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The Individual Mandate and the Taxing Power

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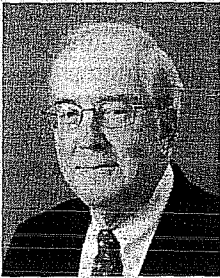
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The Individual Mandate And the Taxing Power

By Erik M. Jensen



Erik M. Jensen

Erik M. Jensen is the David L. Brennan Professor of Law at Case Western Reserve University. This report was prepared for a 2010 symposium at the Salmon P. Chase College of Law, Northern Kentucky University. The author is grateful for helpful comments on an earlier draft made by

Jonathan H. Adler, Jonathan L. Entin, Brian Galle, Helen B. Jensen, Ljubomir Nacev, and the participants at the Chase symposium. Some of those folks like the result; some do not.

This report considers the requirement in the Patient Protection and Affordable Care Act of 2010 (PPACA) that beginning in 2014, most Americans either acquire suitable health insurance or pay a penalty, and it asks whether the taxing clause of the Constitution provides authority for the mandate. In November the Supreme Court granted certiorari in several PPACA cases, with arguments to address the constitutionality of the mandate; whether the Anti-Injunction Act might bar judicial intervention until the mandate goes into effect; and, if there are problems with constitutionality, whether the individual mandate can be severed from the rest of the PPACA. Litigation has been proceeding on so many fronts that it is impossible to describe the procedural details of every challenge to the individual mandate with up-to-the-minute precision. In any event, unless the PPACA is substantially revamped, the underlying issues will not change.

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This report has a limited purpose: to consider the constitutionality of one part of the Patient Protection and Affordable Care Act of 2010 (PPACA) — the requirement that after 2013 most individuals either obtain a minimum level of health insurance (minimum essential coverage) or pay a penalty.¹ Even with the topic narrowed to that one subject, however, the report does not pretend to discuss everything. It does not systematically consider the validity of the so-called individual mandate under the commerce clause,² about which the author, a tax lawyer, is largely clueless. If the commerce clause provides authority by itself for all aspects of the mandate, you need read no further.³ This report matters not at all.⁴

But the Obama administration and other supporters of the individual mandate have been touting an alternative constitutional justification, one on which Congress clearly did not rely: That the charge on those who do not acquire suitable insurance will be a tax authorized by the taxing clause, which gives Congress the “Power To lay and Collect Taxes, Duties, Imposts and Excises,”⁵ and that the individual mandate as a whole will be a valid exercise

¹ See the Patient Protection and Affordable Care Act of 2010 (PPACA), section 1501, P.L. 111-148. A few of the details of the PPACA were changed by subsequent corrective legislation, with those changes effective as if included in the PPACA as originally passed. See Act of April 26, 2010, P.L. 111-159; Act of May 27, 2010, P.L. 111-173. For purposes of this report, I will treat this post-act tweaking as part of the original legislation, without separate citation to the later enactments.

² U.S. Const. Art. I, section 8, cl. 3 (granting Congress the “Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes”).

³ Consult your own adviser on the commerce clause.

⁴ There are so many issues. See Kathleen S. Swendiman, “Health Care: Constitutional Rights and Legislative Powers,” Congressional Research Service (May 18, 2010), Doc 2010-11158, 2010 TNT 97-14; Jennifer Staman et al., “Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis,” CRS (May 7, 2010) [hereinafter Staman I]; Jennifer Staman et al., “Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis,” CRS (Oct. 15, 2010), Doc 2010-22610, 2010 TNT 201-23; Staman et al., “Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis,” CRS (Nov. 15, 2011), Doc 2011-24032, 2011 TNT 221-44. And so little time.

⁵ U.S. Const. Art. I, section 8, cl. 1. All the legislative findings in the PPACA have to do with the commerce power. See PPACA (Footnote continued on next page.)

of the taxing power.⁶ To the extent that the commerce clause cannot do the heavy lifting, it is argued, the taxing clause can.

The penalty-as-tax argument has not been made merely for show. In litigation brought by state attorneys general challenging the constitutionality of the individual mandate, the federal government has defended the penalty as a tax.⁷ For example, in seeking dismissal of the case arising in Virginia, the lawyers for Health and Human Services Secretary Kathleen Sebelius invoked the Anti-Injunction Act, which provides that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person” to challenge the jurisdiction of a federal court to hear the suit.⁸ And several prominent constitutional law-

section 1501(a)(1) (“The individual responsibility requirement . . . is commercial and economic in nature, and substantially affects interstate commerce”); section 1501(a)(2) (listing many economic effects, none related to taxation). In its findings, Congress cited only one Supreme Court decision, *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944), for the proposition that “insurance is interstate commerce subject to Federal regulation.” PPACA section 1501(a)(3). It cited no authority construing the taxing clause.

⁶See Robert Pear, “Changing Stance, Administration Now Defends Insurance Mandate as a Tax,” *The New York Times*, July 18, 2010, at A-14 (“Administration officials say the tax argument is a linchpin of their legal case in defense of the health care overhaul and its individual mandate”). The president had earlier refused to characterize the penalty as a tax, apparently reluctant to support what might have been seen as a tax increase that could reach lower-income persons. *Id.*; see also George Stephanopoulos, “Obama: Mandate Is Not a Tax,” ABC News, Sept. 20, 2009, available at <http://blogs.abcnews.com/george/2009/09/obama-mandate-is-not-a-tax.html>.

⁷See, e.g., *Virginia v. Sebelius*, 702 F. Supp.2d 598 (E.D. Va. 2010), *Doc 2010-17270*, 2010 TNT 149-11 (memorandum opinion denying the government’s motion to dismiss, concluding that significant issues exist under all the government’s theories); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp.2d 768 (E.D. Va. 2010), *Doc 2010-26522*, 2010 TNT 239-8 (granting summary judgment to Virginia and rejecting the taxing clause as authority for the individual mandate), *vacated*, No. 11-1057 (4th Cir. 2011), *Doc 2011-19032*, 2011 TNT 175-13 (concluding that Virginia did not have standing to challenge the individual mandate).

⁸Section 7421(a) (emphasis added). The government did not argue that the penalty had to be a tax for the Anti-Injunction Act to be relevant; it argued that the act could be extended to reach taxlike penalties as well. The Anti-Injunction Act argument was successful in *Liberty Univ. v. Geithner*, No. 10-2347 (4th Cir. 2011), *Doc 2011-19031*, 2011 TNT 175-12, with one member of the panel dissenting. The argument was rejected in *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 539-540 (6th Cir. 2011), *Doc 2011-14236*, 2011 TNT 126-9 (concluding that the penalty is not a tax for purposes of the Anti-Injunction Act). In granting the petition for certiorari in *Dep’t of HHS v. Florida*, 648 F.3d 1235 (11th Cir. 2011), in which the question presented is “whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision,” the Supreme Court also directed the parties to brief and argue Anti-Injunction Act issues. Should the Court reach the constitutionality of the individual mandate and find authority wanting, it will also need to address whether the

(Footnote continued in next column.)

yers, Profs. Jack M. Balkin, Gillian E. Metzger, and Trevor W. Morrison, filed an amicus brief in several cases, including the Virginia dispute, arguing that the individual mandate was authorized by the taxing clause.⁹

Some earlier versions of the healthcare legislation referred to the charge on the uninsured or underinsured as an excise,¹⁰ a form of tax specifically mentioned in the taxing clause, or as a 2.5 percent “tax” on modified adjusted gross income (MAGI).¹¹ But as enacted, the PPACA did not use the language of taxation. The charge was simply called a “penalty.”¹² Yes, the provision was added to the code, payment of any penalty will be made with a taxpayer’s annual income tax return, and enforcement will lie with the IRS. But the code contains all sorts of provisions for payment of interest and penalties that are not taxes,¹³ and the fact that the IRS has the obligation to collect interest and penalties does not magically convert those charges into taxes.¹⁴

To be sure, a charge need not be labeled as a “tax, duty, impost, or excise” to be within the congressional taxing power,¹⁵ but this report argues that the

mandate can be severed from the rest of the PPACA, a question raised by appeals coming out of the same litigation, *Nat’l Fed’n of Indep. Bus. v. Sebelius* and *Florida v. Dep’t of HHS*, *Doc 2010-22392*, 2010 TNT 199-7.

⁹See Amicus Curiae Brief of Constitutional Law Professors in Support of Motion to Dismiss, *Virginia v. Sebelius*, No. 3:10-cv-00188-HEH (E.D. Va. 2010) [hereinafter Con Law Brief]. The brief focused on the taxing clause, including the possibility that the penalty might be a direct tax, see *infra* Part III.B., but the authors made it clear that they were advancing alternative arguments that would be necessary only if the commerce clause were found wanting.

¹⁰See S. 1796, America’s Healthy Future Act of 2009, section 1301, 111th Cong., 1st Sess. (including “excise tax on individuals without essential health benefits coverage”).

¹¹See H.R. 3962, Affordable Health Care for America Act, section 501(a), 111th Cong., 1st Sess. (including “tax” on “individuals without acceptable health care coverage”). The charge was referred to as a tax 14 times in the bill. See Steven J. Willis and Nakku Chung, “Constitutional Decapitation and Healthcare,” *Tax Notes*, July 12, 2010, p. 169, *Doc 2010-11669*, or 2010 TNT 133-6; see also Charles S. Clark, “Healthcare Reform Tax Constitutionality a Hot Topic,” *Tax Notes*, Nov. 16, 2009, p. 734, *Doc 2009-24982*, or 2009 TNT 217-1 (discussing constitutionality of what was then called an excise or surtax).

¹²Section 5000A(b)(1) and (c).

¹³See generally sections 6601-6665.

¹⁴Cf. section 6096 (providing for collection by the IRS of amounts designated by taxpayers (up to \$3) for the presidential election campaign fund, amounts having nothing to do with additional tax liability).

¹⁵A valid tax is a valid tax, call it what you will. *Penn Mut. Indem. Co. v. Commissioner*, 277 F.2d 16, 20 (3d Cir. 1960); *id.* (“It is not necessary to uphold the validity of [a] tax . . . that the tax itself bear an accurate label”). I shall argue, however, that labels affect how we think about a charge and the deference that should be accorded a congressional enactment. See *infra* Part II.A.

attempt to find constitutional authority for the individual mandate in the taxing clause is misguided. The cans of worms opened by invoking the taxing power are full of really slimy, squiggly creatures. Relying on the taxing clause raises skepticism, adds little or nothing to the substantive arguments for constitutionality, and complicates matters in an important way.

Raising skepticism: The argument under the taxing clause is being advanced because of nervousness about whether the commerce clause provides sufficient authority for the individual mandate. The argument smacks of desperation. If, despite the extraordinary expansion in the scope of the commerce clause in 20th-century jurisprudence, proponents of the mandate are still nervous about constitutional questions, we should all be nervous.

Adding little, if any, substantive support: It is hard to see the taxing clause as helping to justify the generally applicable requirement that each individual secure health insurance. If the individual mandate works perfectly, everyone will be incentivized¹⁶ to acquire insurance, no penalties will be paid, and government revenues will not be directly increased at all. In the Virginia litigation, the federal government argued that the measure will be “revenue-raising[, and] the associated regulatory provisions bear a reasonable relation to the statute’s taxing purpose.”¹⁷ But that description gets things backwards. The statute has no “taxing purpose.” The penalty will support the regulatory structure — it has no independent reason for existence — not vice-versa.

Complicating the argument for constitutionality: At best, the taxing clause might validate the penalty provision of the mandate — the amount that might have to be paid directly to Uncle Sam.¹⁸ But this line of argument creates other difficulties. The taxing clause is not, as many seem to think, a simple alternative to the commerce clause. If the charge will really be a *tax*, it will be subject to the limitations in the Constitution on the taxing power, regardless of whether the charge might otherwise be a valid regulation of commerce. One particular limitation, the apportionment rule applicable to direct taxes that are not “taxes on incomes,” presents a non-trivial, constitutional problem — but

only if the penalty will be a tax.¹⁹ And some commentators have posited another constitutional issue that may be implicated if the penalty will be a tax: the uniformity rule that applies to indirect taxes.²⁰

My argument is simple. The charge will be what Congress called it — a penalty²¹ — and, for proponents of the mandate, nothing is gained by arguing otherwise.²² If the penalty will not be a tax (or, more broadly, a tax, duty, impost, or excise),²³ the taxing clause provides no independent authority for its imposition — and, a fortiori, for imposition of the individual mandate. That should get us back to analyzing commerce clause issues, which is where the debate should have been centered all along — it was that clause that Congress relied on as authority²⁴ — and about which I express no well-founded opinion. (As of this writing, no court has concluded that the taxing clause provides authority for the individual mandate.²⁵) But if the penalty will be a

¹⁹See U.S. Const. Art. I, section 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers”); U.S. Const. Art. I, section 9, cl. 4 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken”); U.S. Const. Amend. XVI (exempting “taxes on incomes” from the apportionment requirement).

²⁰See U.S. Const. Art. I, section 8, cl. 1 (“all Duties, Imposts and Excises shall be uniform throughout the United States”); Memorandum of the Cato Institute, Competitive Enterprise Institute, and Prof. Randy E. Barnett as Amici Curiae Supporting Plaintiff’s Opposition to Defendant’s Motion to Dismiss, at 19-20, *Virginia v. Sebelius*, No. 3:10-cv-00188-HEH [hereinafter Cato Brief] (arguing that if the penalty is an excise, it violates the uniformity clause because of geographical variation). *But see infra* text accompanying notes 133-136 (arguing that uniformity will not be a problem with the individual mandate penalty).

²¹Jack M. Balkin has called the penalty a “penalty tax,” as if that term helped with constitutional issues. See “The Constitutionality of the Individual Mandate for Health Insurance,” 362 *New Eng. J. Med.* 482 (2010).

²²The Joint Committee on Taxation’s report on the legislation complicated matters by referring to the penalty as an “excise tax on individuals without essential health benefits coverage,” JCT, “Technical Explanation of the Revenue Provisions of the ‘Reconciliation Act of 2010,’ as Amended, in Combination with the ‘Patient Protection and Affordable Care Act,’” JCX-18-10, at 35 (Mar. 21, 2010), *Doc 2010-6147*, 2010 *TNT* 55-23. This characterization was presumably left over from the JCT’s reports on earlier versions of the legislation, which used the term “excise” to describe the penalty. See *supra* text accompanying note 10.

²³From now on I shall generally use the term “tax” as an umbrella term to refer to the four listed items in the taxing clause. I have argued elsewhere that the category “Duties, Imposts and Excises” constitutes a subset of “Taxes” — indirect taxes. See Erik M. Jensen, “The Apportionment of ‘Direct Taxes’: Are Consumption Taxes Constitutional?” 97 *Colum. L. Rev.* 2334, 2393-2397 (1997); see also *infra* Part III.A.

²⁴See PPACA section 1501(a)(1); *supra* note 5.

²⁵That includes cases in which a court has concluded that the individual mandate is constitutional. See *Thomas More Law Ctr. v.*

(Footnote continued on next page.)

