Court stated that "the power to *regulate* commerce presupposes the existence of commercial activity to be regulated."⁸³ The Court offered the example that extending legislative power to include the creation of activity would theoretically authorize a mandatory purchase to solve every policy problem and represent the general police power the Constitution had sought to avoid.⁸⁴ Most importantly, the Court recognized that the very doctrine of enumerated powers logically presupposes an outer limit to Congressional jurisdiction.⁸⁵ Believing that the individual mandate "would open a new and potentially vast domain" of Congressional authority, "carrying us from the notion of a government of limited powers," the Court held that the mandate could not be sustained as a regulation of commercial activity.⁸⁶

The Taxing Power

Another of Congress' enumerated powers is the ability to "Lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."⁸⁷ The Clause, important from the Framers' viewpoint because of their inability to fund government operations under the Articles of Confederation,

⁸¹ 'Brief for Petitioners (Minimum Coverage Provision)' (*Dept of Health and Human Services v Florida*) 2012 WL 37168; 'Brief for Respondents (Minimum Coverage Provision)' (*Dept of Health and Human Services v Florida*) 2012 WL 392550; The difference in case names results from cross-appeals.

⁸² n 3
⁸³ *Ibid*

⁸⁴ 'Transcript of Oral Argument' (*Department of Health and Human Services v State of Florida*) WL 1017220; Justice Scalia's observation that this doctrine could enable a requirement to purchase broccoli in order to promote healthier lifestyles and lower healthcare costs underscores this conclusion.

⁸⁵ n 3

⁸⁶ *Ibid*

⁸⁷ n 11, §VIII, Cl. III

is very broad, owing to the “common Defense and general welfare” provision.⁸⁸ Congress is also not limited to appropriation in the areas covered by the other enumerated powers- it may spend money toward any object that provides for the common defense and general welfare of the country.⁸⁹ *South Dakota v Dole* (1987) centered on Congressional appropriation of Federal highway funds, with the proviso that states raise their legal drinking ages to 21.⁹⁰ The Supreme Court upheld these conditions and the legislative aim.⁹¹

Similarly, taxes are most naturally thought of as levies producing revenue to fund the operations of government.⁹² However, these instruments must also be seen in light of incentivizing conduct and their tangential regulatory aim. *McCulloch v Maryland* (1819) established the broad nature of the taxing power, holding that this discretion may be extended to “every object brought within its [government’s] jurisdiction,” and most famously, “that the power to tax involves the power to destroy,” but noting that “to carry this to the excess of destruction would be an abuse.”⁹³ Noting that “every tax is in some measure regulatory,” the Court recognized that taxes impose “an economic impediment to the activity taxed as compared with others not taxed.”⁹⁴ In this way, Congress may use tax policy to incentivize conduct that it cannot regulate through its specific regulatory powers. Understanding these grants of authority, Congress may not enact a tax that is “verbal cellophane,” a levy that goes beyond encouraging conduct to such an extent that “it loses its character...and becomes a mere penalty with the characteristics of regulation and punishment.”⁹⁵ In that way, there is a clear distinction between taxes and penalties as distinct instruments of policy.

⁸⁸ Gale Ann Norton, ‘The Limitless Federal Taxing Power’ (1985) 8 Harvard J on L & Public Policy 591

⁸⁹ *Ibid*

⁹⁰ *South Dakota v Dole* (1987) 483 US 203

⁹¹ *Ibid*

⁹² G Merle Bergman, ‘The Federal Power to Tax and Spend’ (1946-1947) 31 Minnesota LR 330

⁹³ *McCulloch v Maryland* (1819) 100 US 1

⁹⁴ *Ibid*; *Sonzinsky v United States* (1937) 300 US 506

⁹⁵ *Child Labor Tax Cases* (1922) 259 US 20; Justice Jackson states in his concurrence that “It will be a sad day for the revenues if the good will of the people toward their taxing system is frittered away in efforts to accomplish by taxation moral reforms that cannot be accomplished by direct legislation.”

“That Is Not the End of the Matter”

A legal “not so fast,” these words underscored the Supreme Court’s surprising decision. The taxing power had been a backwater of the healthcare litigation from the beginning. No court had held the mandate to be an exercise of the taxing power, even though some judges had considered it in detail and rejected it.⁹⁶ Of the two hours spent before the Court in oral arguments on the minimum coverage provision, an inexplicably trivial 54 words were devoted to the tax argument.⁹⁷ Having seen the Commerce Clause argument rejected by the Supreme Court, this is perhaps the reason why CNN and Fox made a grievous error in initially reporting the Court’s decision. Consequently, no one expected the Court to turn to the taxing power to rescue the legislation, and yet that is exactly what happened.

Writing for the majority in a fractious 5-4 opinion, Chief Justice Roberts based the decision to read the minimum coverage provision as a tax on the following elements:⁹⁸

- The minimum coverage provision’s penalty is paid into the Treasury by applicable taxpayers when they file their annual tax return.⁹⁹
- The level of the exaction is determined by “familiar factors” such as taxable income, dependents, and marital status.¹⁰⁰
- The provision is administered by the Internal Revenue Service, “in the same manner as taxes.”¹⁰¹

The opinion declares that “if a statute has more than one possible meaning, one unconstitutional, courts should adopt the meaning that is constitutional.”¹⁰² This paradigm seeks to articulate the substantial deference and presumption of constitutionality that courts

⁹⁶ See n 54, Sutton, J (dissenting), *Thomas More Law Center v Obama* (Sixth Circuit); Davis, J (dissenting) *Liberty University v Geithner* (Fourth Circuit); *Florida v Dept of Health and Human Services* (Eleventh Circuit); n 57

⁹⁷ n 85

⁹⁸ Importantly, the Chief Justice wrote the central portion of the opinion. While Justices Ginsburg, Breyer, Kagan, and Sotomayor voted to uphold the constitutionality of the minimum coverage provision, they did not join in Chief Justice Roberts’ reasoning to hold it as a tax.

