

Michigan Business & Entrepreneurial Law Review

Volume 5 | Issue 2


2016

NFIB v. Sebelius and the Individual Mandate: Thoughts on the Tax/Regulation Distinction

Kyle D. Logue

University of Michigan Law School, klogue@umich.edu

Follow this and additional works at: <https://repository.law.umich.edu/mbelr>

 Part of the [Health Law and Policy Commons](#), [Insurance Law Commons](#), [Legislation Commons](#), [Supreme Court of the United States Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Kyle D. Logue, *NFIB v. Sebelius and the Individual Mandate: Thoughts on the Tax/Regulation Distinction*, 5 MICH. BUS. & ENTREPRENEURIAL L. REV. 173 (2016).

Available at: <https://repository.law.umich.edu/mbelr/vol5/iss2/5>

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Business & Entrepreneurial Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NFIB V. SEBELIUS AND THE INDIVIDUAL MANDATE: THOUGHTS ON THE TAX/REGULATION DISTINCTION

*Kyle D. Logue**

INTRODUCTION

When Chief Justice John Roberts wrote the opinion of the Court in *National Federation of Independent Businesses v. Sebelius* (*NFIB*) explaining the constitutionality of the Affordable Care Act's (ACA) minimum essential coverage provision (sometimes referred to as the individual mandate), he reasoned that the mandate—or, more precisely, the enforcement provision that accompanied the mandate (the Shared Responsibility Payment or SRP)—could be understood as a tax on the failure to purchase health insurance.¹ According to this view, the enactment of the mandate and its accompanying enforcement provisions fell within Congress's virtually unlimited power to “lay and collect taxes.”² This tax-based interpreta-

* Wade H. and Dores M. McCree Collegiate Professor of Law, University of Michigan Law School. A previous version of this Article was presented at “The Affordable Care Act Turns Five” symposium at the University of Connecticut School of Law, where many useful comments and questions were received. Richard Primus read an early draft and gave me some excellent suggestions. None of these generous readers, of course, are to blame for the final content of the Article. The Article is dedicated to my colleague and friend, Professor Douglas H. Kahn, on the occasion of his retirement from teaching at the University of Michigan Law School. Doug, who has been a member of the faculty since 1964, is justifiably renowned for his encyclopedic knowledge of the federal income tax laws, scholarly writing in the field, and famously rigorous and highly effective approach to teaching the Individual, Partnership, and Corporate Tax classes. He is also a kind and generous colleague and a close friend. If Doug had not been on the faculty in 1993 when I started at the Law School, I probably would not have made it through my first semester teaching tax. And although he will doubtless disagree with every position I take in this Article, I hope he will at least find it interesting.

1. More precisely, the Court concluded that the tax interpretation of the mandate was at least “fairly possible” and therefore should be so interpreted, in order to avoid unnecessarily striking down an Act of Congress as unconstitutional. *NFIB v. Sebelius*, No. 11-393, slip op. at 32 (June 28, 2012) (quoting *Crowell v. Benson*, 285 U. S. 22, 62 (1932)).

2. U.S. CONST., art. I, § 8, cl. 1. Note that the same provision also gives Congress the power to “provide for the common Defence and general Welfare of the United States.” *Id.* When you combine these provisions, it means that Congress, simply put, has the power to tax and to spend. And both powers are historically subject to very few limits, beyond where it can regulate. See *Sebelius*, slip op. at 5 (“This grant [of the taxing and spending power in Article I] gives the Federal Government considerable influence even in areas where it cannot directly regulate.”). Why the power to tax is virtually unlimited, as a normative matter, and whether the distinction between taxes and regulations in this context makes sense are questions that have received almost no attention in the literature and are main themes of this paper. Normative arguments concerning the limits of Congress's spending power, especially in the context of anti-commandeering concerns, are more common. See generally, Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn't*, 96 MICH. L. REV. 813 (1998).

tion of the individual mandate's enforcement provisions turned out to be essential to the outcome of the case, since Roberts also concluded that, if the Court had focused on the mandate itself, it would have found the law to be unconstitutional. This is because, according to the Roberts' opinion, the minimum coverage provision is a form of regulation that is not relevantly different from a law requiring people to purchase, say, broccoli. And such laws, both health insurance mandates and broccoli mandates, are obviously beyond Congress's regulatory power granted by the Commerce Clause of the Constitution.³