¹⁶I apologize for using the word “incentivized.” I want to sound wonkish.

¹⁷*Virginia v. Sebelius*, 702 F. Supp.2d at 612.

¹⁸If the requirement to acquire insurance is valid to begin with under the commerce clause or whatever, a reasonable penalty would be valid without recourse to any other constitutional provision.

tax, things get hairy: We must consider whether the penalty will be a direct tax, subject to the onerous apportionment rule, or whether it might be treated as a “tax on incomes,” exempted from apportionment by the 16th Amendment.²⁶ Despite what you might have read in the papers, those are not easy issues.

Part I of the report describes the relevant portions of the individual mandate. Part II explains why the taxing clause cannot provide authority for the mandate as a whole, why the penalty should not be treated as a tax, and why, therefore, any further consideration of the taxing power should be unnecessary. Part III explains why, if the penalty will be treated as a tax, the charge might be considered a capitation tax or some other form of direct tax, and why there is reason to doubt that the penalty, although sometimes measured by income, will be a tax on incomes, exempt from apportionment under the 16th Amendment. Finally, Part IV discusses why the commerce clause cannot trump limitations in the Constitution on the taxing power — if the penalty will be a tax.

I. The Individual Mandate: Nuts and Bolts

Section 1501 of the PPACA added new section 5000A to the code, effective for tax years ending after 2013. That provision creates 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.”²⁷ With some exceptions not relevant for present purposes, an applicable individual is a citizen or national of the United

Obama, 651 F.3d 529 (6th Cir. 2011) (divided panel upholding constitutionality of individual mandate under the commerce clause and rejecting the argument that the individual mandate penalty is a tax that would divest the court of jurisdiction under the Anti-Injunction Act); *supra* note 8. At the district court level, Judge George Caram Steeh concluded that Congress had power under the commerce clause to enact the PPACA, and he therefore denied declaratory and injunctive relief to parties challenging its constitutionality. On tax issues, Steeh noted only that relief under the Anti-Injunction Act was unavailable because, with the relevant provisions not going into effect until 2014, the IRS had as yet made no effort to collect anything that might be characterized as a tax. *Thomas More Law Ctr. v. Obama*, 720 F. Supp.2d 882, 890-891 (E.D. Mich. 2010), *Doc 2010-22007*, 2010 TNT 196-15.

²⁶And perhaps we need to worry that the penalty might violate the uniformity rule if it is an indirect tax. See *supra* text accompanying note 20. I argue later, however, that uniformity is not a serious concern here. See *infra* text accompanying notes 133-136.

²⁷Section 5000A(a).

States or a resident alien.²⁸ Qualifying insurance includes a government-sponsored plan (like Medicare or Medicaid), an employer-provided plan, or other plan designated by the HHS secretary.²⁹

If an applicable individual fails to acquire minimum essential coverage for herself (or for other applicable individuals for whom she is responsible), the statute will impose a penalty to be paid with the individual’s income tax return for the relevant tax year.³⁰ The amount of the penalty will generally be determined for each month for which the applicable individual does not have minimum essential coverage.

Computing the amount of the charge requires working through some eye-glazing statutory language, but the structure is simpler for many persons than it first appears.³¹ In general, subject to a cap that I shall describe momentarily, the annual penalty (assuming an applicable individual does not have insurance for the entire 12 months³²) will be the greater of two figures: (1) a flat dollar amount equal to the “applicable dollar amount” per applicable individual³³ (\$95 in 2014, \$325 in 2015, \$695 in 2016, and \$695 indexed for inflation thereafter), with the total flat dollar amount (if multiple applicable individuals are affected) not to exceed 300 percent of the applicable dollar amount³⁴; or (2) a percentage (1 percent in 2014, 2 percent in 2015, and 2.5 percent in 2016 and thereafter) of the figure by which household income exceeds what is commonly called the “filing threshold.”³⁵ Household income is the MAGI of a person and her dependents, meaning AGI as we know and love the concept,³⁶ increased by any foreign-earned income

²⁸Section 5000A(d). Exceptions from the definition of applicable individual include practitioners of some religions, members of healthcare-sharing ministries, illegal aliens, and incarcerated persons. Section 5000A(d)(2)-(4).

²⁹Section 5000A(f) (defining minimum essential coverage).

³⁰Section 5000A(b)(1) and (2).

³¹“Simpler” does not, however, mean “simple.”

³²If the individual fails to have minimum essential coverage for only part of the year, the penalty will in effect be prorated.

³³For an applicable individual under age 18, the dollar figure will be halved for purposes of most of the computations. See section 5000A(c)(3)(C).

³⁴Section 5000A(c)(2)(A)(ii). In no event, therefore, should the total flat dollar amount, taking into account all applicable individuals for whom the taxpayer is responsible, exceed 300 percent of the flat dollar amount listed. For a family with eight applicable individuals, none of whom has qualifying insurance, the flat dollar amount for 2014 would therefore be \$285, 300 percent of \$95. For 2016 the figure would be \$2,085, 300 percent of \$695.

³⁵Section 5000A(c)(2).

³⁶AGI is gross income as defined in section 61, reduced by the deductions listed in section 62 — generally, but not entirely, deductions associated with business and investment activities. Section 62(a).

not taxed in the United States and by the amount of any tax-exempt interest.³⁷ (Think of MAGI as bulked-up AGI.) The filing threshold is the amount of income a taxpayer must have before any income tax liability arises — basically the sum of the standard deduction and the exemption amount for the applicable individual.³⁸

A visual aid might help make the apparently incomprehensible comprehensible. Let us assume that we are looking only at single taxpayers who have no dependents (that is, no other applicable individuals for whom they are responsible).³⁹ If we continue to ignore the cap, it seems as though the amount to be paid as a penalty in any year by someone who does not acquire minimum essential coverage will be, in:

- 2014: the greater of \$95 or 1 percent of household income above the filing threshold⁴⁰;
- 2015: the greater of \$325 or 2 percent of household income above the filing threshold⁴¹;
- 2016: the greater of \$695 or 2.5 percent of household income above the filing threshold⁴²; and in
- 2017 and thereafter: the greater of \$695, adjusted for inflation, or 2.5 percent of household income above the filing threshold.

It seems that the amount of the penalty for any high-income taxpayer will be the percentage-of-income figure.

But that is misleading. All this will be subject to a cap, which makes the comparison of the two figures ultimately irrelevant for many persons. In no event will the penalty in any year be greater than the national average premium for plans, available through an exchange, that offers a bronze level of coverage.⁴³ The PPACA is silent about how that determination will be made, but the general idea is

that an individual should not have to pay more as a penalty than she would have to pay for decent, but not lavish, coverage.

The real bottom line is that the annual penalty for any particular uninsured or underinsured person who is not exempted from the system will be one of three figures: (1) the flat dollar amount, which will set the floor; (2) the percentage-of-income number, which will apply if it is higher, *unless* that figure exceeds the cap; or (3) the average national cost of bronze-level coverage, in which case the cap will be the amount of the penalty.

The statute contains some relief provisions exempting specified persons from the penalty. For example, no penalty will be imposed if the cost of coverage for any month is greater than 8 percent of the applicable individual's household income; if the individual's income is below the federal poverty line; if the individual is a member of an American Indian tribe; if the individual fails to obtain coverage for fewer than three consecutive months; or if the individual is a hardship case as determined by the HHS secretary.⁴⁴

II. The Penalty Will Be a Penalty

As noted in the introduction, I find it difficult to understand the argument that the taxing clause provides authority to mandate the purchase of insurance. Someone who follows the mandate and buys insurance will not be obligated to make any payment to the government (unless the person has government-provided insurance). In what sense is a "tax, duty, impost, or excise" being imposed on someone who purchases insurance from a private carrier or who receives coverage through an employer-provided plan, even if she does so only because of the mandate? If, say, the statute had required that health coverage be acquired, period, with no exceptions and with no monetary penalty for noncompliance, would any legal scholar have thought of characterizing the obligation to buy insurance as a tax?⁴⁵ An economist might attribute

³⁷Section 5000A(c)(4)(B) and (C).

³⁸Section 5000A(c)(2)(B) and (e)(2).

³⁹I make this unrealistic assumption for purposes of simplification. It does not affect the validity of the analysis.

⁴⁰For 2014 the percentage figure will be higher than the flat dollar amount if MAGI exceeds the filing threshold by at least \$9,500.

⁴¹For 2015 the percentage figure will be higher than the flat dollar amount penalty if MAGI exceeds the filing threshold by at least \$16,250.

⁴²For 2016 the percentage figure will be higher than the flat dollar amount if MAGI exceeds the filing threshold by at least \$27,800.

⁴³Section 5000A(c)(1)(B). Bronze-level coverage provides benefits that are equivalent actuarially to 60 percent of the full actuarial benefits provided under a plan. *See* PPACA section 1302.

⁴⁴Section 5000A(e); *see also supra* note 28 (noting exceptions to the definition of applicable individual). It has been suggested that the existence of these exceptions might affect whether the penalty is characterized as a capitation tax or a tax on incomes, although I will argue to the contrary. *See infra* text accompanying notes 170-173 (arguing that a tax might still be a capitation tax even if not all persons are subject to the levy) and text accompanying notes 198-201 (arguing that a tax is not "on incomes" simply because low-income taxpayers are exempted from its scope).

⁴⁵Even without a monetary penalty, most people would follow the dictate, just as most would stop at a stop sign in the middle of the Mojave Desert.

taxlike effects to all sorts of governmental mandates, including this one, but that does not make the obligation a tax for legal purposes.

If you are in a metaphysical frame of mind, you might conceptualize a payment grudgingly made to purchase insurance as having been transferred to the government and then retransferred to an insurance company. You might do that, but most folks would not. Even if made as a result of governmental encouragement or a governmental directive, a payment to an insurance company (or a payment made on a person's behalf to an insurance company) is not a tax as we ordinarily understand that term in the law.⁴⁶

The federal government, via *Sebelius*, has argued that the individual mandate will be "revenue-raising[, and] the associated regulatory provisions bear a reasonable relation to the statute's taxing purpose,"⁴⁷ as if the statute were fundamentally a taxing provision. The penalty will bring in some revenue to the treasury, to be sure,⁴⁸ but that is hardly its purpose. Seeing the individual mandate as having a central taxing purpose turns the statutory structure upside-down. It is requiring the acquisition of insurance that is the heart of the statute. The penalty has no *raison d'être* other than to

strengthen that mandate; it would make no conceptual sense as a stand-alone provision.⁴⁹

If the taxing clause will be applicable at all in this context, it must be in evaluating the legitimacy of the penalty imposed on those who do not acquire minimum essential coverage. Here, too, I am skeptical about the clause's relevance. Congress called the charge a penalty, and I see no reason to question that characterization. It is a penalty as we ordinarily understand that term: a punishment for not engaging in desired behavior or for engaging in disfavored behavior. Also, Congress specified that with a couple of exceptions, "the penalty . . . shall be assessed and collected in the same manner as an assessable penalty,"⁵⁰ and section 6671 provides that assessable penalties "shall be assessed and collected in the same manner as taxes."⁵¹ The penalty may thus be like a tax in some respects, but Congress really went out of its way not to call it a tax.⁵² Congress did call an applicable individual who will have to pay a penalty a taxpayer,⁵³ but here, too, the statutory language is clear: "There is hereby imposed on the taxpayer a *penalty*."⁵⁴ Not all charges paid by taxpayers to governments are taxes.

Congress has historically imposed charges that were called taxes but were in effect penalties. This

⁴⁶For example, we do not consider payments of antitrust treble damages or punitive damages to be taxes, even though the payments are mandated by government. Cf. J. Kenneth Blackwell and Kenneth A. Klukowski, "Why the ObamaCare Tax Penalty Is Unconstitutional," *The Wall Street Journal*, July 22, 2010, at A19 ("The government . . . is commanding [private individuals] to give their money to another private entity, not the Treasury"). Although Blackwell and Klukowski nailed this basic point, I disagree with most of the rest of their analysis. For example, they write that the original Constitution "allowed only three types of taxes," *id.*, but the taxing clause gives Congress the power to "lay . . . Taxes, Duties, Imposts and Excises." U.S. Const. Art. I, section 8, cl. 1. That is four types of taxation right there. They write that "the only type of direct tax permitted by the Constitution was a 'capitation tax.'" Blackwell and Klukowski, *supra*. But the Constitution refers to "Capitation, or other direct, Tax," U.S. Const. Art. I, section 9, cl. 4 (emphasis added), clearly suggesting that other direct taxes are possible. Further, the Constitution did not altogether prohibit any direct tax; instead, it required only that a direct tax be "apportioned among the several States . . . according to their respective Numbers." U.S. Const. Art. I, section 2, cl. 3. And apportionment did not mean that "every person in a given state had to pay the same amount." Blackwell and Klukowski, *supra*; see *infra* Part III.A (discussing workings of apportionment).

⁴⁷*Virginia v. Sebelius*, 702 F. Supp.2d at 612.

⁴⁸The Congressional Budget Office estimates penalties totaling \$4.2 billion in 2016, enough to pay for a few White House parties. CBO, "Payments of Penalties for Being Uninsured Under the Patient and Affordable Care Act" (Apr. 22, 2010), *Doc 2010-8974*, 2010 TNT 78-32

⁴⁹But see Edward D. Kleinbard, "Constitutional Kreplach," *Tax Notes*, Aug. 16, 2010, p. 755, *Doc 2010-15640*, or 2010 TNT 159-3 (noting that "it is natural to have a visceral reaction that section 5000A(b) should not properly be characterized as a tax, because it is not primarily designed to collect revenue, but to compel behavior," but then suggesting that the modern Supreme Court has largely ignored that distinction as long as some revenue is likely to be raised).

⁵⁰Section 5000A(g)(1).

⁵¹Section 6671 (emphasis added).

⁵²I thus disagree with Willis and Chung that "the act's penalty provision is styled as a tax," and "Congress arguably did this to finesse commerce clause problems." Willis and Chung, *supra* note 11, at 170; see also Con Law Brief, *supra* note 9, at 14 and n.3 (arguing that the individual mandate "on its face purports to be an exercise of the taxing power" — quoting *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937) — because it was added to the code, the provision "references taxpayers and tax returns," and so on). A penalty imposed as part of the enforcement of a legitimate tax would presumably be authorized by the taxing clause. It would not matter in that case that the penalty is itself not a tax. Cf. *United States v. Kahriger*, 345 U.S. 22, 25 (1953) (upholding a federal tax on "the business of accepting wagers," and stating that "unless there are [penalty] provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power"). But a penalty unconnected with taxation must derive its authority from some constitutional provision other than the taxing clause — that a penalty might bring in revenue is not enough to make it a tax — and a nontax penalty does not become legitimate merely because it is placed within the code.

⁵³E.g., section 5000A(b)(1) and (c).