⁹⁹ n 3

¹⁰⁰ *Ibid*

¹⁰¹ *Ibid*

¹⁰² *Ibid*

employ in statutory interpretation.¹⁰³ Courts have long assumed statutes that come before them on review are constitutional, and rightly so, because the judiciary is not the principal lawmaking organ of government.¹⁰⁴ This places a burden on the plaintiffs in an action to prove that the statute is “unavoidably” defective.¹⁰⁵

The Court uses the three specific characteristics outlined above to move the Affordable Care Act from facial unconstitutionality *as drafted*, to constitutional safety under the taxing power. These facets, while tangentially supportive of the Court’s reasoning, do not even approach the level of a dispositive conclusion. As will be shown, the statute was “unavoidably” defective from its initial passage as a Commerce Clause regulation, with the Court’s reasoning setting aside three foundational principles of statutory interpretation, legislative findings, materials and statements, and rejected proposals, departing from our understanding of separation of powers.¹⁰⁶

¹⁰³ Andrew F Hessick, ‘Rethinking the Presumption of Constitutionality’ (2009-2010) 85 Notre Dame LR 1448

¹⁰⁴ *Spector Motor Service, Inc v McLaughlin* (1944) 323 US 101

¹⁰⁵ *Ibid*

¹⁰⁶ *Ibid*

5.

Indicators of Legislative Intent

The Role of Findings

Legislative intent is the policy goal of the enacting legislative coalition behind a particular statute.¹⁰⁷ The primary role of statutory interpretation is the practical application of legislative purpose memorialized within the enactment.¹⁰⁸ While central to statutory interpretation, structural characteristics of individual legislative bodies mean that a coherent legislative intent is only discernible in specific scenarios.

Behind a statute stands the ‘legislative bargain’ - the mechanical logic behind our representatives’ agreement on an enacted text.¹⁰⁹ For example, in the United Kingdom Parliament, legislation is controlled from drafting to Royal Assent by the Government of the day, with a majority in the House of Commons virtually ensuring passage of all Government bills.¹¹⁰ This is a powerful indicator of legislative intent, because the constitutional role of House of Commons is merely to approve or reject clearly defined policy objectives advocated by the Government in a bill.¹¹¹ Conversely, Congress’ legislative bargain is exceedingly complex, with individual members and lobbyists drafting legislation, negotiating with colleagues and adapting provisions based on varying interests and an understanding of what is likely to garner enough support to pass. In that way, it is possible that discernible views of intent with regards to a particular act are as numerous as Members of Congress themselves, except when legislators explicitly enact provisions stating ‘this is what we mean.’

¹⁰⁷ Reed Dickerson, ‘Statutory Interpretation: ‘A Peek into the Mind and Will of a Legislature’’ (1974-1975) 50 *Indiana LJ* 206

¹⁰⁸ *Ibid* 217; n 13, Frankfurter

¹⁰⁹ *Alaska Airlines v Brock* (1987) 480 US 685

¹¹⁰ Jeremy Waldron, ‘Representative Lawmaking’ (2009) 89 *Boston Univ LR* 341

¹¹¹ *Standing Orders of the House of Commons* (House of Commons, 2012) 18; *Standing Orders of the House of Lords* (House of Lords, 2013) 17

Legislative findings are the exception to the rule that Congressional intent is hard to discern. Much like preambles, findings are factual conclusions found in statutory text that explains how the legislature determined that action was warranted, the policy issues addressed, the application of the statute to these goals, and, if necessary, constitutional authority.¹¹² Appropriately, these sections are often entitled “Legislative Intent” or “Findings.”¹¹³ No constitutional requirement obligates Congress to include findings in its work.¹¹⁴ In the aftermath of Gun-Free School Zones Act falling in *Lopez* however, Congress has taken the view that findings are a critical method of expressing legislative intent when considering legislation that might be subject to a constitutional challenge.¹¹⁵

As discussed earlier, the Constitution establishes a narrow set of areas in which Congress can act.¹¹⁶ Enumeration, therefore, means that it is important for citizens, Congress, and the courts to be cognizant of the authority in which legislation purports to act. Findings make the relationship between enumeration and legislation explicit, tying real-world fact to legislative intent and statutory provisions to constitutional authority.¹¹⁷ Beginning after the 2010 election, the House of Representatives began including constitutional authority statements with all bills and joint resolutions introduced in the House.¹¹⁸ Both findings and constitutional authority statements, while not constitutionally mandated, are important drivers of accountability and transparency, allowing citizens to better understand the actions their representatives are taking. This is a model of good legislative practice that needs to be more widely understood and continued.

¹¹² Ann Seidman, Robert Seidman, and Nalin Abeysekere, *Legislative Drafting for Democratic Social Change* (Kluwer 2001) 310; n 65

¹¹³ n 2

¹¹⁴ *See generally*, n 11

¹¹⁵ n 65

¹¹⁶ n 11

¹¹⁷ Harold J Krent, ‘Turning Congress into an Agency: The Propriety of Requiring Legislative Findings’ (1995-1996) 46 Case Western LR 736

¹¹⁸ Richard E Cohen, ‘House GOP: Bills Will Have to Cite Constitution’ (*Politico*, December 17, 2010) <<http://www.politico.com/news/stories/1210/46565.html>>

Findings make statutory analysis much easier, allowing judges to skip the potentially perilous step of divining legislative direction and meaning, since these factors are plainly set out in the statutory text. This allows the judiciary to instead turn to whether the stated legislative intent and findings of fact are reconcilable with the enumerated powers doctrine and other constitutional elements. Consequently, when courts are faced with findings in statutory analysis, they essentially have two options.

Most commonly, courts will accept the legislative findings and hold the legislation constitutional. Conversely, judicial analysis may accept the findings and intent, but find defects in the underlying constitutional authority and strike the legislation down. In either case, however, courts must accept findings as conclusive proof of legislative intent, as the findings have undergone the constitutionally prescribed method of bicameralism and presentment with the remainder of the enactment, and have been explicitly included by legislators to convey their purpose.¹¹⁹ This crucial concept represents the first defect in the Supreme Court's holding of the Affordable Care Act's minimum coverage provision as a tax.

The Affordable Care Act's Findings

Congress elected to include lengthy findings in the section immediately before the minimum coverage provision:

“(a) Findings.- Congress makes the following findings:

(1) In General. - The individual responsibility requirement provided for in this section (in this subsection referred to as the ‘requirement’) is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).

¹¹⁹ John F Manning, ‘Textualism as a Non-Delegation Doctrine’ (1997) 97 Columbia LR 675; Bicameralism and presentment refers to the constitutional process of identical text being passed by both houses and presented to the President for action.

(2) *Effects on the National Economy and Interstate Commerce.- The effects described in this paragraph are the following:*

(A) *The requirement regulates activity that is commercial and economic in nature...*

(B) *Health insurance and healthcare services are a significant part of the national economy. National health spending is projected to increase from \$2,500,000,000,000, or 17.6 percent of the economy, in 2009 to \$4,700,000,000,000 in 2019.*

...