The Court's reliance on the taxing-power argument came as a surprise to many Court observers.⁴ The argument had been addressed in relatively few of the briefs; it had been given little time in the oral argument; and it was considered by some legal scholars to be an unlikely fulcrum on which the case might turn.⁵ In fact, after the Court's decision in *NFIP* was handed down, some commentators questioned whether Roberts really believed the taxing-power argument himself. Maybe the Chief Justice's opinion was merely a savvy political compromise, an effort to solidify his position in the history books as the person who both limited Congress's regulatory power and avoided throwing the healthcare markets into turmoil. On the other hand, the Court's reliance on the taxing power is consistent with arguments that have been made by some legal scholars.

In this Article I argue that, if the Court is going to interpret the Constitution as drawing an important distinction between taxes and regulations

3. *Sebelius*, slip op. at 26 ("Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States."). The Chief Justice is so certain that a broccoli mandate would be beyond the Commerce Clause power that he simply assumes it to be true. *Id.* at 27 (responding to the Government's response to the broccoli mandate argument).

4. See, e.g., *Charles Fried, Balls, Strikes, and the Fog of War*, SCOTUSBLOG (Aug. 2, 2012, 12:19 PM), <http://www.scotusblog.com/2012/08/the-june-surprises-balls-strikes-and-the-fog-of-war/> reprinted in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 51 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013) ("Even fewer thought [a majority decision written by Chief Justice Roberts upholding the mandate] would be on the ground that the mandate could be and thus must be justified as an exercise of Congress's taxing power.").

5. Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 88 (2012) (citations omitted) ("To some, Chief Justice Roberts's argument for sustaining the individual mandate as a tax seemed to come out of nowhere. The Court received a total of 156 briefs related to the case, but only ten contained more than a passing discussion of the tax power argument, and the government devoted only fifteen pages to it. Though raised throughout the litigation, the tax power argument was repeatedly rejected or not reached below and received only passing expressions of support. Nor did the Court itself seem to show much interest; the question of whether the mandate represented an exercise of the tax power received less than fourteen minutes of sustained discussion at oral argument.") Some commentators, however, saw the taxing power argument not only as a possibility, but as a serious alternative to the Commerce-Clause argument. See, e.g., Brian Galle, *Conditional Taxation and the Constitutionality of Health Care Reform*, 120 YALE L. J. ONLINE 27 (2010), <http://yalelawjournal.org/forum/conditional-taxation-and-the-constitutionality-of-health-care-reform>; Robert D. Cooter & Neil S. Seigel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012).

(or penalties), a distinction that permits Congress to achieve some ends through the use of taxes that it cannot achieve through the use of regulations (because the breadth of the taxing power is greater than that of the regulatory power),⁶ then the Court needs a different way of distinguishing taxes from regulations. Specifically, I argue that instead of focusing so much on how coercive an exaction is (in the Court's view, the more coercive, the more likely it is to be considered a "penalty" or a "regulation"), the Court should focus on the primary purpose of the exaction: is it to raise revenue or to alter behavior? I also argue that the definition of a tax should not include a requirement that money be paid to the government; rather, it is enough that there be a mandatory payment of money towards a public purpose. On this alternative understanding of the tax/regulation distinction, it is the individual mandate itself that has the important characteristics of a tax while the SRP has the characteristics of a penalty or enforcement provision that backs up the mandate.⁷

To make this argument, I develop a distinction between taxes and regulations that differs from the distinction deployed by the Court in *NFIB* and in the Court's previous taxing power decisions. My goal is to articulate a distinction between taxes and regulations that is based on a functional account of why tax laws should receive more deference from courts than regulatory laws receive. After all, *that* is the point of the distinction, at least in this context: if a law enacted by Congress is designated by the Court to be a tax, that law is basically immune from constitutional challenge—so long as the law is in fact a tax.⁸ By contrast, if a Congressional enactment is designated by the Court to be a regulation or a penalty, and thus as being authorized by the Commerce Clause, there are some constitutional limits on what such a law can do.⁹ If courts are going to apply different types of scrutiny to laws or government practices based on whether they are taxes or regulations, as *NFIB* suggests seems to be the case, then the distinction between taxes and regulations should be based on the reasons for the different types of judicial scrutiny. The Court in *NFIB* made little effort to provide such a normative grounding for the tax/regulation distinction. What's more, the way the Court has drawn the distinction between taxes and regulations is counter-intuitive and creates in-