⁵⁴Section 5000A(b)(1) (emphasis added); see also section 5000A (c)(1) (referring to "the amount of the penalty imposed by this section on any taxpayer").

was generally done in the distant past when there were questions about whether the commerce clause provided sufficient authority to regulate various commercial activities. And, yes, legitimate taxes can have penalty-like effects.⁵⁵ The boundary between taxes and penalties is fuzzy,⁵⁶ courts are understandably reluctant to look to congressional motives in evaluating the legitimacy of charges,⁵⁷ and often the distinction does not matter anyway for constitutional purposes.⁵⁸ The concepts are nevertheless not identical, and the distinction can matter.⁵⁹ I will

⁵⁵Cf. *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (“It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed”). Tariffs or other taxes imposed on reports of consumption increase the cost of those goods, making them less attractive to consumers. In some circumstances at least, one might view such an increased cost for someone who buys a taxed good as a penalty.

⁵⁶Cf. Balkin, “The Constitutionality of an Individual Mandate for Health Insurance,” 158 *U. Pa. L. Rev. PENumbra* 102, 105 (2009) (“If taxes that act as incentives to engage in socially desirable behavior and reduce the cost of government programs are unconstitutional, much of our tax system would be constitutionally suspect”). Balkin’s point is valid, but it is hardly determinative regarding any particular charge. And there is presumably a distinction to be drawn between imposing taxes as an incentive and exempting some amounts from taxation as an incentive. See Ruth Mason, “Federalism and the Taxing Power,” 99 *Cal. L. Rev.* 975, 984-992 (2011) (distinguishing between two types of “tax regulation,” “tax expenditures,” and “tax penalties”). But see Ryan Lirette, “The Health Insurance Mandate: If It Must Be, Let It Be a Tax,” *Tax Notes*, July 26, 2010, p. 415, *Doc 2010-14305*, or *2010 TNT 144-10* (“Many code provisions, including the charitable deduction, the child care credit, empowerment zones, and the low-income housing credit, are intended to affect personal behavior. Distinguishing between those presumably constitutional provisions and a penalty may be complicated”). In what sense is a benefit of that sort — a reduction in tax liability if specified behavior is engaged in — ever going to be characterized as a penalty on someone who takes advantage of the benefit? (I might feel aggrieved if someone else is getting a tax benefit, but it strikes me as peculiar to use the term “penalty” to refer to my sense of distress.) Some have equated not taking advantage of available deductions to a penalty because the result is higher tax liability. See, e.g., Leonard Burman, *CNN Money* (Apr. 10, 2010), *quoted in Willis and Chung, supra* note 11, at 187. Yes, you pay more tax if you do not donate an extra dollar to charity, but calling that result a penalty also strikes me as a stretch. (Assuming your marginal rate is less than 100 percent, you are still better off economically if you do not make the contribution.)

⁵⁷See Lirette, *supra* note 56, at 423.

⁵⁸Many penalties will be valid anyway under the commerce clause or some other provision in Article I, section 8. As noted earlier, a penalty imposed to carry out a legitimate taxing function would presumably be validated by the taxing clause, see *supra* note 52, although the commerce clause might also provide authority. If such a penalty were recharacterized as a tax, it would still be valid if it were an indirect tax that satisfied the uniformity rule, see *infra* Part III.A, and that should be the case with many penalties.

⁵⁹“The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in

(Footnote continued in next column.)

return to the constitutional history associated with taxation and regulation in Part II.A. Suffice it to say for now that although the Supreme Court has generally abandoned the attempt to make “distinctions between regulatory and revenue-raising taxes”⁶⁰ — no tax is entirely one or the other — at no time has the Supreme Court held that Congress can define anything it wishes as a tax.

Because the taxing clause is an independent grant of power to Congress in Article I, section 8 — a tax may be valid under that clause even if it would not withstand scrutiny under the commerce clause⁶¹ — it has become distressingly common for some members of Congress to use the language of taxation for legislation that is otherwise not taxlike. It should go without saying, but will not, that not all charges imposed by governments are taxes.⁶² The federal government’s power to impose an entry fee to national parks, for example, or to charge for meals in a federal building cafeteria — easy cases — obviously does not come from the taxing clause. Also — this is the key point for present purposes — the congressional power to impose penalties for violation of rules does not come from the taxing clause, unless the rules being violated are those associated with taxation.⁶³

the required method of their collection often are important. . . . Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.” *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922). One might question whether the result in the child labor tax case is still good law, see *infra* Part II.B, but these points still make sense and the case has not been overruled. See *infra* note 123.

⁶⁰*Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974).

⁶¹That could be the case, for example, if the levy has nothing to do with foreign or interstate commerce or with commerce with the Indian tribes (assuming that situation can exist).

⁶²In fact, I said this a few paragraphs ago, and I will say it again. Richard Darman’s widely quoted ditty — if “it looks like a duck, quacks like a duck, and walks like a duck, it’s a duck” — was not helpful in this regard. *Quoted in* Ellin Rosenthal and Pat Jones, “Year in Review: From Germany to the Tax Code, the Walls Begin to Tumble — a Look at the 101st Congress,” *Tax Notes*, Jan. 1, 1990, p. 16. Office of Management and Budget Director-designate Darman was interpreting the first President Bush’s “no new taxes” pledge, and his statement came to stand for the wrong-headed proposition that any governmental charge is an aquatic bird. See also Lirette, *supra* note 56, at 422 (noting that “the mandate’s penalty provision compels a monetary payment to the government, similar to all taxes”).

⁶³The government’s argument that “numerous provisions in the Internal Revenue Code impose assessments that are described as ‘penalties,’” and that “the constitutionality of these

(Footnote continued on next page.)

One widely noted recent example of an attempt to cloak a penalty in the garb of taxation was a proposed tax, not enacted (although it did pass the House in 2009), intended to reach bonuses paid to employees or former employees of AIG Inc. and other significant recipients of Troubled Asset Relief Program (TARP) funds — that is, bailout funds paid to financial institutions during the financial crisis.⁶⁴ The version of the bill that passed the House would have taxed an affected bonus at a 90 percent rate for any employee or former employee with AGI exceeding \$250,000, if the company granting the bonus received more than \$5 billion in TARP funds. The 90 percent rate would have applied to the bonus regardless of the marginal rate otherwise applicable to the bonus recipient. In short, this legislation was an attempt to claw back bonuses that Congress considered unseemly.⁶⁵ And pretty clearly the drafters crafted the clawback as a tax because they were unsure of their authority to get the desired results under the commerce clause.

Prof. Laurence Tribe initially blessed the clawback as an exercise of the taxing power,⁶⁶ but he soon had second thoughts. He became concerned about the congressional pique that was driving the

exercises of the General Welfare Clause is not in doubt," Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, *Virginia ex rel. Cuccinelli*, No. 3:10-cv-00188-HEH, at 20 n.5 (Sept. 23, 2010), is hardly conclusive. I concede that penalties associated with failing to satisfy one's tax obligations can derive their authority from the taxing clause, see *supra* note 52, but that is not what the individual mandate penalty is about. And penalties for failure to meet other obligations must derive their authority from elsewhere in the Constitution. (I understand that Balkin disagrees. He has argued that penalties for failure to comply with pollution control standards, for example, are authorized by the taxing clause because the penalty is on those contributing to social problems that Congress is trying to deal with. Balkin, *supra* note 56, at 103; Balkin, *supra* note 21, at 482. That claim basically would make any penalty into a tax. In my view, the key question is whether Congress has the relevant authority to regulate environmental matters to begin with. If it does, associated penalties will be valid. If it does not, the penalties will not magically become valid because of the taxing clause.)

⁶⁴H.R. 1586, 111th Cong., 1st Sess., passed the House by a 328-93 vote on March 19, 2009.

⁶⁵Even though the bonuses were paid by the companies and the tax would have been paid to the government, the term "clawback" is appropriate here. The persons who would have been subject to the tax had all been employed by companies that received substantial bailout money from the government. In effect this was to be a repayment to the government of bailout funds that seemed to have been paid out as bonuses.

⁶⁶See Ashby Jones, "Would an AIG-Bonus Tax Pass Constitutional Muster? (A Tribe Calls 'Yes!')," *The Wall Street Journal Blogs* (Mar. 18, 2009), available at <http://blogs.wsj.com/law/2009/03/18/would-an-aig-bonus-tax-pass-constitutional-muster-a-tribe-calls-yes>.

proposals.⁶⁷ It was obvious from the way many members of Congress were talking, both on and off the floor, that punishment, not revenue-raising, was the goal, as a report from the Congressional Research Service noted.⁶⁸

In an earlier report, I argued that the proposed tax on bonuses was the rare case in which a purported tax might cross the line and be an invalid taking of property without just compensation.⁶⁹ In form, the legislation was written using impersonal language — the House bill would have applied to a "TARP bonus," described in terms of a "disqualified bonus payment," paid to "an employee or former employee of a covered TARP recipient"⁷⁰ — but everyone knew who the targets were. A close-to-confiscatory rate of taxation (90 percent) would have applied to a discrete body of taxpayers and for carefully described property. That sounds more like a taking than a tax.⁷¹

Had the suspect "tax" on bonuses been enacted, I concede that it would have been difficult for a bonus recipient to have successfully brought a challenge.⁷² Courts are unlikely to resist Congress's exercise of the taxing power, and, except in special circumstances, courts will not strike down a charge

⁶⁷See "Law Professor Who Advises Obama Says House AIG Bill May Be Unconstitutional," *The Plum Line*, Greg Sargent's Blog (Mar. 23, 2009), available at <http://theplumline.washington.gov/economy/law-professor-who-advised-obama-says-house-aig-bill-may-be-unconstitutional>.

⁶⁸See Erika K. Lunder et al., "Retroactive Taxation of Executive Bonuses: Constitutionality of H.R. 1586 and S. 651," CRS, at summary page (Mar. 25, 2009), *Doc 2009-6788*, 2009 *TNT* 57-35 (noting that a "review of the legislative history established so far . . . seems to indicate that raising revenue is not a primary purpose behind the proposed bills. Rather, the legislative history seems to contain comments that would indicate the existence of a congressional intent to punish those individuals receiving bonuses").

⁶⁹Erik M. Jensen, "Would a Tax on AIG Bonus Recipients Really Be a Tax?" *Tax Notes*, May 25, 2009, p. 1033, *Doc 2009-9186*, 2009 *TNT* 98-12.

⁷⁰H.R. 1586, *supra* note 64, at section 1(b).

⁷¹In this case the property taken would have been cash, and ordinarily we would not think that the government's requiring someone to give up cash is a "taking" requiring just compensation. What would the point be of requiring compensation in cash for a taking of cash? (That is one reason a legitimate tax is not considered a taking.) But the bonus clawback might have been the exceptional case in which applying takings doctrine to analyze a "tax" would have been necessary. Or, alternatively, the clawback might have been characterized as a deprivation of property without due process. A governmental taking of property for a public purpose requires compensation, see U.S. Const. Amend. V; a fortiori, a governmental taking *without* a public purpose should require compensation.

⁷²For one thing, many bonus recipients would not have wanted to argue in public that they were entitled to huge bonuses in difficult economic times.

that Congress calls a tax.⁷³ That judicial reluctance is a matter of deference more than principle — unquestionably there are governmental charges that are not taxes and are therefore not blessed by the taxing clause — but deference counts for a great deal in the real world.

The individual mandate penalty will not even arguably be a taking, but neither will it be a tax as that term is usually understood. If a penalty for engaging or not engaging in a particular behavior would have been understood by the Founders as a tax, the taxing clause would have trumped many other provisions in Article I, section 8.⁷⁴ It would have provided an unintended route to enormous congressional power.⁷⁵ The taxing clause is an independent grant of power — it might permit levies that are not related to commerce or other areas within congressional power — but a charge must be a tax to be permitted by the taxing clause.

¹ In any event, there is an important and obvious difference between Congress's occasional attempts to use the taxing power as the basis for imposing something that is not a tax and what Congress has done with the individual mandate penalty. It may be true, as the Supreme Court said in 1919, that "from an early day the Court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize courts to inquire into that subject."⁷⁶ But whatever the appropriate level of deference when Congress says it is imposing a tax, the individual mandate does not present that situation: *Congress did not call the penalty a tax.*

Indeed, as the legislation worked its way through Congress, the label was changed from "excise" or

"tax" to "penalty," as if Congress knew it was not exercising the taxing power.⁷⁷ And the legislative findings supporting the constitutionality of the individual mandate have no connection to the taxing power; they are all tied to regulation of commerce.⁷⁸ On that fundamental point, I thus disagree with Prof. Steven Willis and Nakku Chung, who wrote that "the healthcare act's penalty provision looks like a tax, which is what the drafters ultimately intended."⁷⁹ If the drafters really intended this, they did a terrific job of hiding it.⁸⁰

⁷⁷See *supra* text accompanying notes 10-11. The term "excise" was not used in the PPACA, but for what it is worth, new section 5000A falls within a subtitle titled "Miscellaneous Excise Taxes." I think the placement is worth almost nothing. Cf. section 7806(b):

No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title [26, the Internal Revenue Code], nor shall any table of contents, table of cross references, or similar outline, analysis, or descriptive matter related to the contents of this title be given any legal effect.

Try explaining to law students struggling with the distinction between above-the-line and below-the-line deductions why section 162, the ordinary and necessary business expense provision, is found in a part of the IRC called "Itemized Deductions for Individuals and Corporations," when sometimes business deductions are itemized and sometimes they are not (see section 62), and when there is no such thing as an itemized deduction for a corporation. See also *Murphy v. IRS*, 493 F.3d 170, 184-186 (D.C. Cir. 2007), *Doc 2007-15777*, 2007 TNT 129-4, *cert. denied*, 553 U.S. 1004 (2008) (concluding that tax on recovery for emotional distress could be classified as an excise for constitutional purposes, even though the recovery was arguably included as part of gross income in computing income tax liability).

⁷⁸See *supra* note 5. In a memorandum for summary judgment filed on September 3, 2010, in the Virginia litigation, *Sebelius* argued that further legislative findings were unnecessary: "It is fair to presume that a provision of the Internal Revenue Code that deals with amounts calculated as a percentage of gross income to be paid by 'taxpayers' with their 'tax returns,' is an exercise of the taxing power. There was accordingly no need to make detailed findings to support its exercise [of] this power." Memorandum in Support of Defendant's Motion for Summary Judgment, at 43, *Virginia v. Sebelius*, No. 3:10-cv-00188-HEH (E.D. Va. Sept. 3, 2010). I understand that because of the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), Congress felt it necessary to make detailed findings under the commerce clause. And I understand congressional reluctance to call a charge a tax in a decidedly antitax environment. But if Congress did not want to be seen as relying on the taxing power and therefore did not make appropriate findings, that decision should have consequences for our understanding of the PPACA.

⁷⁹Willis and Chung, *supra* note 11, at 181.

⁸⁰Prof. Metzger and Morrison argue that "there are the features of the provision that plainly identify it as a tax — the way it amends the Internal Revenue Code, for example, the fact that the penalty is included on annual tax returns, and the fact that the money the government receives from payment of the penalty goes into the general fisc." Gillian Metzger and Trevor

(Footnote continued on next page.)