(C) *Under the Employee Retirement Income Security Act of 1974...the Public Health Service Act...and this Act, the Federal Government has significant role in regulating health insurance which is in interstate commerce.*

...

(3) *Supreme Court Ruling.- In United States v. South Eastern Underwriters Association (322 U.S. 544 (1944)), the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation. ”*¹²⁰

More than a full page of the legislation is devoted toward detailed findings surrounding the country’s policy needs, the manner in which the Act will address healthcare challenges, and constitutional authority for the minimum coverage provision under the Commerce Clause.¹²¹ The statements go to great lengths to tie this authority to interstate commerce effects.¹²² The words/phrases “economic” or “interstate commerce” are cited fourteen times in the findings.¹²³ No mention of taxation or revenue or any related provisions is present.¹²⁴ References to the economic nature of a problem or interstate commerce echo the

¹²⁰ n 2, §1501

¹²¹ *Ibid*

¹²² *Ibid*

¹²³ *Ibid*

¹²⁴ *Ibid*

enumerated powers doctrine, and based on other examples of legislation, are explicit statements of constitutional authority.¹²⁵

Importantly, in the final finding, Congress elected to forgo subtlety and make an unusually direct statement in anticipation of a constitutional challenge.¹²⁶ *United States v South-Eastern Underwriters Association* is cited, noting that “the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation.” This statement, combined with the other numerous references to interstate commerce found in these findings, underscores that Congress intended to enact the statute under its Commerce Clause power.¹²⁷

A number of references to “regulation” and “regulating” are also found in the Congressional findings, and in statements made by legislators, and the President (see following section).¹²⁸ A regulation “is the act or process by controlling by rule or restriction,” establishing a standard of conduct.¹²⁹ Additionally, analysis of the construction of the statute tells us that the minimum coverage provision is located in Title I, the regulatory core of the Affordable Care Act.¹³⁰ These findings and the provision itself (Note 53), demonstrate that Congress enacted the minimum coverage provision as a regulation, a policy tool inherently different from a tax.

Legislative Materials and Statements

While seemingly dispositive, findings are not the only record of legislative intent that exists. Legislative materials are documents prepared by members of the legislature, or most frequently, their staff, as part of the enacting process.¹³¹ Legislative materials in Congress

¹²⁵ n 11; *See* Violence Against Women Act, Public Law 103-322; Omnibus Consolidated Appropriations Act of 1997, Public Law 104-208

¹²⁶ *United States v South-Eastern Underwriters Association* (1944) 322 US 533

¹²⁷ *Ibid*

¹²⁸ n 2, §1501

¹²⁹ Brian A Garner, ‘Regulation’ *Black’s Law Dictionary* (3rd Pocket Edn, Thomson-West, 2006) 604

¹³⁰ n 129; The Act’s tax provisions are located in Title IX.

¹³¹ Stephane Beaulac, ‘Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?’ (1997-1998) 43 McGill LJ 289

include the *Congressional Record*, a verbatim transcript of legislators' remarks in each house, a summary of floor action, and "Extensions of Remarks;" material placed in the *Record* by legislators, including speeches not given in the chambers, letters from constituents, newspaper articles, and other extraneous material related to legislative duties.¹³² Legislative materials can also include analytical policy reports issued by committees that have considered a bill.¹³³

Absolute reliance on these legislative materials in Congress can be ill-advised as the nature of Congress' legislative bargain renders them susceptible to influence by a small number of influential members, staffers, or lobbyists. Most importantly, having not been formally approved through the process of bicameralism and presentment, they are not binding statutory law.¹³⁴ When taken with other more reliable indicators of legislative intent such as plain meaning and maxims of construction, however, they can nevertheless offer limited background insight into legislative intent.

The factual record of statements made by Members of Congress and the President, like the findings found in the text of the bill, are clear.¹³⁵ Representative Louise Slaughter (Democrat, New York), Chairwoman of the ever-important House Rules Committee, stated during the Act's final debate on March 21, 2010 that "the requirements in the bill are not unconstitutional," citing the Act's "substantial effect on interstate commerce, which includes buying and selling health insurance" as part of Congress' power to regulate under the Commerce Clause.¹³⁶ Even Senator Kay Bailey Hutchinson (Republican, Texas), an opponent of the bill, noted the argument of the proponents: "I want to talk about another area

¹³² 'About the Congressional Record' in THOMAS, Library of Congress
<<http://thomas.loc.gov/home/abt.cong.rec.html>> accessed 31 May 2013

¹³³ John F Manning, 'Putting Legislative History to a Vote: A Response to Professor Siegel' (2000) 53 Vanderbilt LR 1529

¹³⁴ See generally, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, 1997)

¹³⁵ The President is a key player in the legislative process because of his constitutional veto authority.

¹³⁶ *Congressional Record* (March 21, 2010) H1826; The House Rules Committee is one of the most important bodies of the House in that it determines the legislative agenda, sets the terms of debate, and therefore has great authority in determining whether bills have the opportunity to be considered.

that I think is a stretch in this bill: apparently the individual mandate is being justified by the commerce clause of our Constitution...”¹³⁷ Senator Baucus also declared that “we have seriously looked at this question [constitutionality] as well and have concluded that the penalty in the bill is constitutional...those who study constitutional law as a line of work...argue forcefully that the requirement is within Congress’ power to regulate interstate commerce.”¹³⁸ Baucus briefly mentioned the potential applicability of the taxing power, but this was never echoed by another Representative or Senator, presumably because of the politically sensitive nature of calling something a tax.¹³⁹ In this way, our examination of legislative materials and statements reinforces the conclusion that Congress intended the minimum coverage provision to be a Commerce Clause regulation.

The Rejected Proposals

The skill and care of the legislative draftsman has historically been the cause of much litigation.¹⁴⁰ Is it possible that a drafting error is to blame for the minimum coverage controversy or that Congress considered any instrument that incentivized health insurance was an acceptable meaning of the Affordable Care Act, irrespective of the findings? As mentioned in Chapter Three, Congress considered many competing pieces of legislation before settling on the final act in March 2010.

¹³⁷ *Congressional Record* (December 22, 2009) S13718

¹³⁸ *Ibid* S13766

¹³⁹ *Ibid* S13830

¹⁴⁰ A British jingle: “I am the Parliamentary draftsman, I make the laws. Of much of the country’s litigation, I am the cause.”