6. While the taxing-power is in a sense broader than the regulatory power, obviously the taxing-power is limited to government action that satisfies the definition of a "tax." Likewise, the regulatory power, in addition to the Commerce-Clause limitation, is limited to government action that satisfies the definition of a "regulation." A third category of government action, which is subject to its own limitations, is the power of eminent domain or a taking, which comes with its own limitations that are beyond the scope of this Article.

7. See, e.g., 26 U.S.C. §6662 (setting out the civil penalties for failure to file accurate tax returns).

8. This is a bit of an overstatement. There are limits on so-called direct taxes, but those limitations are generally considered toothless. See sources cited *infra* note 28.

9. As discussed more fully in the next section, federal regulatory laws must "substantially affect interstate commerce."

centives that could inefficiently alter Congress's choices regarding how it designs and implements public policy.

I. THE COURT'S PIVOT: FROM COMMERCE CLAUSE TO TAXING POWER

The most straightforward way to interpret the Affordable Care Act's individual mandate is to understand it as a straightforward command to pay money to an insurance company in exchange for insurance or else face a penalty. The relevant provision states that each qualifying individual "shall for each month beginning after 2013 ensure that the individual . . . is covered under minimum essential coverage for such month."¹⁰ This provision was accompanied by an enforcement provision, the SRP, which requires that a taxpayer who has gone without the minimal amount of qualifying health insurance coverage for at least three months—who is, in other words, in violation of the mandate—must pay a particular sum of money to the government.¹¹ The precise amount of this sum varies. For 2014, this sum was \$95 per adult and \$47.50 per child (up to \$285 for a family) or 1% of household income above the tax return filing threshold, whichever was greater.¹² In later years, this sum could be higher.¹³

Although Chief Justice Roberts in his opinion for the Court ultimately upheld these provisions under the taxing power, he did not actually conclude that the mandate *itself* is a tax. In fact he repeatedly asserted that the mandate is most naturally understood as a regulation, for the simple reason that it, as mentioned, is a command to do something.¹⁴ That, in the Court's view, is what a regulation *is*. In this case it is a command to purchase health insurance. Therefore, to be constitutional on its own merits (ignoring the enforcement provision for now), the mandate would have to fall within the regulatory power granted to Congress under Article I of the Constitution, which says, rather succinctly, Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁵ The Court has interpreted that clause to limit Congress's regulatory power to "those activities that sub-

10. 26 U.S.C. § 5000A(a) (2015).

11. *Id.* § 5000A(b)(1) ("If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a *penalty* with respect to such failures in the amount determined under subsection (c).") (emphasis added).

12. *Id.* § 5000A(e); see also *Individual Shared Responsibility Payment*, OBAMACARE FACTS, <http://obamacarefacts.com/individual-shared-responsibility-payment/> (last visited Apr. 27, 2016).

13. *Individual Shared Responsibility Payment*, OBAMACARE FACTS, <http://obamacarefacts.com/individual-shared-responsibility-payment/> (last visited Apr. 27, 2016) (explaining how the Individual Shared Responsibility Payment will increase each year).

14. Sebelius, slip op. at 31 ("The most straightforward reading of the mandate is that it commands individuals to purchase insurance.")