⁷³For special circumstances, see *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), *Doc 98-10958*, 98 TNT 62-12 (striking down application of taxing statute as violation of the export clause, U.S. Const. Art. I, section 9, cl. 5); *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843 (1996) (to same effect). See also Erik M. Jensen, "The Export Clause," 6 *Fla. Tax Rev.* 1 (2003). In *United States Shoe*, the government was in the awkward position of having to argue (unsuccessfully) that what Congress had labeled the harbor maintenance tax was a user fee, and therefore not an invalid "tax or duty" as it applied to exported reports.

⁷⁴See *supra* note 52. If a tax is direct, however, it would have to be apportioned, see *infra* Part III.A, making a direct tax an inefficient method of regulation in most cases.

⁷⁵I like the characterization of the penalty as a "tax on *uninsurance*." See Randall R. Bovbjerg, "Are State Challenges to the Legality of the Patient Protection and Affordable Care Act Likely to Succeed?" in Urban Institute, *Timely Analysis of Immediate Health Policy Issues*, at 2 (June 10, 2010) (emphasis added). Kleinbard has characterized it as "a penalty (or tax, take your pick) on the provision of healthcare *self-insurance*." Kleinbard, *supra* note 49, at 756; see also Willis and Chung, *supra* note 11, at 180 ("This is a fee for self-insuring by doing nothing") (footnote omitted).

⁷⁶*United States v. Doremus*, 249 U.S. 86, 93 (1919).

Willis and Chung accepted the penalty as a tax but still rejected its constitutionality. I also question the analysis of several commentators who came to the diametric conclusion. For example, the constitutional law professors who filed amicus briefs in several cases, including the Virginia litigation, argued that “today, any scrutiny the Court devotes to the purposes underlying a tax measure focuses on ensuring it is not a criminal imposition in disguise.”⁸¹ That strikes me as too strong a statement to begin with⁸² and, more important, it is beside the point. The individual mandate does not purport to be a “tax measure!” So, too, I question the relevance of Prof. Brian Galle’s description of Supreme Court authority: “If a provision *that is labeled as a tax* raises any revenue, it is within the taxing power.”⁸³ The “penalty” is *not* labeled as a tax, it has the trappings of a penalty, and Congress did not try to hide the penalty in tax bafflebab.⁸⁴

The commentators relying on the taxing clause as authority for the penalty mix up two distinct questions. Question number 1 — Can a charge that is not labeled as a tax be characterized as one? — has an easy answer: Yes. If Congress calls a levy on the importation of beef a “dingbat,” the levy would still be valid as a duty or impost (assuming the uniformity rule is satisfied), even though the taxing clause makes no reference to dingbats.⁸⁵ But the second question is different: Must we defer to Congress’s powers under the taxing clause when Congress has not characterized a charge as a tax?

Morrison, “Health Care Reform, the Tax Power, and the Presumption of Constitutionality,” *Balkinization* (Oct. 19, 2010), available at <http://balkin.blogspot.com/>. But being in the code does not make a charge a tax, see *supra* text accompanying note 14, nor does having to make an entry on a tax return. And surely many penalty payments go into the general coffers, as do most (but not all) tax payments.

⁸¹Con Law Brief, *supra* note 9, at 12 (citing *Dep’t of Revenue v. Kurth Ranch*, 511 U.S. 767, 779-783 (1994), *Doc 94-5384*, 94 *TNT 109-1* (holding that a tax on drugs was criminal punishment and that its imposition in particular circumstances violated the double jeopardy clause).

⁸²As I discuss in Part II.B, with the expansion in the scope of the commerce clause, the tax-nontax distinction is not nearly as important as it used to be, so it is not surprising that scrutiny today is less stringent than in the past.

⁸³Brian Galle, “Conditional Taxation and the Constitutionality of Health Care Reform,” 120 *Yale L.J. Online* 27, 29 (2010) (emphasis added). I think Galle’s point about the need for administrable, justiciable limits is misplaced as well: “That the Court has found no justiciable limits on the spending power necessarily implies a similar lack of limit on the taxing power.” *Id.* If Congress has not purported to be exercising its taxing power, what difficulty does a court face in deciding that no deference under the taxing clause is appropriate?

⁸⁴As I noted earlier, including the penalty in the IRC and giving enforcement power to the IRS do not make a penalty into a tax. See *supra* text accompanying note 13.

⁸⁵See *supra* text accompanying notes 11-14.

Congress will get the benefit of the doubt in constitutional analysis anyway — if at all possible, a statute will be read in a way consistent with constitutional mandates — but I do not understand the argument that a court should defer to a characterization Congress did not make.

These points are similar to those made by Judge Roger Vinson in the Florida litigation in denying the government’s motion to dismiss.⁸⁶ Vinson interpreted the Supreme Court’s 1903 decision in *Helwig v. United States*⁸⁷ as standing for the proposition that “regardless of whether the exaction could otherwise qualify as a tax . . . it cannot be regarded as one if it ‘clearly appears’ that Congress did not intend it to be,”⁸⁸ and Congress’s intentions with the individual mandate penalty were clear. Congress explicitly called other provisions in the PPACA “taxes,” so it knew how to use that label when it wanted to.⁸⁹ And Congress had used different language in earlier versions of the statute: “Congress’s conspicuous decision to not use the term ‘tax’ in the Act when referring to the exaction (as it had done in at least three earlier incarnations of the legislation) is significant.”⁹⁰ The rule of deference:

must be set aside when it is clear and manifest that Congress intended the exaction to be regarded as one and not the other. . . . To the extent that the label . . . is actually indicative of legislative purpose and intent, it very much does matter. By deliberately changing the characterization of the exaction from a “tax” to a “penalty,” but at the same time including many other “taxes” in the Act, it is manifestly clear that Congress intended it to be a penalty and not a tax.⁹¹

⁸⁶I note for the record that I made these points in an earlier draft of this report that was available on SSRN in late September 2010, and Vinson’s opinion appeared on October 14, 2010. I claim no cause-and-effect, however. Indeed, I claim no originality; these points should have been obvious to any careful student of the situation.

⁸⁷188 U.S. 605 (1903).

⁸⁸*Florida v. Dep’t of Health & Human Servs.*, 716 F. Supp.2d 1120, 1133 (N.D. Fla. 2010), *Doc 2010-22392*, 2010 *TNT 199-7*.

⁸⁹*Id.* at 1134-1135.

⁹⁰*Id.* at 1134.

⁹¹*Id.* at 1135-1136. Vinson dealt with other issues in *Florida v. HHS*, 780 F. Supp.2d 1256 (N.D. Fla. 2011), *Doc 2011-2175*, 2011 *TNT 21-8*, and a divided panel of the Eleventh Circuit agreed that the individual mandate is unconstitutional, explicitly concluding that it was not a valid exercise of the taxing power. See *Florida Attorney General v. HHS*, 648 F.3d 1235, 1313-1320 (11th Cir. 2011), *Doc 2011-17561*, 2011 *TNT 158-14*, *cert. granted* (Nov. 14, 2011). Vinson had also concluded, however, that the individual mandate could not be severed from the rest of the PPACA, and the entire act had to fall. The Eleventh Circuit rejected that conclusion. *Id.* at 1320-1328.

Prof. Gillian Metzger and Trevor Morrison complain that “the obvious lesson of [Vinson’s] approach is that Congress should expressly invoke all possible constitutional bases for legislation or risk being found to have given some up.”⁹² But that misses the point: In this case, Congress *did* give up the language of taxation, openly and notoriously; no inadvertence was involved. We know what emerged from Congress, and Vinson did not need to make difficult judgments about congressional motives and intentions. Metzger and Morrison argue that “the fact that a measure using the term ‘tax’ actually was adopted by one chamber calls into question the district court’s confident assertion that it was called a penalty so that members of Congress could ‘insulate themselves from the possible electoral ramifications of their votes.’”⁹³ Maybe that is so,⁹⁴ but whatever the reason, the language changed and Congress did not call the individual mandate penalty a tax.

If the primary check on the taxing power is political, and it is,⁹⁵ it becomes all the more important to take Congress at its word. Language matters, and if Congress can enact taxes without saying that is what it is doing, political safeguards are disarmed. How can the populace or anyone else be confident about the exercise of the national taxing power if Congress pointedly avoids using the language of taxation?⁹⁶

Balkin has used the term “penalty tax” to characterize the penalty in the individual mandate,⁹⁷ and in litigation the government has referred to the individual mandate penalty as a “tax penalty,”⁹⁸ as if that language would help with the constitutional issues. There are no such terms of art, however. The terms “penalty tax” and “tax penalty” have no constitutional significance,⁹⁹ and in any event, Con-

gress did not use either of those terms in the PPACA. The individual mandate penalty is a “tax, duty, impost, or excise,” or it is not.

A. Taxation and Regulation

If the proposed tax on recipients of bonuses from companies receiving TARP funds could have been grounded in constitutional language other than the taxing clause, the clawback would not have needed to be a tax to be constitutional. If Congress has the power under the commerce clause, say, to require disgorgement of what it considers to be ill-gotten gains, it does not seem to matter whether the charge would be a tax or not. (At least that is so if the “tax” is not subject to the direct tax apportionment rule, about which more shortly.¹⁰⁰) And, as congressional power increased in the 20th century — with the commerce clause in particular becoming an apparently boundless grant of power — the taxation-versus-something-else issue declined in importance.¹⁰¹

But Congress was contemplating a tax on bonuses only because at least some members of Congress thought they did not otherwise have the authority to claw back bonuses that were paid under valid contracts. And the taxing clause has come up as a justification for the individual mandate because at least some supporters are nervous that the commerce clause is not up to the task.

Whether Congress can use the taxing power to achieve goals that would otherwise be outside its power has a long history, with several significant cases decided in the late 19th and early 20th centuries.¹⁰² Although that history unquestionably supports the idea that the taxing clause is an

⁹²Metzger and Morrison, *supra* note 80.

⁹³*Id.*

⁹⁴It seems to me just as likely that members of Congress had second thoughts once it became apparent that they could be seen as having supported a tax increase.

⁹⁵Indeed, the primary check on any exercise of congressional power is political.

⁹⁶*Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1818) (stressing the need for “confidence which is essential to all government” to temper concerns about the power of taxation, which is “the power to destroy”).

⁹⁷See Balkin, *supra* note 21, at 482.

⁹⁸See Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, *Virginia v. Sibelius*, No. 3:10-cv-00188-HEH, at 19 (Sept. 23, 2010).

⁹⁹*Cf. Mason, supra* note 56, at 989-992 (referring to “what might be called tax penalties”). Mason gives as examples of tax penalties disallowing deductions for “‘excessive’ employee remuneration,” section 162(m), and taxing the income from trafficking in illegal drugs but denying deductibility of related expenses, section 280E.

¹⁰⁰See *infra* Part III.

¹⁰¹*Cf. South Carolina v. Dole*, 483 U.S. 203, 216 (1987) (O’Connor, J., dissenting) (“The [*United States v. Butler*, 297 U.S. 1 (1936)] Court saw the Agricultural Adjustment Act for what it was — an exercise of regulatory, not spending, power. The effort . . . was not the Court’s conclusion that the Act was essentially regulatory, but rather its crabbed view of the extent of Congress’ regulatory power under the Commerce Clause”). One might expect more judicial skepticism about taxation as regulation if the commerce clause’s scope lessens. But despite the hoopla about *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the commerce clause does not permit Congress to do everything it might want to), and *United States v. Morrison*, 529 U.S. 598 (2000) (ditto), that is not likely to happen much, if at all. See Jonathan H. Adler, “Is *Morrison* Dead? Assessing a Supreme Drug (Law) Overdose,” 9 *Lewis & Clark L. Rev.* 251 (2005). Even if the commerce clause continues to be broadly construed, however, there still can be instances in which the only possible justification for a purported tax will be the taxing clause.

¹⁰²By adjusting the amount of a tax and creating regulatory structures to enforce a tax, Congress could often get effects equivalent to direct regulation. If the amount of a tax is high enough, the taxed activity will disappear altogether (except perhaps in illegal forms) — the ultimate form of “regulation.”

independent grant of congressional power,¹⁰³ that can be so only if a *tax* is involved. The clause provides authority for Congress to “lay and collect Taxes,” nothing else.¹⁰⁴ No tax, no authority under the taxing clause.

Even before the New Deal, cases concluding that a charge was not really a tax (and that the enactment was otherwise outside congressional power) were exceptional. In general, to the dismay of some Supreme Court justices, the Court bent over backwards not to reject levies that Congress had characterized as taxes. For example, in *McCray v. United States*,¹⁰⁵ decided in 1903, the Court considered federal levies on margarine. In an 1886 act, Congress provided for taxing yellow margarine at 10 cents per pound, while margarine of other colors was taxed at only one-quarter cent per pound. Occupational taxes similarly varied depending on the type of margarine. The purpose behind the taxes was clear — to make margarine less competitive with butter — but the Court refused to look behind the form of the statute. The Court quoted an 1888 opinion to the effect that “the judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.”¹⁰⁶

Sonzinsky v. United States,¹⁰⁷ a New Deal-era case, contains some of the most far-reaching language about deference to congressional characterizations. In *Sonzinsky*, the Court decided on the constitutionality of a license tax on dealers in firearms. The National Firearms Act defined firearms in such a way that it picked up disfavored weapons like sawed-off shotguns; the obvious purpose of the act was to gain federal control over the weapons. Taxpayer *Sonzinsky* argued that the levy was “not a true tax, but a penalty imposed for the purpose of

suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states.”¹⁰⁸ It was assumed that Congress could not directly regulate those firearms — hence Congress’s reliance on the taxing power.

In a unanimous decision, the Supreme Court upheld Congress’s exercise of the taxing power in those circumstances. And the Court provided an amazingly generous interpretation of that power:

A tax is not any the less a tax because it has a regulatory effect, . . . and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.¹⁰⁹

The levy looked like a tax, and “on its face,” it purported to be “an exercise of the taxing power.” It produced “some revenue,”¹¹⁰ and a little bit was enough. As in *McCray*, the Court refused to question congressional motives:

Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. . . . They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution.¹¹¹

The formalism embodied in those cases occasionally prompted vigorous dissents. For example, in *United States v. Kahriger*,¹¹² decided in 1953, the Supreme Court upheld the constitutionality of an occupational tax on persons engaged in the business of accepting wagers even though, as the majority admitted, the revenue generated was “negligible.”¹¹³ Dissenting Justice Felix Frankfurter complained:

When oblique use is made of the taxing power as to matters which substantively are not within the powers delegated to Congress, the Court cannot shut its eyes to what is obviously,

¹⁰³See, e.g., *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950) (stating that in *United States v. Butler*, 297 U.S. 1 (1936), the Court “declared for the first time . . . that, in conferring power upon Congress to tax ‘to pay the Debts and provide for the common Defence and general Welfare of the United States,’ the Constitution delegates a power separate and distinct from those later enumerated, and one not restricted by them”); *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (“Nor does a tax statute necessarily fail because it touches on activities which Congress might not otherwise regulate”).