Each of following was introduced in the months leading up to the Act’s final passage, and all were sponsored by key players in the House and Senate leadership: ¹⁴¹

- **HR 3200, “America’s Affordable Health Choices Act of 2009”**

(Sponsored by Rep. Dingell, Chairman of the Energy & Commerce Committee and nine other Democrats)

-“*Sec. 59B. Tax on Individuals Without Acceptable Healthcare Coverage.*

(a) Tax Imposed.- In the case of any individual who does not meet the requirements of subsection (d)...there is hereby imposed a tax equal to 2.5 percent... ” ¹⁴²

- **HR 3962, “Affordable Healthcare for America Act”**

(Sponsored by Rep. Dingell and six senior Democrats)

-“*Sec. 59B. Tax on Individuals Without Acceptable Healthcare Coverage.*

(a) Tax Imposed.- In the case of any individual who does not meet the requirements of subsection (d)...there is hereby imposed a tax equal to 2.5 percent... ” ¹⁴³

- **S.1796, “America’s Healthy Future Act of 2009”**

(Sponsored by Sen. Baucus)

-“*Sec.5000A Failure to Maintain Essential Health Benefits Coverage.*

(b) Imposition of Tax.-

(1) In General.- If an applicable individual fails to meet the requirement of subsection (a)...there is hereby imposed a tax with respect to the individual... ” ¹⁴⁴

¹⁴¹ Noting that each was sponsored by House or Senate leadership is evidence that these bills had a substantial likelihood of passage.

¹⁴² n 39, HR 3200

¹⁴³ *Ibid*, HR 3962

¹⁴⁴ *Ibid*, S.1796

HR 3962 was debated by the House on November 7, 2009 and passed 220-215.¹⁴⁵ Additionally, both House Bill 3200 and Senate Bill 1796 were both reported favorably by committees and sent to the floors of their respective chambers for consideration.¹⁴⁶ The similarity of the language between these initial proposals is striking. S.1796 would have even created the same “§5000A” of the United States Code created in the version of the Act that finally became law. Each version of the minimum coverage provision in these bills imposed a tax, with Congress considering each at length and expressly declining to send them to the President, opting for HR 3590 as its vehicle for healthcare reform.

Consider a thought experiment. You visit a car dealership. Sales have been brisk, and the salesman only has two cars left, one red and another blue. The red one instantly catches your eye and the salesman prepares a contract. At that moment, you realize that your significant other absolutely loathes the color red, and while red is your favorite color, you are not necessarily opposed to blue. Your pen above the signature line, you rip up the contract and tell the sales representative that you have decided on the blue car instead. The contract is executed, and you drive your new blue car home. Consequently, which car did you buy? The red model you initially favored, but ultimately decided against or the blue car memorialized in the contract and now sitting in your driveway? The blue model is the answer most would quickly arrive at.

This conclusion of this illustration is common sense. Indeed, the concept of choosing one object, and then opting for another, was previously a fundamental statutory interpretive method that placed appropriate weight on legislative choice. “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub*

¹⁴⁵ ‘Roll Call 887’ (*US House of Representatives*, November 7, 2009) <<http://clerk.house.gov/evs/2009/roll887.xml>> accessed August 30, 2013

¹⁴⁶ ‘Bill Summary & Status: HR 3200’ (*Library of Congress*, October 14, 2009) <<http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR03200:@@X>> accessed August 30, 2013; ‘Bill Summary & Status: S. 1796’ (*Library of Congress*, October 19, 2009) <<http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN01796:@@X>> accessed August 30, 2013

silentio [meaning ‘under’ or ‘in silence’] to enact statutory language that it has earlier discarded in favor of other language.”¹⁴⁷ As shown earlier, Congress considered versions of the minimum coverage provision drafted as a tax and discarded each of them in favor of the enacted statute. Affirming this doctrine, the Supreme Court, through volumes of precedent, has historically reasoned that statutory analysis “strongly militates against a judgment that Congress intended a result that it expressly declined to enact.”¹⁴⁸

The *expressio unius est exclusio alterius* canon of statutory interpretation is also illustrative.¹⁴⁹ This canon, “one of the most important rules in the construction of statutes,” holds that the expression of one idea or object (penalty) means the exclusion of other similar objects (tax).¹⁵⁰ This time-tested principle was even recently reaffirmed by the Supreme Court in *Marx v General Revenue Corporation* (2013), stating “the *expressio unius* canon that they invoke does not apply ‘unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.’”¹⁵¹ In our case, Congress did consider the possibility (tax) in both chambers, and explicitly rejected it each time. This canon should have also been controlling in the Court’s statutory analysis, analyzing the Act in the plain language in which it is drafted. As a result, consideration of the proposals which Congress considered, but eventually declined to enact establishes that Congress’ legislative intent in the Affordable Care Act and the Supreme Court’s holding of the minimum coverage provision as a tax are not reconcilable.

¹⁴⁷ *Immigration and Naturalization Service v Cardoza-Fonseca* (1987) 480 US 421

¹⁴⁸ *Gulf Oil Corporation v Copp Paving Company* (1974) 419 US 186; This is perhaps one of the Court’s stronger statutory interpretation precedents. See *Tanner v United States* (1987) 483 US 107; *Federal Election Commission v Democratic Senatorial Campaign Committee* (1981) 454 US 27; *Watt v Alaska* (1981) 451 US 259; *Regents of the University of California v Bakke* (1978) 438 US 265; *S & E Contractors, Inc v United States* (1972) 406 US 1; *NLRB v Gissel Packing Co* (1969) 395 US 575; *Van Dusen v Barrack* (1964) 376 US 612

¹⁴⁹ ‘the expression of one thing is the exclusion of another’; Clifton Williams, ‘Expressio Unius Est Exclusio Alterius’ (1931) 15 Marquette LR 191

¹⁵⁰ *Ibid*; A penalty and tax are similar in that they are both monetary impositions, both are differing policy instruments for constitutional (enumerated powers) and political reasons.

¹⁵¹ 133 S Ct 1366; citing *Barnhart v Peabody Coal Co* (2003) 537 US 149

Abrogation of Legislative Intent

As previously discussed, the primary function of statutory interpretation is to give effect to the legislative enactment.¹⁵² Through analysis of the legislative findings memorialized by Congress in the Affordable Care Act, it is clear that Congress intended that the minimum coverage provision stand as a Commerce Clause regulation and penalty, on the basis of numerous references to economic factors, interstate commerce, and citation of Supreme Court precedent subjecting health insurance to Federal regulation. The uses of the word regulate, or a variation, in the findings and the text of the regulation, strengthen this conclusion. Legislative materials and statements, speeches made by Members of Congress, also provide important evidence that these legislative actors understood the minimum coverage provision to be a regulation. Additionally, the rejected proposals Congress considered before settling on the text of the final enactment clearly establishes that legislators had considered the option of drafting the provision as a tax, and rejected it on numerous occasions.

Statutory interpretation is “the hold of a particular statute law upon a court... conceived as beginning and ending with the particular precepts through which it is expressed by the legislature.”¹⁵³ In this way, courts are bound by statutes in much the same way that citizens must adhere to the text of the legislative enactment. The Supreme Court, through Chief Justice Roberts’ reasoning, departed from this duty and well-established precedent to stay faithful to the words Congress actually said and the intent that lay behind the legislative text. While the Supreme Court is permitted to establish a new precedent allowing it to depart from the statutory text in this way, doing so departs from the central role that separation of powers plays in balancing our constitutional forces.

¹⁵² n 13, Frankfurter; n 108, 217

¹⁵³ Joseph P Witherspoon, ‘The Essential Focus of Statutory Interpretation’ (1960-1961) 36 Indiana LJ 430

6.

The Separation of Powers

The Boundary of Legislative Policies

Legislative authority is defined as “the right and duty to determine the subject, character, and extent of governmental regulations...to proscribe at least in definite general terms what offices shall exist, what burdens shall be imposed, what rules of conduct and procedure shall be observed...”¹⁵⁴ Similarly, courts must construe and apply legislative statutes, in addition to other adjudicatory roles, “sifting through the evidence before it, and declaring what it found to be Congress’ intent.”¹⁵⁵ Only the legislature has the ability to make new policy choices and bind citizens with statutory law.¹⁵⁶ Legislators, relying on their experience and constituents’ views, make the policy decision to turn left or right when our nation faces a fork in the road. Congress, however, cannot be reasonably expected to produce statutes covering every hypothetical scenario that could arise at some unknown point in the future. They fill in specific detail where needed, laying out a roadmap through signals of legislative intent, enabling the executive and judiciary to fulfill their fiduciary constitutional roles by applying and interpreting the law.

Consequently, statutory interpretation must inevitably involve some limited manner of discretion. Consider for example, the classic “no vehicles in the park” illustration.¹⁵⁷ Does this hypothetical statute prohibit cars, bicycles, or even toy cars? It is not unreasonable to say, literally, that each of these could fall under this requirement. This is because the statute is ambiguous in the scope of the policy expressed. A reasonable judge could arrive at any of these conclusions and still remain within the expressed legislative intent.

¹⁵⁴ J B Whitfield, ‘Legislative Powers That May Not Be Delegated’ (1910-1911) 20 Yale LJ 91

¹⁵⁵ Nicholas S Zeppos, ‘Judicial Candor and Statutory Interpretation’ (1989-1990) 78 Georgetown LJ 353

¹⁵⁶ n 11

¹⁵⁷ n 3

The important relationship in this example is that interpretation of a provision always has an outer boundary, in this case everything that could be reasonably construed as a vehicle. This outer boundary is “conceived as beginning and ending with...particular precepts” in the findings, goals, policy instruments, and construction of a statute.¹⁵⁸ This demarcation, reflective of legislative intent, establishes the range of interpretations that could be reasonably viewed as possible within the text of the enactment. Without an outer boundary, there would be no need for formal statutes. Legislators could instead pass a one-sentence bill signifying its approval of the other two branches’ authority to take action to improve our roads, for example, delegating an unlimited level of authority to solve the issue in whatever manner other governmental actors feel is appropriate. The rule of law, our republican form of government, and our representative democracy make this action an impossibility, however.

If statutory language is ambiguous and offers no other evidence in the manner of the vehicles example, then anything that could be reasonably construed is arguably within the boundary of the enacted policy. Perhaps Congress is even aware of this. In making necessary decisions that cannot garner legislative consensus, our Members of Congress may sometimes opt to allow courts to define the parameters of a policy by passing hopelessly ambiguous legislation, which at a minimum allows our representatives to show to their constituents that action has been taken.

In this way, ambiguous provisions will inevitably arise. If Congress is ambiguous, judges have additional discretion to reasonably develop the policy within the statute. This should not be the goal, however, as good legislation is clear, accessible to everyone, and straightforward in its intent, laying out a logical roadmap from problem to solution and expected results. However, when legislatures are specific, and have clearly established a

¹⁵⁸ n 13, Frankfurter, 533; n 154

policy boundary with the words employed in the text, these frontiers must be respected. No one could seriously argue, for example, that the vehicles example prohibits tires in the park. For courts to interpret otherwise would represent impermissible judicial revision.

A Judicial 'Fix'

Jurists have warned against this danger for many years. In *United States v. Butler* (1936), Justice Robert stated the function of the judiciary in reconciling statutes with the Constitution:

“There should be no misunderstanding as to the function of this Court...*all legislation must conform to the principles it lays down*...When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty, -to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”¹⁵⁹

Justice Harlan, in *Scales v United States* (1960) reminds the judiciary that “although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute.”¹⁶⁰ The Supreme Court has previously underscored that “the framers of the Constitution were not mere visionaries toying with speculations or theories, but practical men; dealing with the facts of political life...prescribing in language clear and intelligible the powers that government was to take.”¹⁶¹ In that way, the Founders were one of the first proponents of the plain language movement in legislative drafting that is budding today.¹⁶² Confusingly, in the *NFIB* decision, Chief Justice Roberts, before holding the minimum coverage provision as a

¹⁵⁹ 297 US 1; Italics are mine, this statement emphasizes the crucial link between the minimum coverage provision’s legislative findings and the text of the requirement to purchase insurance.

¹⁶⁰ 367 US 203

¹⁶¹ n 3, citing *South Carolina v United States* (1905) 199 US 437

¹⁶² Vareen Vanterpool, ‘A Critical Look at Achieving Quality in Legislation’ (2007) 9 European J of Law Reform 168

tax, cites this text and seemingly emphasizes its importance, which contrasts greatly later with the tax holding.¹⁶³

Affirming these important principles, courts must construct a statute “without doing violence to the fair meaning of the words used.”¹⁶⁴ In that way, the judiciary is constraining itself- emphasizing that it must remain within the policy boundary established by Congress in legislation. It was previously a fundamental truth that “under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation.”¹⁶⁵

Consider the totality of enacted text, findings, legislative materials, and rejected proposals as evidence of the overall nature of the minimum coverage provision. It cannot be reasonably said that the holding of this provision as a tax fails to do “violence to the fair meaning of the words used” by Congress and in doing so “requires rewriting, not just reinterpretation.”¹⁶⁶

While intended as a “fix” to allow healthcare reform to go forward, perhaps placing emphasis on political concerns, this decision instead prevails today as a fundamentally original statutory revision external to the separation of powers.