¹⁰⁴A reminder: I am using the term “tax” to refer to all levies listed in the taxing clause: “Taxes, Duties, Imposts and Excises.” See *supra* note 23.

¹⁰⁵195 U.S. 27 (1903).

¹⁰⁶*Id.* at 58 (quoting *Spencer v. Merchant*, 125 U.S. 345, 355 (1888)).

¹⁰⁷300 U.S. 506 (1937).

¹⁰⁸*Id.* at 512.

¹⁰⁹*Id.* at 513.

¹¹⁰*Id.* at 514.

¹¹¹*Id.* at 513-514; cf. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869) (upholding a tax on state bank notes, although the purpose of the tax was to drive notes out of existence). In *Veazie Bank*, the government had power to regulate the currency, so the tax at issue might have been valid even if not characterized as a tax.

¹¹²345 U.S. 22 (1953).

¹¹³*Id.* at 28.

because designedly, an attempt to control conduct which the Constitution left to the responsibility of the states, merely because Congress wrapped the legislation in the verbal cellophane of a revenue measure.¹¹⁴

But shut its eyes is what the Court did in *Kahriger* and many other cases involving regulatory use of taxation, such as levies on narcotics¹¹⁵ and marijuana.¹¹⁶ Two 1968 cases overruled *Kahriger* on issues relating to the constitutionality of registration and information requirements under a wagering tax statute; the rules were held to violate the privilege against self-incrimination. But the legitimacy of the taxing power as a method of regulating suspect activities was upheld.¹¹⁷

The Supreme Court has generally deferred to Congress in this area, but occasionally the Court has looked through “verbal cellophane” to conclude that a charge was not really a tax (and that the enactment at issue was otherwise outside congressional power). The best-known example is the Child Labor Tax Case (*Bailey v. Drexel Furniture Co.*),¹¹⁸ decided in 1922. Congress had used a purported tax (10 percent of the net profits of businesses “knowingly” employing children in violation of the terms of the statute) as a way to get around a 1918 Supreme Court case, *Hammer v. Dagenhart*,¹¹⁹ which had held that Congress did not have power to regulate child labor.

Writing for the Court, Chief Justice William Howard Taft concluded that the usual deference to Congress in tax matters did not apply when, “on the very face of its provisions,”¹²⁰ the levy was a penalty, not a tax. The scienter requirement was evidence that this was a penalty. Providing a “heavy exaction for a departure from a detailed and specified course of conduct in business,” said the Court, was not consistent with the exercise of the taxing power.¹²¹ Presumably some justices were irritated, too, by Congress’s haste in trying to use the taxing power to effect results the Court had just held could not be achieved through direct regulation.

The narrow holding of the Child Labor Tax Case is no longer relevant because the Court later overruled *Hammer v. Dagenhart*, making it clear that Congress has the power to regulate child labor straightforwardly.¹²² And the Child Labor Tax Case was unusual in the extent to which it evidenced judicial skepticism of the taxing power.

But the Child Labor Tax Case, which has not been overruled, demonstrates that there can be some charges that are not actually taxes and are therefore invalid if Congress does not otherwise have the power to regulate the “taxed” activity. Maybe those cases are few and far between — one hopes Congress will legislate in a way not intended to push the constitutional envelope — but Congress’s power to tax, while broad, is not limitless. Despite the deferential post-child-labor-tax-case authority, the distinction between a tax and a penalty has not disappeared.¹²³

Besides — to return to my main point — Congress was not engaging in any subterfuge with the individual mandate penalty. Congress did not call it a tax or rely on the taxing clause as authority for enactment. Nothing was hidden — quite the contrary — and the result, beginning in 2014, will be “a heavy exaction for a departure from a detailed and specified course of conduct.”¹²⁴ In discussing the appropriate level of deference to Congress, we should not make the analysis more difficult than it

¹¹⁴*Id.* at 38 (Frankfurter, J., dissenting).

¹¹⁵*United States v. Doremus*, 249 U.S. 86 (1919); see also *Minor v. United States*, 396 U.S. 87 (1969).

¹¹⁶*United States v. Sanchez*, 340 U.S. 42 (1950); see also *Leary v. United States*, 395 U.S. 6 (1969).

¹¹⁷*Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); see also *United States v. Knox*, 396 U.S. 77 (1969).

¹¹⁸259 U.S. 20 (1922).

¹¹⁹247 U.S. 251 (1918).

¹²⁰259 U.S. 20 at 38.

¹²¹*Id.* at 36.

¹²²*United States v. Darby*, 312 U.S. 100 (1941).

¹²³Although I am in the minority on this, I happen to think that the *Child Labor Tax Case* involved such a clear nontax penalty that it would be decided the same way today (if the issue could come up and assuming the commerce clause had remained static). In any event, despite the later authority on the tax-versus-regulation issue, the case is still on the books. And the Supreme Court has mandated that lower courts follow Court precedent, even if its continuing vitality has been challenged. It is up to the Supreme Court, that is, to discard its own precedents. See *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (reaffirming “that [i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions” (alteration in original) (quoting *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477, 484 (1989))).

¹²⁴Because of the cap on the penalty — tying the maximum amount to the national average cost of bronze-level coverage, see *supra* text accompanying note 43 — the penalty is intended to be no greater burden than buying insurance. In that respect, if the appropriate comparison is between a compliant and a noncompliant taxpayer after enactment of the mandate, no heavy exaction is involved. But if the appropriate comparison is between the financial position of the noncompliant taxpayer before enactment of the individual mandate and her position after enactment, a heavy exaction is clearly involved.

needs to be: What Congress has called a penalty should generally be treated as a penalty and evaluated accordingly.¹²⁵

III. Direct Taxes and Taxes on Income

I am convinced that the “penalty” for failure to acquire minimum essential coverage will be just that — a penalty and not a tax. If so, the appropriate constitutional analysis must be done under the commerce clause, to determine whether that clause gives Congress the power to require acquiring health insurance and to impose penalties on those who fail to satisfy the requirement. No more input on the taxing clause should be necessary. We should let taxing clause experts return to the beach to work on their bronze coverage.

But if the administration and commentators insist on calling the penalty a tax, on the assumption that the taxing clause might bolster the case for constitutionality, we must take the characterization issue seriously. If the penalty will be a tax, what does the Constitution have to say about its validity? The bottom line is that a tax must meet one of the alternative requirements set out in the Constitution — the uniformity rule if the tax is indirect, or the apportionment rule if it is direct — and that is true even if the commerce clause might provide independent authority for enactment.¹²⁶

A. Indirect vs. Direct Taxes

The Constitution effectively divides the universe of permissible taxes into two broad categories. Duties, imposts, and excises are what are generally known as indirect taxes, although that is not a constitutional term, and they are subject to the uniformity rule, basically requiring that the levy be imposed in the same way across the country.¹²⁷ For an indirect tax, the rates and tax base must be the same in Montana as they are in Florida.¹²⁸ Direct taxes, all other taxes,¹²⁹ are subject to an onerous rule requiring that the aggregate liability for any direct tax be apportioned among the states on the

basis of population¹³⁰ (unless the tax is on incomes and is therefore exempted from apportionment by the 16th Amendment¹³¹). For example, a state with one-tenth of the national population must bear, in the aggregate, one-tenth of the total liability for any direct tax, regardless of how the tax base is distributed across the country. The citizens and residents of a state with one-twentieth of the population must pay one-twentieth of the total. And so on. The uniformity and apportionment rules are alternatives; one or the other applies to any particular levy.¹³²

If the penalty under the individual mandate will be an *indirect* tax, it will probably be constitutional.¹³³ Although some commentators have found geographical variation in how the penalty will work, and thus a potential violation of the uniformity clause,¹³⁴ I think the cap on the penalty will take care of the uniformity problem: The cost of insurance might vary across the nation, but the cap will be determined using a *national* average.¹³⁵ Whether the penalty for any particular person will be the flat dollar amount, the percentage-of-income figure, or the bronze-level cap will not depend on geographical factors in a way that would implicate the uniformity clause.¹³⁶ (If I am wrong about that, however, the uniformity rule must be revisited.)

¹³⁰See U.S. Const. Art. I, section 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers”); U.S. Const. Art. I, section 9, cl. 4 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken”).

¹³¹U.S. Const. Amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration”).

¹³²And they are effectively mutually exclusive. Unless each state has the same percentage of the national tax base and the national population — almost impossible to imagine — an apportioned tax would not be uniform, and a uniform tax would not satisfy the apportionment rule. See Jensen, *supra* note 23, at 2341-2342.

¹³³I reemphasize that the “it” here is the penalty. I see no way that the taxing clause can provide authority for the individual mandate as a whole. See *supra* text accompanying notes 45-49.

¹³⁴The Cato Institute and other amici have argued that because “the individual mandate penalty can depend in part on the cost of health insurance offered in the particular market,” and “that cost will depend in part on rating areas within each state,” Cato Brief, *supra* note 20, at 19, “the individual mandate penalty can vary by location and . . . would be unconstitutional” if it were an excise. *Id.* at 19-20.

¹³⁵See also Kleinbard, *supra* note 49, at 760 (agreeing that uniformity is not a problem as part of his argument that the mandate as a whole presents no insuperable constitutional problems).

¹³⁶Incomes do vary across the country, and the percentage-of-income figure will therefore be higher, on the average, in

(Footnote continued on next page.)

¹²⁵I use the weasel-word “generally” only because one can imagine a situation in which Congress calls something a penalty in an attempt to avoid *limitations* on the taxing power.

¹²⁶In Part IV, I argue that even if the commerce clause can provide authority for enactment of the penalty, it cannot provide authority for ignoring the limitations that come into play if the penalty is in fact a tax.

¹²⁷See U.S. Const. Art. I, section 8, cl. 1 (“all Duties, Imposts and Excises shall be uniform throughout the United States”).

¹²⁸See Jensen, *The Taxing Power*, ch. 5 (2005).

¹²⁹Commentators have occasionally suggested that a residual category of levies might exist, one subject to neither the uniformity nor the apportionment requirement, see Jensen, *supra* note 23, at 2341 (citing Joseph Story, 2 *Commentaries on the Constitution of the United States*, section 948, at 420-421 (1833)), but no such levy has ever been discovered.

A charge that is an indirect tax and that satisfies the uniformity rule could conceivably meet the requirements of both the commerce clause and the taxing clause. As I argued in Part II, I do not think the penalty will be a tax to begin with, but if the penalty will be an indirect tax, that will not hurt the case for constitutionality. Indeed, to the extent that the taxing clause provides authority that goes beyond the commerce clause, the taxing clause by itself might validate the individual mandate penalty if the commerce clause falls short. That works, however, only if the penalty will be an indirect *tax*.

But if the penalty is deemed to be a *direct* tax and not a tax on incomes, it would have to be apportioned to be constitutional. And the penalty could not work as desired if that is the case. The aggregate liability borne by the taxpayers of any state would have to be determined on the basis of population rather than by the percentage of the population that has failed to acquire health insurance. Consider two states with identical populations. If the penalty will be a direct tax, the total revenue from the penalty must be identical for the two states, even if, say, the first has twice as many uninsured as the second. That would be a bizarre result.¹³⁷ If Congress were forced to rethink the penalty structure to meet apportionment requirements, it is hard to imagine that it could come up with a set of penalties that would both work technically and be politically palatable.

B. Is the Penalty a Direct Tax?

Apportionment of the penalty would lead to bizarre results, but if the penalty will be a direct tax, apportionment is what will be required to meet constitutional requirements. (As a practical matter, the apportionment rule should prevent enactment

high-income states than in low-income ones. But the income tax need not take into account cost of living differences. In fact, it is generally assumed that building geographical cost of living differences into the income tax would *violate* the uniformity clause (which has been held to apply to the income tax even if, after the 16th Amendment, it remains a direct tax, see *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 18-19 (1916)), although there is no authority precisely on point.

¹³⁷If an income tax had to be apportioned — no longer the case after the 16th Amendment — apportionment would presumably require different tax rates in different states. The total income tax revenue from two states with the same population would have to be the same, even if the average income is twice as high in state 1 than in state 2. That would presumably mean that the rates applicable in the richer state would have to be only half those in the poorer one. It is hard to imagine that Congress would ever have been willing to enact such a tax. See Erik M. Jensen, “Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses),” 21 *Const. Comment.* 355, 358-360, 369-374 (2004).

of “penalties” that are really direct taxes.¹³⁸) In this section I argue that the individual mandate penalty might be a direct tax, and with the stakes so high, this is an issue that must be taken seriously.

Commentators rightly emphasize how limited the Supreme Court’s conception of direct taxes has been; that is one reason Congress pays no attention these days to the possibility of apportionment.¹³⁹ I suspect you would get blank stares from almost all members of Congress if you were to mention the direct tax apportionment rule.¹⁴⁰

The Founders unquestionably thought of capitation taxes (specifically mentioned in the Constitution)¹⁴¹ and taxes on real estate as direct¹⁴²; several federal real estate taxes were apportioned between 1798 and 1861.¹⁴³ In the minds of many, however, capitation and real estate taxes were it. Dicta in the great 1796 case of *Hylton v. United States*,¹⁴⁴ in which the Supreme Court concluded that a federal tax on carriages was not a direct tax, suggested that no other taxes can be direct.¹⁴⁵ Until the Supreme

¹³⁸That is the fundamental purpose of the apportionment rule: to deter Congress from enacting direct taxes, particularly those with decidedly sectional effects, except when revenue needs become overwhelming, as in a time of war. *Id.* at 373-374. In the healthcare context, Prof. Calvin H. Johnson adheres to his longtime position that the apportionment rule applies only to easily apportioned taxes — that is, it applies only to those levies for which the rule is no limitation whatsoever. See Johnson, “Healthcare Penalty Need Not Be Apportioned Among the States,” *Tax Notes*, July 19, 2010, p. 335, *Doc 2010-15557*, or *2010 TNT 137-7*. I will go to my grave resisting the argument that a limitation on congressional power should apply only when it makes no difference. No document, certainly no constitution, should be interpreted in that way.

¹³⁹See, e.g., *Con Law Brief*, *supra* note 9, at 17-24.

¹⁴⁰Of course, you would get blank stares on many other constitutional issues as well. Anyway, Congress has not apportioned a tax since 1861 and, to my knowledge, there has been no serious consideration of apportioning a tax for well over a century. Once the 1894 income tax was struck down in *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895), 158 U.S. 601 (1895), on the grounds that it was an unapportioned direct tax, there was no possibility of its being replaced by an apportioned income tax. An apportioned tax would not have worked as the income tax was intended to — hitting the relatively well-to-do Northeast the hardest — and there would have been no political support for such a tax. The 16th Amendment made possible the modern income tax, which does have sectional effects, by eliminating apportionment for any “tax on incomes.”

¹⁴¹U.S. Const. Art. I, section 9, cl. 4.

¹⁴²See, e.g., *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175, 177, 183 (1796).

¹⁴³See Act of Aug. 5, 1861, ch. 45; Act of Mar. 5, 1816, ch. 24; Act of Feb. 27, 1815, ch. 60; Act of Jan. 9, 1815, ch. 21; Act of Aug. 2, 1813, ch. 37; Act of July 14, 1798, ch. 75.