¹⁶³ n 162

¹⁶⁴ *Grenada v Brown* (1884) 112 US 261

¹⁶⁵ *United States v Rutherford* (1979) 442 US 544

¹⁶⁶ *Ibid*; *United States v Stevens* (2010) 559 US 460

The Nature of Separated Powers

Separation of powers is the delegated system of administrative, legislative, and adjudicatory functions among the executive, legislative, and judicial branches at both the national and state level.¹⁶⁷ This tripartite division of power was first devised by Montesquieu in his seminal work *The Spirit of the Laws* (1748).¹⁶⁸ Building upon Montesquieu's concept, the Founders' fear that liberty could be threatened by concentration of authority in the hands of a single branch, much like in 18th century Great Britain, led to the adoption of a system of separated powers.¹⁶⁹ Separation of powers exists "as a bulwark against tyranny...For if governmental power is fractionalized, if a given policy can only be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will."¹⁷⁰

Separation of powers was not implemented with government efficiency in mind, instead affirming the notion that the Federal government was one of limited powers, emphasizing the prerogatives of the states and important individual protections.¹⁷¹ This understanding contrasts distinctly with the United Kingdom, i.e. before the removal of the House of Lords' appellate jurisdiction in 2005, separation of powers did not formally exist.¹⁷² Continuing to develop today, Britain's doctrine can best be defined as "separate institutions sharing powers" as a result of parliamentary sovereignty, with executive agencies and many quasi-governmental agencies exercising adjudicatory discretion, with the executive wielding a great deal of influence over Parliament and most government ministers being drawn from the House of Commons.¹⁷³

¹⁶⁷ n 11, Art. I (Legislative), Art. II (Executive), Art. III (Judiciary); George I Lovell, 'That Sick Chicken Won't Hunt: The Limits of a Judicially Enforced Non-Delegation Doctrine' (2000) 17 Constitutional Commentary 84-88

¹⁶⁸ Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* (Hafner, 1949)

¹⁶⁹ n 16, 879

¹⁷⁰ *United States v. Brown* (1965) 487 US 437

¹⁷¹ *Ibid*

¹⁷² Roger Masterman, *The Separation of Powers in the Contemporary Constitution*, (Cambridge, 2011) 17-18

¹⁷³ *Ibid* 17,18, 31

Judicial Revision is an Improper Assumption of Congress' Legislative Power

Congress' ability to set the policymaking agenda and control appropriations means that it is the central actor of government. Article I establishes that "All legislative Powers herein granted shall be vested in a Congress of the United States."¹⁷⁴ The mandated system of bicameralism and presentment is the exclusive means of crafting the "Laws of the United States."¹⁷⁵ Congress, consequently, has absolute and sole authority to make the policy decisions that require statutory law and to place those provisions onto the statute book. Congress chooses, from time to time, to delegate a limited fraction of lawmaking authority needed to implement statutes to the executive, but this delegation must be limited and legislators must expressly enable this rule-making authority.¹⁷⁶

Beyond this, Congress may not transfer primary legislative authority to another branch, in the same way that other branches cannot constitutionally substitute their functions or assume powers constitutionally delegated to other branches. This inability is called the non-delegation doctrine.¹⁷⁷ Thus, in much the same way as the separation of powers, the non-delegation doctrine is "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another."¹⁷⁸ The ability of the judiciary to "sit as a council of revision" or redraft congressional statutes impermissibly encroaches on Congress' legislative authority.¹⁷⁹ Beyond this essential justification, good policymaking demands that power to legislative and revise remain with Congress.

Policymaking

Penalties and taxes are fundamentally different policy instruments. A penalty is "an exaction imposed by statute as punishment for an unlawful act," and is fundamentally

¹⁷⁴ See generally, n 11

¹⁷⁵ Bradford R Clark, 'Separation of Powers as a Safeguard of Federalism' (2000-2001) 79 Texas LR 1334

¹⁷⁶ 5 USC §553

¹⁷⁷ See generally, John F Manning, 'Lessons from a Non-Delegation Canon' (2007-2008) 83 Notre Dame LR 1541

¹⁷⁸ *Buckley v Valeo* (1976) 424 US 1

¹⁷⁹ n 166

regulatory in the sense that it proscribes conduct and establishes punishment for transgressing an established standard.¹⁸⁰ A penalty can have a scienter requirement, or can be an absolute-liability offense, where simply committing the act is sufficient.¹⁸¹ Conversely, “a tax is an enforced contribution to provide for the support of government,” that also can incentivize, but not require conduct.¹⁸² Taxes can be used to incentivize certain conduct, but not to formally prohibit.¹⁸³ Consequently, penalties establish a standard to be obeyed, with taxes supporting government operations and incentivizing conduct as a secondary function. However, the *Child Labor Tax Cases* note that,

“where the sovereign enacting the law has the power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another.”¹⁸⁴

This case and the historic annals of Congressional legislation remind us of the common sense principle that penalties and taxes are separate instruments of the legislative process.¹⁸⁵ As distinct tools of the policy process, Congress must consider varying consequences including drafting style and phrasing, definitions of conduct, knowledge of guilt, proportionality, and methods of enforcement and collection in choosing between these instruments. Separate constitutional grants of Congressional taxing powers in Art. I, §VIII, Cl. I, and regulatory power in Cl. III also evidence this choice. As a result, policymaking is a difficult and specialized process. The judiciary is hardly qualified for this task since they have criminal, civil, bankruptcy, immigration, and countless other cases to adjudicate, and little experience with the nature of the legislative bargain (Notes 112-114). Members of Congress, on the other hand, exclusively spend their time studying the country’s policy

¹⁸⁰ *United States v La Franca* (1931) 282 US 568

¹⁸¹ n 3

¹⁸² *United States v Reorganized CF & I Fabricators of Utah Inc et al* (1996) 518 US 213, citing *La Franca*

¹⁸³ n 95, *Sonzinsky*

¹⁸⁴ n 95; In the case of the individual mandate after *NFIB*, the power to regulate the mandatory purchase of health insurance lies with the states.

¹⁸⁵ *Ibid*

needs, listening to constituents, hearing expert testimony, and mastering the nuance of the legislative process, supported by subject-matter experts in areas of policy. In this way, the idea of allowing the judiciary “to rewrite the statutory scheme in order to approximate what it thinks Congress might have wanted had it known...[a provision] was beyond its authority” ignores the truism that the judiciary is simply less than qualified to make effective policy decisions.¹⁸⁶

The precedent set by the Supreme Court in revising the minimum coverage provision encourages Congress to also place little emphasis on effective legislative drafting. If legislators know that the likelihood of their policy preferences being translated into their desired outcomes is not tied to the quality of their draft, Congress will inevitably place less emphasis on it, transferring the role of legislative drafting *de facto* to the courts, dramatically increasing their workload, and in effect making them the primary arbiter of legislative detail. Noting this inevitable result, the Supreme Court noted that “if we allowed a legislature to correct its mistakes without paying for them (beyond the inconvenience of passing a new law), we would decrease the legislature's incentive to draft a narrowly tailored law in the first place.”¹⁸⁷ This trend could even theoretically continue until, as discussed earlier, legislatures simply pass a broad statement of intention requiring that “action be taken” to address a particular policy problem, leaving it to the executive to exercise broad discretion in fashioning a policy, and allowing the courts to establish the policy boundaries of the initial enabling act. At that point, the idea of having one legislative branch and the whole notion of separation of powers becomes a myth.

¹⁸⁶ *Seminole Tribe of Florida v Florida* (1996) 517 US 44

¹⁸⁷ *Osborne v Ohio* (1990) 495 US 103

Congress Is “the Decider”

President George W. Bush famously remarked in 2006 that he is “the decider.”¹⁸⁸ Congress is the great ‘decider,’ however, when it comes to transforming policy goals into binding law. In our republican form of government, legislators are accountable for their choices, understanding that “all authority flows from and returns at stated periods to, the people.”¹⁸⁹ Therefore, Congress’ fundamental authority to make political decisions, such as choosing between a penalty and a tax, is enabled by this accountability- legislators will make the decision most responsive to their constituents’ wishes, and if they fail to do so, they can be held accountable at the next election, never more than two or six years away.¹⁹⁰ Consequently, Congress’ ability to decide between policy alternatives and frame those alternatives via the language it employs is its only effective method of communicating the actions it has taken. Legislators have no greater charge, and will ultimately be held accountable for the way in which they exercise this solemn responsibility.

Legislators must reconcile broadly diverging political viewpoints in the midst of forming “a more perfect Union,” promoting “the general Welfare,” and securing “the Blessings of Liberty to ourselves and our Posterity.”¹⁹¹ In this way, Congress must make hard choices between competing legislative proposals, interest groups, constituents’ wishes and electoral concerns, often reflecting politically charged viewpoints about how a problem should be addressed.

It is doubtless true that for many, the imposition of a tax means something different in their political value judgments than compliance with a regulatory penalty, because individuals make different value judgments on the role of government. Congress gauges

¹⁸⁸ Ed Henry and Barbara Starr, ‘Bush- I’m the Decider on Rumsfeld’ (*CMN*, April 19, 2006) <<http://edition.cnn.com/2006/POLITICS/04/18/rumsfeld/>> accessed June 20, 2013

¹⁸⁹ Charles Pinckney, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Vol 4 (Jonathan Elliott, ed, J B Lippincott & Co, 1876) 331

¹⁹⁰ n 11, Art. I, §2-3

¹⁹¹ *Ibid*, Preamble

support for policy alternatives based on these factors and is uniquely qualified to do so because they are periodically accountable to their constituents. In this way, the Supreme Court's revision of the Affordable Care Act fatally interrupts that accountability.

The Court's actions impose a policy alternative that legislators disagreed vehemently on from the beginning, leaving them in the awkward position of having to defend themselves before their constituents for imposing a tax they thought they would never be held accountable for and which failed to pass.¹⁹² Congress' framing of the individual mandate as a regulatory penalty was doubtless a political judgment that their constituents would refuse to accept a tax, not wanting to be liable for the politically sensitive charge that they were imposing a tax increase, viewing that they could suffer electoral consequences. This perhaps explains the shift from tax to penalty in the draft Affordable Care Act versions discussed earlier.

In the same light, President Obama went to extraordinary lengths to deny that the individual mandate was a tax- before the Court's decision in *NFIB v Sebelius* and after- even going to the remarkable length of disputing the Court's holding.¹⁹³ The Republican Party, especially Presidential candidate Mitt Romney, also went to great lengths to exploit the Court's *NFIB* ruling in the months leading up to the 2012 election, emphasizing that "the American people know that President Obama has broken the pledge he made; he said he wouldn't raise taxes on middle-income Americans."¹⁹⁴ Similarly, Governor Bobby Jindal (Republican, Louisiana), speaking on behalf of Romney, noted, "You know what's interesting is throughout the process by this there are promises made by the president, Nancy Pelosi, and

¹⁹² n 3, Scalia, J (dissenting),

¹⁹³ Jacqueline Klingebiel, 'Obama: Mandate Is Not a Tax' (*ABC News*, September 22, 2009) <<http://abcnews.go.com/blogs/politics/2009/09/obama-mandate-is-not-a-tax/>> accessed June 19, 2013; Byron Tau, 'Obama Campaign: It's a Penalty, Not a Tax' (*Politico*, June 29, 2012) <<http://www.politico.com/politico44/2012/06/obama-campaign-its-a-penalty-not-a-tax-127721.html>> accessed June 19, 2013; Olivier Knox, 'White House: Sorry, Roberts, Obamacare Mandate Is Penalty, Not a Tax' (*ABC News*, June 29, 2012) <<http://abcnews.go.com/Politics/OTUS/white-house-roberts-obamacare-mandate-penalty-tax/story?id=16679772>> accessed June 19, 2013

¹⁹⁴ Josh Rogers, 'Romney: Obama's Healthcare Mandate is a Tax' (*National Public Radio*, July 5, 2012) <<http://www.npr.org/2012/07/05/156275694/romney-obamas-health-mandate-is-a-tax>> accessed June 22, 2013

others, saying 'Oh no, we're not going to tax people.'" ¹⁹⁵ The group "Americans For Prosperity" launched a \$9 million advertising campaign in the days after the ruling, commenting that "The Supreme Court's ruled and President Obama's now given us one of the biggest tax increases in history...we're going to remind people." ¹⁹⁶

Tax policy is among the most fundamental policy decisions that government makes. ¹⁹⁷ The Constitution envisions, resulting from the Framers' difficulties in raising funds during the Revolutionary War and later under the Articles of Confederation, that our government today must have a redoubtable, effective funding mechanism. However, as the United States was born of a tax revolt, the drafters of our constitutional framework understood that this effective mechanism must also be both accountable and responsive. Article I, §VII places the sole right to originate tax legislation in the House of Representatives. ¹⁹⁸ As a result, the Constitution emphasized that the individuals responsible for creating tax policy would be subject to the highest standard of accountability of any office in the Federal government- election every two years. Above and beyond constitutional authority, the Origination Clause underscores the fact the revising legislation from the bench undercuts accountability in our representative democracy.