¹⁴⁴3 U.S. (3 Dall.) 171 (1796).

¹⁴⁵*Id.* at 175 (Chase, J.) (stating that the direct taxes “contemplated by the Constitution, are only *two*, to wit, a *capitation*, or *poll tax*, *simply*, without regard to *property*, *profession*, or any other *circumstance*; and a tax on *LAND*”); *id.* at 183 (Iredell, J.) (“In

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Court struck down the 1894 income tax a century later on the ground that it was a direct tax (at least insofar as it reached income from property) that had not been properly apportioned,¹⁴⁶ the direct tax apportionment rule was largely a dead letter.¹⁴⁷

And the 16th Amendment, ratified in 1913, made it unnecessary to apportion a tax on incomes.¹⁴⁸ With the cash cow that is the unapportioned income tax clearly constitutional, there was even less reason to reconsider the meaning of direct tax. In the recent, widely noted case of *Murphy v. IRS*,¹⁴⁹ a panel of the District of Columbia Circuit canvassed Supreme Court case law, concluding that the category of direct taxes is pretty much limited to capitations and taxes on property (with a tax on personal property now being treated the same as a tax on real estate).¹⁵⁰

1. Direct taxes generally. Given the Supreme Court's narrow conception of direct taxes, one might think there is nothing left to say about the meaning of direct taxes and the possible application of the apportionment rule to the individual mandate penalty. But I have two responses to the argument that direct taxes are nothing but capitation taxes and property taxes and that the appor-

tionment rule should therefore be automatically inapplicable to the penalty.¹⁵¹

First, whatever the Supreme Court thinks, that cramped understanding of direct taxes is wrong as a matter of first principle. It is absurd to think that the Founders meant to restrain only forms of taxation with which they were familiar. (What sort of constitutional limitation would that be?) I have elsewhere discussed at length an understanding of the meaning of direct tax that is consistent with original understanding and that recognizes that forms of taxation unknown to the Founders ought to be treated as direct if they share characteristics with capitation and real estate taxes.¹⁵²

In a nutshell, the argument is this: Indirect taxes were understood to be taxes on reports of consumption, and with indirect taxes, people can generally avoid liability by not buying the taxed goods. As a result, the national government cannot abuse indirect taxes as long as the taxes are uniform. If Congress raises indirect taxes too much, consumption will decline and so will tax revenues — to the government's detriment. In contrast, direct taxes generally cannot be shifted to someone else and therefore cannot be easily avoided. In that respect, a capitation tax, which is imposed directly on persons, is the quintessential direct tax.¹⁵³ Because direct taxes were more dangerous — they could be abused by an overreaching government in a way indirect taxes could not — they needed to be subject to a more stringent constitutional limitation.

After it heard arguments in *Murphy* for the second time, the D.C. Circuit panel seemed to be sympathetic to this understanding as a theoretical matter¹⁵⁴ — it really is strange to think the only direct taxes can be those known in 1789 — but the panel concluded, correctly, that the Supreme Court has not interpreted the direct tax clauses in that way.¹⁵⁵ Following Supreme Court hints,¹⁵⁶ the *Murphy* court was reluctant to extend the universe of

regard to other reports, there may possibly be considerable doubt"); *id.* at 177 (Paterson, J.) ("I never entertained a doubt, that the principal, I will not say, the only, objects, that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land").

¹⁴⁶*Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), 158 U.S. 601 (1895).

¹⁴⁷It did have some effect. As noted, Congress apportioned several national real estate taxes between 1798 and 1861. See *supra* text accompanying note 143. And one never knows what levies might not have seen the light of day because of congressional concern that apportionment would have been required.

¹⁴⁸U.S. Const. Amend. XVI (exempting "taxes on incomes" from apportionment).

¹⁴⁹*Murphy v. IRS*, 460 F.3d 79 (D.C. Cir. 2006), *Doc 2006-15916*, 2006 TNT 163-6 (*Murphy I*), *vacated*, 2006 WL 4005276 (D.C. Cir. Dec. 22, 2006), *Doc 2006-25647*, 2006 TNT 248-3, *decision on rehearing*, 493 F.3d 170 (D.C. Cir. 2007), *Doc 2007-15777*, 2007 TNT 129-4 (*Murphy II*), *cert. denied*, 553 U.S. 1004 (2008); see Jensen, "Murphy v. Internal Revenue Service, the Meaning of 'Income,' and Sky-Is-Falling Tax Commentary," 60 *Case W. Res. L. Rev.* 753 (2010).

¹⁵⁰*Murphy II*, 493 F.3d at 181-186. *Murphy* considered whether a recovery for a nonphysical personal injury could constitutionally be included in the income tax base. The first time around, a panel of the D.C. Circuit concluded that the recovery was not income and therefore could not constitutionally be reached by the income tax. On rehearing, in *Murphy II*, the panel concluded that the tax was in effect an excise, not a direct tax, which was valid whether or not the recovery was income within the meaning of the 16th Amendment. *Id.* at 185.

¹⁵¹I need to keep repeating — sorry! — that I think apportionment will be unnecessary, because I do not think the penalty will be a tax at all. But if it will be a tax, apportionment issues become serious ones.

¹⁵²See Jensen, *supra* note 23, at 2389-2402.

¹⁵³Of course, any tax is avoidable in some ways. A capitation tax, for example, can be avoided by committing suicide or by removing oneself from the jurisdiction of the taxing entity. But neither of those steps is easy. Direct taxes were understood to be relatively unavoidable compared with indirect taxes.

¹⁵⁴*Murphy II*, 493 F.3d at 183-184.

¹⁵⁵*Id.*

¹⁵⁶I say "hints" because the Supreme Court has not outlined a theory to distinguish direct from indirect taxes. Once a body of unprincipled case law developed that characterized just about any tax as indirect, it was hard to find a principle that would

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direct taxes beyond the examples known to and accepted by the Founders, plus the income tax for which apportionment is no longer required anyway.¹⁵⁷

All that is fair enough — wrong, as a matter of original understanding and good sense, I think, but consistent with reality. It is unlikely that the Supreme Court will reinvigorate the direct tax clauses today by finding a particular tax to be direct under this chain of abstract reasoning *unless*. . . I now turn to that *unless*, the other reason characterization of the individual mandate penalty is not easy.

2. Capitation taxes in particular. The concept of direct tax has been narrowly understood, but everyone has to accept that a capitation tax is direct.¹⁵⁸ The Constitution specifically refers to “Capitation, or other direct, Tax” in connection with apportionment.¹⁵⁹ In categorizing the individual mandate penalty for purposes of constitutional analysis, we ignore the meaning of capitation or capitation tax at our peril.

To the extent the man on the street thinks about capitation taxes,¹⁶⁰ I suspect he assumes they are lump sum taxes imposed on everyone subject to the national taxing jurisdiction. Indeed, a CRS report — prepared by sophisticated folks — said, without citation of authority, that “a capitation, or head tax, is a fixed tax imposed on each person in a jurisdiction.”¹⁶¹ Balkin wrote in 2009 that those taxes are “‘head’ taxes on the general population, under which people are taxed no matter what they do.”¹⁶² The amicus brief filed by several constitutional law scholars in the Virginia litigation, including Balkin, baldly stated that “capitation taxes . . . are imposed on a per-person basis without regard to property,

income or other circumstances,”¹⁶³ the latter phrase largely picked up from Justice Samuel Chase’s 1796 opinion in *Hylton v. United States*.¹⁶⁴ And, citing the work of Prof. Joseph Dodge, Prof. Edward D. Kleinbard characterized a capitation tax as “imposed on a person simply by virtue of his existence.”¹⁶⁵

In fact, Kleinbard wrote that a “capitation tax is *universally* understood as a tax imposed on an individual ‘without regard to property, profession or any other circumstances,’”¹⁶⁶ directly quoting Chase.¹⁶⁷ And Kleinbard supplied what he thinks are the relevant circumstances that should keep the individual mandate penalty from being treated as a capitation. The penalty “applies only to applicable individuals with income above specified thresholds who choose to self-insure their healthcare costs; in turn, the amount of the tax varies with incomes. These are special circumstances that take section 5000A(b) out of any common understanding of a capitation tax.”¹⁶⁸

If Kleinbard’s statement reflects the “*universal* understanding,” I must come from another universe. I do not dispute his description of the “*common* understanding,” but I am unconvinced that it holds up to scrutiny and therefore should be universal. To begin with, if capitation is limited to lump sum taxes — something that is implicit in the idea that the tax cannot depend on “other circumstances” — the apportionment requirement seems to be superfluous. Why did the Founders bother to require apportionment based on population for a tax that by its nature seems automatically to be apportioned? (If the tax is, say, \$2,000 per person, a state’s percentage of the national population will automatically equal its percentage of the national tax liability.) In fact, apportionment of a lump sum capitation tax would have mattered in 1789, and might still matter today for reasons I note in the

lead to a different result in a new case. See Jensen, *supra* note 149, at 843-846 (describing the D.C. Circuit’s perusal of Supreme Court case law in *Murphy II*).

¹⁵⁷*Murphy II*, 493 F.3d at 183-184.

¹⁵⁸At least I think that is so, although there are still folks willing to argue that constitutional provisions ought to be ignored when they get in the way. See, e.g., Johnson, *supra* note 138; cf. Bruce Ackerman, “Taxation and the Constitution,” 99 *Colum. L. Rev.* 1, 58 (1999) (arguing that because of constitutional moments — and the fact that the apportionment rule would interfere with his proposal for a national wealth tax — the original understanding that real estate taxes are direct should no longer be given effect). But even Johnson and Ackerman concede that a capitation tax is direct.

¹⁵⁹U.S. Const. Art. I, section 9, cl. 4; see Ackerman, *supra* note 158, at 58 (arguing that only capitation taxes should be treated as direct today).

¹⁶⁰And why would anyone do that, given that enactment of a straightforward national capitation tax has, as far as I am aware, never been seriously considered?

¹⁶¹Staman I, *supra* note 4, at 5-6.

¹⁶²Balkin, *supra* note 21, at 482.

¹⁶³Con Law Brief, *supra* note 9, at 3; at 25 (“As Story explained in his *Commentaries* . . . , capitation taxes, or, as they are more commonly called, poll taxes [are] taxes upon the polls, heads, or persons, of the contributors”) (quoting Story, *supra* note 129, section 112, at 424).

¹⁶⁴*Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.).

¹⁶⁵Kleinbard, *supra* note 49, at 761 (citing Joseph M. Dodge, “What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?” 11 *U. Pa. J. Const. L.* 839, 841-843 (2009)).

¹⁶⁶*Id.* at 762 (emphasis added).

¹⁶⁷A capitation tax is thus the quintessential direct tax: It is unavoidable and cannot be shifted to anyone else.

¹⁶⁸Kleinbard, *supra* note 49, at 761 (“It applies only to taxpayers with incomes above specified levels, and then only to those taxpayers who have made the economic decision to self-insure their healthcare costs”).

margin,¹⁶⁹ but it is nevertheless the case that apportionment is a much less serious constraint for a lump sum head tax than for other taxes. What, one might ask, was the point of emphasizing capitation taxes in the Constitution if the term was understood to encompass so little?

My second point: Is it really the case that Congress can avoid apportionment by fiddling with the terms of a tax to make it less than generally applicable? It would be peculiar to see a tax imposed on everyone subject to U.S. taxing jurisdiction as requiring apportionment, but an otherwise similar tax that reached much but not all the population — if Congress exempts a person here and there in a way that satisfies the rule of geographical uniformity — as falling outside the apportionment rule. If exempting a few persons makes a levy something other than a capitation, and if we accept the idea that direct taxes are only capitations so understood and property taxes, we really would come close to gutting the apportionment rule. In other contexts we would not accept interpretive principles that eviscerate the provision being interpreted.¹⁷⁰ Why should we do so here?

Regarding the individual mandate penalty in particular, it has been said that some “might point to the fact that the tax would not be imposed on individuals with insufficient income as evidence that it should not be characterized as a capitation.”¹⁷¹ Some might do that, but surely the Founders understood that impoverished American citizens or residents would be unable to pay a capitation tax (or any other tax, for that matter) in

whatever form it might take. At the founding, a capitation tax would therefore have had to be subject to exceptions, either in the governing statute or in enforcement practice, and that remains true today.¹⁷² If the apportionment rule is going to have any force at all, the term “capitation” cannot be restricted to levies that reach everyone.¹⁷³

Point number three: I am also unconvinced that it is or should be “universally” understood that the amount of capitation tax liability cannot depend on “circumstances” beyond a taxpayer’s existence. Can Congress avoid having a tax treated as a capitation by having liability vary from person to person ever so slightly according to “other circumstances”? Once again, that would make it much too easy for Congress to circumvent the apportionment requirement. (That many would like that to be the case does not make it so.)

Let us test the persuasiveness of the “other circumstances” argument. Suppose Congress enacted a taxing regime under which all citizens and resident aliens with annual incomes exceeding \$50,000 were required to pay a tax of \$1,000, but the liability for those with incomes of \$50,000 or less

¹⁶⁹Given that slaves were counted as only three-fifths of a person, and Indians “not taxed” (*i.e.*, those Indians who had not become naturalized citizens) were not counted at all, U.S. Const. Art. I, section 2, cl. 3, apportionment computations were not as straightforward as might otherwise have been the case. More generally, there was a concern — and there would certainly be a concern today — about who gets counted in the computations. Presumably it is the same people who get counted for purposes of apportioning representatives, and, as we know, who should be counted for that purpose (illegal aliens?) remains a contentious question. See Jensen, *supra* note 23, at 2391-2392.

¹⁷⁰Occasionally text must be disregarded because one passage contradicts another. See, e.g., *Chickasaw Nation v. United States*, 534 U.S. 84 (2001) (finding it impossible to reconcile two contradictory phrases in the Indian Gaming Regulatory Act); see also Jensen, “Taxation and Doing Business in Indian Country,” 60 *Me. L. Rev.* 1, 30-41 (2008) (discussing *Chickasaw Nation*). That situation is not the norm, however, and in other circumstances we must try as best we can to make sense of constitutional, statutory, and regulatory language. Cf. *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998) (“We are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law”). But cf. Johnson, *supra* note 138 (arguing for interpretation of the direct-tax clauses in a way that gives them little effect).

¹⁷¹Staman I, *supra* note 4, at 7.

¹⁷²Cf. Galle, *supra* note 83, at 28 (“Congress may condition exemptions from a tax on any criteria it chooses — other than those expressly prohibited by the Constitution, such as restrictions on free speech — so long as it is willing to pay the political price for carving out that exception”).

¹⁷³We know for sure that the Founders did not expect everyone to have to bear tax liability with a capitation tax because slaves, counted as three-fifths of a person for this purpose, were certainly not expected to satisfy any capitation liability themselves. And a person who would have been liable for any capitation that fell on slaves — the slave owner — would have had an aggregate liability different from someone who owned no slaves, or, for that matter, from another slave owner who owned a different number of slaves.