As Chief Justice Roberts himself admitted, the tax argument is not "the most natural interpretation of the mandate." ¹⁹⁹ Courts should give greater deference to tax provisions in statutory interpretation because of Congress' fundamental accountability to the public and because of the political consequences of expropriation. ²⁰⁰ To redraft a statute and impose a politically sensitive tax is to assign motives that the Constitution places great weight on and

¹⁹⁵ Brian Montopoli, 'Healthcare "Tax" A Problem for Obama- and Romney' (*CBS News*, June 29, 2012) <http://www.cbsnews.com/8301-503544_162-57463745-503544/health-care-tax-a-problem-for-obama-and-romney/> accessed June 22, 2013

¹⁹⁶ Alexander Burns, 'Americans for Prosperity Launches \$9 Million Ad Campaign On Obamacare Ruling' (*Politico*, June 28, 2012) <<http://www.politico.com/blogs/burns-haberman/2012/06/americans-for-prosperity-launching-million-ad-campaign-127556.html>> accessed June 22, 2013

¹⁹⁷ Kirk J Stark, 'The Right to Vote on Taxes' (2001-2002) 96 *Northwestern Univ LJ* 191

¹⁹⁸ n 11

¹⁹⁹ n 3

²⁰⁰ In the case of the minimum coverage provision, refraining from revising or creating new exactions.

which itself Congress weighs in excruciating detail before enactment. Through revising the minimum coverage provision, the Court has inappropriately injected political instability into the accountability relationship, making political actors responsible for a policy in which they never intended to be held accountable for. This is the cornerstone of why courts should not do “violence to the fair meaning of the words used” by Congress. It interrupts the important chain of accountability between legislator and citizen and impermissibly exercises Congress’ Article I powers. That is why judicial review exists- to consider what Congress has actually done, *not what it could have done but chose not to do*, unafraid to return defective legislation back to the branch that is most qualified and accountable in assessing the desires and needs of the people of our United States and constitutionally charged with this task.

7.

Conclusion

Responding to Alice's comment of "*whether you can make words mean so many different things*," Humpty cogently observed that the real question was simply which was to be master.²⁰¹ Constitutionally, Congress is required to be the master of statutory law in devising, considering, and translating policy goals into legal requirements. However, in *National Federation of Independent Business v Sebelius*, the United States Supreme Court exercised a power of revision that abrogated Congress' intent and placed at risk Congress' legislative authority under the separation of powers.

This work began by discussing the policy setting of healthcare reform, establishing the background in which Congress chose to act in 2009-2010 and the legislative history of the Patient Protection and Affordable Care Act. Litigation surrounding the mandate to carry health insurance was quickly heard in Federal courts, challenging the constitutionality of Congress' intent to enact the minimum coverage provision as a Commerce Clause regulation. Finding this intent an impermissible stretch of Congress' enumerated Article I powers, the Supreme Court instead searched for an alternative method in which to allow healthcare reform to go forward. Citing numerous tangential elements, the Court stated that it was possible that the minimum coverage provision could be read as a tax, and in a split decision, opted to uphold its constitutionality on those grounds.

Noting that legislative intent is the policy goal of legislators, and that primary role of statutory interpretation is the practical application of the legislative intent, the Court failed to place appropriate weight on Congressional findings, legislative materials, and previous versions of the legislation which were rejected. Each of these facets, long-recognized by the judiciary in statutory analysis, gives a dispositive indication that Congress intended the

²⁰¹ n 1

minimum coverage provision to be a Commerce Clause regulation enforced by penalty. Even ceding that “the most straightforward reading of the mandate is that it commands,” the Court impermissibly revised the statute to stand as a tax, an option previously considered and expressly discarded by Congress.²⁰²

Judicial revision is foreign to our separation of powers jurisprudence. In revising the statute, the Court has challenged our notion of separation of powers and Congress’ role within it. Clearly delineated areas of authority are necessary and beneficial since Congress only has significant expertise in policymaking decisions and extensive experience weighing political factors. Accountability is the foundation that underscores this crucial power. Congress, in exchange for the ability to chart the course of government, is held accountable regularly for the consequences of its choices. It is inappropriate for the judiciary to interpose itself in these processes in by exercising a revisionary power.

The Constitution has established that our legislative process is the political means by which we make policy decisions that inevitably engender passion and disagreement. The judicial power to revise statutes, as seen in the Affordable Care Act, is external to this process. This is not to say that healthcare reform is not vitally important, or that imposing a tax to incentivize health insurance coverage is the wrong policy way to achieve this.²⁰³ The central truth, however, is that in the rush to make a difference for those suffering an inability to access healthcare, we have taken the first step toward undercutting the solid constitutional framework that our country rests upon.

²⁰² n 3

²⁰³ No representation is made that a tax is the appropriate way to achieve this; urgently needed policy must also be constitutionally sound to be genuinely effective.

Chief Justice Taft, in the *Child Labor Tax Cases*, notes:

“The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant...”²⁰⁴

As a key feature in our national “ark”, the separation of powers insures that plenary government authority cannot exist, and that no faction of government can aggrandize itself at the expense of transitory concerns and individual discretion. The revision of the Affordable Care Act has weakened this crucial bulwark.

Though facially unconstitutional as drafted, it was simply the Court’s duty to judge it so and return it to the organ of government best prepared to formulate an alternative proposal that meets our nation’s urgent healthcare needs. Statutory interpretation, at its core, is rooted in giving essence and effect to what our legislators have done. If established, a doctrine allowing courts to revise defective legislation would represent the reduction of the separation of powers to symbolic form, mortally lessening the value of Congress’ enactments. We have taken a step in that direction. Let us now quickly take a step back.

²⁰⁴ n 95

8.

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