I hesitated to make this point about counting slaves because it has been argued that the direct tax apportionment rule should be narrowly construed, and perhaps ignored altogether, since it was part of an invidious compromise with slavery. See Ackerman, *supra* note 158, at 58 (arguing that the “original understanding must be revised in light of the Civil War. . . . Given the Reconstruction Amendments, there is no longer a constitutional point in enforcing a lapsed bargain with the slave power”). There was a slavery connection, to be sure, but, as I have argued elsewhere, “the apportionment rule, which applies to representation as well as direct taxation, wasn’t pro-slavery.” Jensen, *supra* note 137, at 375. On one hand, counting a slave as three-fifths of a person for purposes of representation represented a positive for the slave states. (Many northerners had argued that slaves should not be counted at all for that purpose.) But the slave states would have been delighted not to count slaves at all when it came to determining a state’s share of national direct tax liability. Read together, the apportionment rules for representation and direct taxation were neither pro- nor anti-slavery — hardly a positive, I admit, but not an unqualified evil, either. See Jensen, *supra* note 23, at 375; see also Jensen, “Taxation and the Constitution: How to Read the Direct-Tax Clauses,” 15 *J.L. & Pol.* 689, 702-706 (1999).

would be \$2,000.¹⁷⁴ (Let us assume for purposes of this hypothetical that we can agree on a conception of “incomes” that is consistent with the meaning in the 16th Amendment.) I take it that the “universal” understanding is that this would not be a capitation tax because, even though it reaches everyone, the amount of the levy would depend on other circumstances — in this case, income levels. Couple that conclusion with the general academic and judicial understanding that the apportionment rule applies only to capitation taxes (we just concluded this would not be one) and taxes on property (which this tax clearly would not be). *Voilà!* We have an indirect tax that, because it would be uniform in its application (the same rules in all states), would be constitutional.

That is crazy. *Of course this would be a direct tax!* This hypothetical tax would not be avoidable or shiftable in any easy way.¹⁷⁵ And I also think that with everyone obligated to pay it, this is a capitation tax, as universal understanding should have it. (Application to everyone should not be necessary for a tax to be a capitation, as I argued above, but it makes a levy look a lot more like what people “universally” think of as a capitation.) This is a tax on existence, on being, but with the measure of the tax varying from person to person. Unless this would be a tax on incomes — I will address that question in the next section of the report¹⁷⁶ — it would have to be apportioned to be valid.

I concede that my hypothetical tax is preposterous. If it were enacted — impossible to imagine! — it would result in higher revenues from poorer states than from richer ones, unless the apportionment rule would come into play. With apportionment, however, the sectional effects of the tax would be eliminated. The liability per person, *on average*, from a poor and a rich state would be the same; it would have to be the same. It is because the tax would have to be apportioned to be constitutional (assuming it is not a tax on incomes) that the average amount collected from each taxpayer would be identical. A capitation tax becomes a lump

sum tax (on the average) *because* of apportionment, not because the term “capitation tax” encompasses such a requirement.¹⁷⁷

Relatively little direct evidence exists that the Founders thought a capitation tax can vary in its effects from person to person, but there are hints.¹⁷⁸ And we know that a contemporary of the Founders, Adam Smith, thought that could be the case.¹⁷⁹ The Constitution does not necessarily embody the principles of *The Wealth of Nations*, of course, but some of the Founders were familiar with Smith’s writings.¹⁸⁰ Following Smith, I have argued that a tax on incomes was understood by some in the late 18th century as the quintessential capitation tax (one of the reasons the Supreme Court came to a defensible result in 1895 when it invalidated an unapportioned income tax).¹⁸¹ Smith criticized capitation taxes that are “proportioned to the fortune or revenue of each contributor” or are proportioned to the “rank of each contributor,”¹⁸² but those taxes had been imposed in the past — and they had been understood to be capitation taxes.¹⁸³

My point is not that the Founders automatically would have thought of an income tax, say, as direct. It is only that it is not bizarre to think the Founders understood the term “capitation tax” as having much broader scope than Kleinbard’s “universal” conception. They would have understood that the apportionment rule was supposed to make the imposition of those taxes unlikely. If that tax were to be seriously considered, however, it was understood that apportionment would temper its unhappy, sectional effects by making the tax into something like a lump sum head tax.

Does any of this matter in the real world, particularly in how we think about the individual mandate penalty? Maybe not. The constitutional law professors’ brief in the Virginia litigation stated that “the Supreme Court has never struck down a

¹⁷⁷I keep saying “on the average” because the apportionment rule does not say how much any particular taxpayer has to pay; it speaks only to the aggregate to be collected from each state.

¹⁷⁸See *supra* note 173 (discussing slavery and capitation taxes).

¹⁷⁹See Adam Smith, *The Wealth of Nations* 818-821 (Edward Cannan ed., Random House Inc. 1937) (1776).

¹⁸⁰In his opinion in *Hylton*, decided in 1796, Justice Paterson quoted two lengthy passages from *The Wealth of Nations*. See *Hylton*, 3 U.S. (3 Dall.) at 180 (quoting Smith, *supra* note 179, at 821) (“The state not knowing how to tax directly and proportionably the revenue of its subjects, endeavours to tax it indirectly, by taxing their expence, which it is supposed in most cases will be nearly in proportion to their revenue”).

¹⁸¹See Jensen, *supra* note 23, at 2392-2393.

¹⁸²Smith, *supra* note 179, at 819.

¹⁸³*Id.* at 819-821.

¹⁷⁴Yes, this is a law professor’s hypothetical, dealing with something that could not possibly happen in the real world. But for what it is worth, if a law professor had hypothesized the individual mandate 25 or so years ago, he would have been viewed as out of his mind.

¹⁷⁵If this were an indirect tax, it would satisfy the uniformity rule — the tax would apply in the same way in all states, even though the effects would vary from state to state — but it is not like the indirect taxes contemplated by the Founders.

¹⁷⁶A preview: There are reasons to question whether a tax that reaches high-income taxpayers more gently than low-income ones is a tax on incomes.

federal tax on the ground that it is a capitation,¹⁸⁴ and that is true enough. But it is not as though this issue has regularly been before the Court. I am not aware of any tax the constitutionality of which has been seriously questioned and that might have been characterized as a capitation tax¹⁸⁵ — until now.¹⁸⁶

But, I hear you say, the individual mandate penalty is different from my hypothetical tax. I agree that it is different, but I am not so sure it is fundamentally different. Let me tie up some loose ends.

With the individual mandate penalty, say the con law professors, the penalty:

is based on a very specific circumstance: the taxpayer's failure to pay premiums into a qualified health care plan in a given month. Taxpayers can *easily* remove themselves from the tax by purchasing health insurance; this ability to exit the tax is not true of poll taxes or any other capitation tax.¹⁸⁷

The con law professors would argue, I am sure, that easy avoidance would distinguish the penalty from my hypothetical tax, one that by its terms cannot be avoided.

Well. What seems easy for well-paid law professors at Yale and Columbia might not seem quite so easy for large segments of the American population. The quintessential indirect tax, as understood by the Founders, was one that could be avoided by not purchasing the taxed good and by substituting an untaxed good or doing without. In contrast, the individual mandate "tax," if that is what it will be, will apply if the taxpayer does nothing, and she has

no way to avoid a significant obligation one way or the other. The individual mandate, the combination of the requirement to acquire insurance and the penalty if that is not done, really will approach a universal set of obligations, just like my hypothetical tax. (Some people will be exempted, as would have to be true with my hypothetical tax as well, but that group is intended to be relatively small.)

Yes, it is expected that most of the population, although subject to substantial obligations under the individual mandate, will not be paying anything to the federal government, and I argued earlier that the taxing clause cannot provide authority for the mandate itself.¹⁸⁸ But I do not think I am being hypocritical in looking at the mandate and the penalty as a package for purposes of this analysis. I am taking seriously the argument being advanced by some proponents of the mandate: If the mandate will really be part of a scheme that derives its constitutional authority from the taxing clause, it makes sense to look at all the obligations created by that scheme. Congress has effectively said, "Pay a tax (if the penalty will be a tax) or pay something else." That set of unavoidable obligations is based on existence, on being.

Also, or maybe this is another way of making the same point, if the penalty is going to be characterized as a tax to begin with — and that is the theory that would justify invoking the taxing clause — we should be viewing the "tax" as the central part of the enterprise. The "tax" will fall on everyone, with exceptions to be sure, *unless* some other, costly steps are taken. As one commentator argued, a "tax on a person who chooses not to act is precariously close to a tax on everyone with an exemption from the tax for those who act."¹⁸⁹ One thing can be said without doubt: If the penalty really will be a tax, it will be unlike any indirect tax previously known.

In sum, if we take as the starting point that the individual mandate scheme will involve a tax, the argument that Congress has enacted an unapportioned capitation tax is not frivolous. I do not think we should be heading down the tax path at all, as I have said over and over,¹⁹⁰ but if we begin on that path, we need to follow it to its logical end. These

¹⁸⁴Con Law Brief, *supra* note 9, at 25. To be precise, a tax would be struck down not because it is a capitation, but because it is an *unapportioned* capitation. An apportioned capitation is constitutional. The con law profs got the language right elsewhere. See *id.* at 23 ("The Court has *never* invalidated a tax on the ground that it is an unapportioned capitation tax").

¹⁸⁵I suppose that given what I have written about Smith and capitation taxes, the *Pollock* decisions in 1895 are exceptions to my statement in the text. However, the ultimate decision in *Pollock*, that the 1894 income tax was an unapportioned direct tax, did not focus on the tax as a possible capitation. That should not be surprising. If an unapportioned tax is direct, it is invalid whether or not it is a capitation, which is just one form of direct tax.

¹⁸⁶It is not unheard of for the Supreme Court to invalidate provisions that have been around for a long time. See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating dozens of statutory provisions involving unicameral vetoes); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (holding dual for-cause limitations on removal of members of PCAOB unconstitutional).

¹⁸⁷Con Law Brief, *supra* note 9, at 25 (emphasis added); cf. Balkin, *supra* note 21, at 482 (stating that a "good analogy would be a tax on polluters who fail to install pollution-control equipment; they can pay the tax or install the equipment").

¹⁸⁸See *supra* text accompanying notes 45-49.

¹⁸⁹George M. Clarke III, "Baucus 'Excise' on Those Who Fail to Buy Insurance Raises Constitutional Issues," *DTR*, Sept. 29, 2009. We know that not everyone will be subject to the penalty, but the estimates of how much revenue will be brought in by the penalty are at best informed guesses. See *supra* note 48. And we can be reasonably sure, can we not, that more persons will be subject to the penalty in 2014 and 2015, when the floor and percentage-of-income figures will be relatively small, than will be the case in 2016 and thereafter, when the mandate will be fully phased in.

¹⁹⁰And over.

arguments are serious enough that no one should be relying on an incomplete, albeit “universal,” understanding of capitation taxes to rebut them.

C. Tax on Incomes?

Whether the Supreme Court was right or not in concluding that the unapportioned 1894 income tax was invalid, with the 1913 ratification of the 16th Amendment a tax on incomes no longer had to be apportioned. Thus, even if the individual mandate penalty will be a capitation or other form of direct tax, it will not have to be apportioned if it will be a tax on incomes.¹⁹¹ Let me remind the reader that I do not think the penalty will be a direct tax, because I do not think it will be a tax at all. But if it will be a tax, which I now accept for the sake of argument, it might very well be direct. And if so, its categorization as a tax on incomes could be critical.

It has been argued that the penalty will be a tax on incomes. For example, Kleinbard has made the following points:

On its face, section 5000A(b) functions as an income tax. It is a section of the Internal Revenue Code. Low-income taxpayers are exempt . . . the amount collected is measured as a percentage of income . . . (subject to a floor and a ceiling), and the amount is includable on a taxpayer’s federal income tax return. So why isn’t it an income tax, and as such plainly constitutional?¹⁹²

Sebelius made basically the same points in a memorandum, dated September 3, 2010, in support of summary judgment in the Virginia litigation.¹⁹³

Maybe the penalty will be an income tax, but if so, it will not be for those reasons. Being in the code does not turn a penalty into a tax, nor does it make a tax an income tax. (If placement matters at all, the penalty is in the part of the code devoted to excises, not the income tax.¹⁹⁴) I do not understand that

¹⁹¹An apportioned income tax would be a horror and almost certainly could never have been enacted. See *supra* note 137.

¹⁹²Kleinbard, *supra* note 49, at 760.

¹⁹³“Congress repeatedly treated the minimum coverage provision as a tax. It is in the Internal Revenue Code. Its penalty acts as an addition to an individual’s income tax liability on his annual return, which is calculated by reference to income. It is enforced by the Internal Revenue Service. And it will raise a projected \$4 billion annually for general revenues. The provision thus falls easily within Congress’s independent authority to lay taxes and make expenditures for the general welfare.” Memorandum in Support of Defendant’s Motion for Summary Judgment, *supra* note 78, at 2-3.

¹⁹⁴To be sure, if the penalty will really be an excise, an indirect tax, it almost certainly will be constitutional anyway. See *supra* text accompanying notes 133-136. But see *supra* note 77 (questioning whether placement in the code should be given interpretive weight and noting that the D.C. Circuit in *Murphy* concluded that an excise could be hidden in the income tax

(Footnote continued in next column.)

exempting low-income taxpayers makes the penalty, or any other charge that is unquestionably a tax, into an income tax. (I will return to this point in a moment.) And the reference to the income tax return is silly. The fact that I satisfy my Ohio use tax liability by including it on my Ohio income tax return, as I do, does not convert the use tax into an income tax.¹⁹⁵ Would a tax that is universally understood to be a capitation tax (\$100 per person, say) become an income tax if Form 1040 included a line for its inclusion? Of course not.¹⁹⁶

Kleinbard’s reference to the “floor and ceiling” in the individual mandate penalty did not belong in a parenthetical. The floor and ceiling will mean that for many persons the measure of the penalty will not be income. Income is used as one of the alternative components to determine the amount of the penalty — the greater of a fixed figure and a percentage of something that is dependent on income, capped by the cost of bronze-level coverage — but it is a bit much to say that this will be a tax *on* income. Although three different figures must be computed and compared, the income figure will turn out to be irrelevant for many persons subject to the penalty.¹⁹⁷

provisions of the code); Willis and Chung, *supra* note 11, at 187 (noting placement of the penalty with excise tax provisions and stating that “if this is supposed to be an income tax, it certainly is well hidden from the view of an experienced tax professional”).

¹⁹⁵The use tax does not become an income tax, for example, for purposes of section 164, dealing with the deductibility of state and local taxes in computing federal taxable income.

¹⁹⁶Whether or not Adam Smith’s view that an income tax was a capitation tax helps us understand constitutional meaning; see *supra* text accompanying notes 178-183 (a capitation tax need not be an income tax).

¹⁹⁷Will a tax (if the penalty will be a tax to begin with) be *on* incomes if it may be measured by income for some persons but not be for many others? What would the constitutional authority be for imposing an unapportioned direct “tax” on some particular person if for her the amount of the liability is not dependent on *her* income?

Galle has told me that I seem to be arguing that the Constitution requires a particular bracket structure to count as an income tax, and no court ever would or should impose that requirement. If a purported income tax resulted in exactly the same liability for those with income between \$50,000 and \$100,000, he argues, it should still be an income tax, even for those with incomes between those two figures. One of course hopes that Congress would never impose that tax, but if it did, I think the problem goes beyond “bracket structure.” Note that the \$50,000 of income between those two extremes would not be reached at all by this hypothetical tax. In what sense is imposing a tax of, say, \$10,000 on someone with income of \$50,000 and exactly the same amount, \$10,000, on someone with an income of \$100,000 a tax on incomes? We are used to the term “income tax,” but for this purpose, I want to emphasize the actual constitutional language, “tax *on* incomes,” complete with preposition. If income goes up, tax liability should too. If that does not happen, at least in general we do not have a tax on incomes as

(Footnote continued on next page.)

I want to return to another of Kleinbard's points in support of treating the penalty as a tax on incomes — that “low-income taxpayers are exempt.”¹⁹⁸ The argument seems to be that a tax with a hardship exception defined in terms of income is a tax on incomes. Galle has made that point explicitly, noting that “the obligation to pay the minimum \$695 tax [in 2016] is subject to exemptions for personal hardship, which are also determined with reference to income.”¹⁹⁹ But that argument goes too far; it would have the effect of potentially making any tax with a hardship exemption — which is to say almost any tax — into a tax on incomes. That is like the claim, made to me many years ago, that all taxes are income taxes because they will be satisfied from income. That might be a plausible economic argument, but it has no legal force.²⁰⁰ There is no reason to think the 16th Amendment was intended to do away with the direct tax clauses altogether,²⁰¹ and by its terms, the amendment deals only with taxes *on* incomes, not taxes in which a calculation of income plays some role, however attenuated.

Willis and Chung add, and I agree, that the penalty calculation will not involve the sorts of issues that we would expect with a tax on income: “The provision refers to no gains, receipts, accruals, or accessions to wealth, other than to an arguably unimportant algebraic function of income for some taxpayers.”²⁰² Kleinbard's response is unconvincing: “Imposing mandatory government collections calculated as a percentage of household income, while perhaps an unimportant algebraic function, is exactly how an income tax operates.”²⁰³ That is how an income tax operates, but it is not how the individual mandate penalty will operate. Galle has similarly argued that the penalty will be an income tax in part “because whether a family pays \$695 [in 2016] or some other amount depends on the household income.”²⁰⁴ But the Willis-Chung argument was not that “income” will be ignored in the calculations; it is that, regardless of whatever calculations are done along the way, the amount of the

understood by the proponents of the 16th Amendment. See *infra* text accompanying notes 206-207.

¹⁹⁸Kleinbard, *supra* note 49, at 760.

¹⁹⁹Galle, *supra* note 83, at 31.

²⁰⁰See Jensen, *supra* note 23, at 2413.

²⁰¹In fact, there is reason to think that was *not* the intention. See Jensen, “The Taxing Power, the Sixteenth Amendment, and the Meaning of ‘Incomes,’” 33 *Ariz. St. L.J.* 1057, 1114-1123 (2001) (discussing how Congress did not adopt a resolution that, had it been ratified by the states, would have repealed the direct tax clauses altogether and instead intentionally limited the category of taxes not subject to apportionment to “taxes on incomes”).

²⁰²Willis and Chung, *supra* note 11, at 187.

²⁰³Kleinbard, *supra* note 49, at 760.

²⁰⁴Galle, *supra* note 83, at 31.

penalty for many persons will ultimately not depend, in anything like a direct way, on household income. “Mandatory government collections” will *not* be “calculated as a percentage of household income” for anyone subject to the floor or the cap.²⁰⁵

Return to the levy I hypothesized in the preceding section — a \$1,000 tax that would reach all persons with incomes exceeding \$50,000, with a levy of \$2,000 on those with incomes of \$50,000 or less. (As before, let us assume that we can come up with a definition of income that would coincide with the term “incomes” in the 16th Amendment.) As with the calculation of the individual mandate penalty, determining the amount of liability does require calculating “income” — in this case, of all persons — but I can conceive of no argument that this tax would be imposed *on* income.

Indeed, my hypothetical tax, if it were treated as on “incomes,” would turn the traditional justification for an income tax on its head. We should remember what the proponents of the 16th Amendment were trying to do: to make sure that well-to-do Americans would pay their fair share of national taxes, something that had not happened with a revenue system heavily dependent on tariffs and other taxes on consumption.²⁰⁶ The 1894 income tax, which the Supreme Court struck down in 1895, reached a very small percentage of the American population — about 1 percent, all well-to-do. Similarly, the income taxes imposed after ratification of the 16th Amendment in 1913 and before American entry into World War I reached only the wealthy. Tax liability was unquestionably tied to income: the higher the income, the higher the tax liability.²⁰⁷

²⁰⁵Prof. Ljubomir Nacev has raised an interesting theoretical argument: We might consider medical care provided at little or no cost to uninsured persons as income to those persons. (I doubt that the benefit would be treated as part of gross income under section 61, but it would not strain the concept of income to do so.) To the extent that a penalty is imposed on that uninsured person, we might treat that penalty, if it were a tax, as a tax on that care-related income. At best, however, although this helps with the conceptual issue, the issue remains. For many uninsured persons, there will be no income component in any particular year. For example, the self-insured wealthy will not be receiving subsidized care, and the seemingly immortal self-insured young are also unlikely to be receiving that care. In those cases, there is no additional “income” to tax, but the “tax” will be imposed anyway. More generally, even for those who do receive subsidized care, the penalty will not be measured by the value of that care. To my mind, it will not be imposed *on* incomes.

²⁰⁶See Jensen, *supra* note 201, at 1091-1107.

²⁰⁷I am not talking progressivity here. A proportional tax, with the same rate on all income, would also result in higher tax obligations for higher-income people. (For that matter, a regressive income tax, with lower marginal rates on higher levels of income, would still bring in more revenue from high-income

(Footnote continued on next page.)

Rather than imposing higher taxes on the relatively well-to-do, my hypothetical tax would hit lower-income persons harder. That tax, which I think would unquestionably be direct, should not be protected from apportionment by the 16th Amendment. And the same is true with the individual mandate penalty. Uninsured persons with incomes of \$500,000, \$1 million, \$10 million, \$100 million, and \$1 billion will have to pay exactly the same penalty — the cost of bronze-level coverage. If that is a tax on incomes, I will eat my insurance card.

A similar point can be made about Social Security taxes, to be sure, and that makes me nervous. The Supreme Court has never said that self-employment taxes and the portion of Social Security taxes that is in form paid by employees are taxes on incomes, but that has generally been assumed to be the case.²⁰⁸ Unlike the archetypical income tax, however, the Old Age, Survivors, and Disability Insurance tax has been subject to an annual income cap,²⁰⁹ has been unquestionably regressive, and has represented by far the largest federal tax obligation for low-income Americans. A tax that disproportionately hits lower-income persons is not what proponents and ratifiers of the 16th Amendment had in mind when taxes on incomes were exempted from apportionment.

I would not expect any court to invalidate the Social Security system, regressive although many of its tax effects might be, and I am not arguing for that to happen.²¹⁰ (I do wish a bit more thought had been given back in the day to the constitutional basis for Social Security taxation, but we cannot turn back the clock.²¹¹) Willis and Chung provide a

taxpayers than from low-income taxpayers, as long as the marginal rate on the highest income does not reach zero.) What I am saying is that a tax that does not require higher absolute obligations on higher-income persons than on lower-income ones would not be a "tax on incomes," focusing on the constitutional language, and it would be inconsistent with the goals of the 16th Amendment.

²⁰⁸Willis and Chung note that the basic Social Security and self-employment taxes, capped as they are, have the effect of a flat amount tax for many. Nevertheless, it is assumed that they are valid taxes on incomes. Willis and Chung, *supra* note 11, at 187. Or, in the alternative, it has been assumed that these levies are not direct taxes to begin with. Cf. Lawrence Zelenak, "Radical Tax Reform, the Constitution, and the Conscientious Legislator," 99 *Colum. L. Rev.* 833, 843 n.58 (1999) (describing unsuccessful constitutional challenges to Social Security taxes).

²⁰⁹The Medicare component of the Social Security tax scheme has not been subject to an income cap for some time.

²¹⁰That can of worms would be slimy beyond belief.

²¹¹It may well be that in 1935 it was assumed that the creation of a social insurance scheme for which "premiums" had to be paid did not involve taxes at all. See Erik M. Jensen, "A Tax or Not a Tax, That Is the Question," 14 *Green Bag* 2d 368 (2011).

way to distinguish the OASDI tax from the individual mandate penalty, and for present purposes, their argument seems good enough to me: With the individual mandate penalty, many uninsured will pay the flat minimum or maximum amount, neither of which is determined by income, while, despite the cap, by far most persons subject to the OASDI tax pay the percentage-of-earnings rate.²¹² That is an arguably important difference, but the constitutional status of OASDI taxes still makes me uncomfortable.²¹³

IV. The Commerce Clause and the Taxing Power

One final issue, which has been implicit in the discussion to this point, is worth making explicit: If the commerce clause provides sufficient support for the individual mandate, is there any reason to care whether the penalty might be a tax or not? In a 2009 report in *Tax Notes*, Dean (and constitutional scholar) Erwin Chemerinsky was quoted as saying that the proposed excise (as it was then called) "is so clearly within Congress's commerce power that it is not necessary to consider whether it fits within the taxing power."²¹⁴ For Chemerinsky, it did not seem to matter whether the charge would be a tax at all, or, if it would be a tax, whether it would be direct or indirect. Chemerinsky's position seems to be taken for granted by many other proponents of the individual mandate.²¹⁵

Chemerinsky's conclusion that Congress has the power under the commerce clause to impose the penalty may be correct — because of ignorance, I am agnostic on that point — but the idea that the commerce clause trumps specific limitations on the taxing power cannot be right. All sorts of taxes affect commerce and perhaps would be authorized under the commerce clause, especially as broadly interpreted as it has come to be, even if there were no taxing clause in the Constitution. But the commerce clause can provide no authority for circumventing the specific limitations on the taxing power that apply to charges that are in fact *taxes* — the uniformity rule or the apportionment rule, as appropriate. If the commerce clause could be used to

²¹²Willis and Chung, *supra* note 11, at 188.

²¹³It would also make me uncomfortable, however, if I had to rely on an implicit understanding of Social Security taxation to argue in support of the constitutionality of the individual mandate penalty. I find less than compelling an argument that takes the form, "We take for granted that this old system is OK, so this new one must be too."

²¹⁴Clark, *supra* note 11, at 736.

²¹⁵Not all, to be sure. For example, the brief of the constitutional law professors in the Virginia litigation recognizes that if the penalty will be a tax — and they argue that will be the case — it will have to be an indirect tax to satisfy constitutional requirements. See *Con Law Brief*, *supra* note 9, at 17-26.

trump constitutional limitations on the taxing power, those limitations would be meaningless, or nearly so,²¹⁶ and we should not interpret constitutional terms in such a way.

If the individual mandate penalty will be a tax but an indirect one, there should be no constitutional problem, as I argued earlier. It should satisfy the uniformity rule,²¹⁷ and if the penalty is also deemed a regulation of commerce, so much the better.²¹⁸ The taxing clause can come to the rescue if the commerce clause cannot do the job by itself.²¹⁹

If the penalty will be a direct tax, however, and assuming it will not be a “tax on incomes” protected by the 16th Amendment — in Part III, I suggested those are serious possibilities — it would have to be apportioned among the states on the basis of population. That has not been done,²²⁰ and it could not be done if the penalty is to work as intended. Regardless of congressional power under the commerce clause, a direct tax that is not on incomes must be apportioned to be valid.²²¹

Of course, if the penalty will not be a tax, constitutional limitations on the taxing power would be irrelevant — analysis is so much easier if the charge is *not* a tax — and we could then look only to the commerce clause for legitimacy. But with a tax, those complications come into play. That

a tax should be analyzed as a *tax* is a mundane point, I suppose, but too many mundane points get lost these days in the rush to constitutional judgment.

V. Conclusion

Analyzing something as complex as the individual mandate inevitably involves thorny issues, but this report has argued that the invocation of the taxing clause as an alternative, constitutional justification for the mandate has made the analysis thornier than it needs to be. My argument, point by point, has been this: First, the taxing clause provides no authority for requiring the acquisition of insurance. Second, the penalty for failure to acquire minimum essential coverage should not be treated as a tax at all and, whatever proponents of the individual mandate think, that makes the case for constitutionality easier. Third, if the penalty will be a tax, it might be a direct tax (in particular, a capitation tax), and if so, it will be invalid because it will not be apportioned and it will not be a tax on incomes. Finally, even if the individual mandate can be justified under the commerce clause, the constitutional rules dealing with taxes will come into play — if the penalty will be a tax.

One final point is worth making. Although the Supreme Court is unlikely to strike down significant parts of a monumental piece of legislation on constitutional grounds, the probability of that happening is not zero, especially if the merits can be reached before the legislation would come into effect. (With the individual mandate, Congress would have time to adjust before 2014.) And supporters of the individual mandate have increased the likelihood of judicial problems by raising theories under the taxing clause that are more problematic than helpful.

²¹⁶*Cf.* Willis and Chung, *supra* note 11, at 180 (“If Congress can lay an unapportioned direct fee on people who fail to do what it wants them to do, the fourth sentence of Article 1, section 9 means nothing. Any direct tax can merely be relabeled a fee”).

²¹⁷But if Chemerinsky was suggesting that the commerce clause would give Congress the power to enact an excise that would *not* satisfy the uniformity clause — a levy that varies in application from state to state — he was wrong.

²¹⁸A tariff, for example, might be viewed as an exercise of both the commerce and taxing powers, and the limitations that apply to taxes would present no problem. A tariff (a “duty” or “impost”) would have to be uniform in its application, *see supra* note 20, but as long as it applies in the same way in all states, uniformity exists.

²¹⁹I remain unconvinced, however, that the taxing clause can validate the individual mandate as a whole. *See supra* text accompanying notes 45-49.

²²⁰*Cf.* Willis and Chung, *supra* note 11, at 170 (“Even if the act survives a commerce clause challenge, it still fails a capitation challenge”).

²²¹It was universally understood at the founding that a tax on real estate was direct, early Congresses apportioned those taxes, *see supra* note 143, and the Supreme Court has never suggested that apportionment might no longer be necessary for those taxes. The 16th Amendment, exempting only “taxes on incomes” from the apportionment requirement, did nothing to change that longtime understanding. I assume Chemerinsky did not mean to suggest that Congress would have the power today, under the commerce clause, to circumvent the apportionment rule for a direct tax on real estate. Or did he? *Cf.* Ackerman, *supra* note 158, at 58 (arguing that taxes on wealth should no longer be treated as direct taxes).