15. U.S. CONST., art. I, §8, cl. 3.

stantially affect interstate commerce.”¹⁶ Further, the Court, speaking through the Chief Justice’s opinion, concluded that the mandate does not regulate an activity that substantially affects interstate commerce, because it does not regulate a commercial activity at all. It regulates inactivity. In the Court’s words, “[t]he individual mandate . . . does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce.”¹⁷ Such a regulation, Roberts concluded, would be unprecedented in scope and would represent a degree of congressional regulatory reach never before recognized by the Court.¹⁸

It is true that Congress has historically regulated all manner of commercial activities, large and small, and those regulations have been upheld as falling within Congress’s Commerce Clause authority.¹⁹ But all of those regulated activities were actual *activities*. All of the individuals or firms subject to regulations that have previously been upheld under the Commerce Clause by the Court were engaged in some type of affirmative economic conduct. Therefore, the Congressional statutes in those cases merely imposed limitations on how those activities could be undertaken. And yes, when it comes to regulating affirmative conduct, the Court had been pretty expansive in its views of congressional authority. But what the Court had never previously approved was an effort by Congress to require individuals who are not engaged in any economic activity to in fact engage in some activity—here to purchase the minimal amount of qualifying health insurance.²⁰

16. *United States v. Morrison*, 529 U. S. 598, 609 (2000). The statement in the text is a bit of an oversimplification. The Commerce Clause power also extends to “the channels of interstate commerce” and “persons or things in interstate commerce.” *Id.*

17. *Sebelius*, slip op. at 20.

18. Roberts captured the unprecedented and worrisome nature of this supposed expansion of federal regulatory power as follows:

Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within the scope of federal regulation, and—under the Government’s theory—empower Congress to make those decisions for him.

Id.

19. The extent of modern federal regulatory state is vast, and a catalogue of all the domains that have been held subject to the reach of Congress’s Commerce Clause power is beyond the scope of this Article. However, the classic case of *Wickard v. Filburn*, 317 U.S. 111 (1942), famously illustrates how far the Court had historically been willing to extend Congress’s Commerce-Clause power. There the Court upheld the Agricultural Adjustment Act of 1938, which sought to stabilize fluctuation in wheat prices, holding that the growing of wheat, even for one’s own consumption, sufficiently affected interstate commerce that it could be regulated by Congress. *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942).

20. *Sebelius*, slip op. at 18 (“But Congress has never attempted to rely on that [regulatory] power to compel individuals not engaged in commerce to purchase an unwanted product.”).

The Court did point out a few exceptions to this sweeping statement. Never has Congress mandated action on the part of regulated parties, with the exception of when it has done so under the authority granted by some specific provision in the Constitution other than the Commerce Clause. For example, as the Chief Justice pointed out, Congress has in the past enacted laws that require people to file tax returns. Congress has also enacted laws requiring people to register for the draft. And Congress has even enacted laws requiring individuals to show up and serve on federal juries.²¹ Moreover, all such mandates have been considered easily constitutional. The difference is that with all of those examples the congressional mandate in question was expressly authorized by a specific, non-Commerce Clause provision in the Constitution.²² By contrast, there is no such independent constitutional grounding for a mandate to buy health insurance. Just as there is no such independent grounding for a mandate to purchase broccoli. The only provision that Congress can rely upon for an insurance mandate, the Court concludes, is the Commerce Clause, and the Commerce Clause has never been interpreted to reach (and, in Court's view, it does not in fact reach) that far. Put succinctly by the Chief Justice, "[t]he Federal Government does not [under the Commerce Clause] have the power to order people to buy health insurance."²³

Many opponents of the ACA had hoped the Court would reach just that conclusion and then declare the mandate, and perhaps the rest of the ACA, unconstitutional.²⁴ But the Court did not do that. After declaring the limits of Congress's Commerce Clause power, the Court pivoted and suggested a different way to understand the minimum coverage provision and the SRP provision that accompanied it. Specifically, the Court argued that, instead of viewing the minimum coverage provision as a command to buy health insurance backed up by the SRP penalty, an alternative inter-

21. *Id.* at 18 n.3.

22. *Id.* ("Each of those mandates—to report for jury duty, to register for the draft, to purchase firearms in anticipation of militia service, to exchange gold currency for paper currency, and to file a tax return—are based on constitutional provisions other than the Commerce Clause.").

23. *Id.* at 44. The Court also dismissed various arguments offered by the Government in support of the claim that the failure to purchase health insurance—that particular absence of activity—is unusual because of its likelihood of having substantial future effects on insurance markets, including interstate insurance markets. For example, the Government argued that virtually everyone eventually will have some interaction with the health care system. We all get sick. And when this happens, not having purchased health insurance has consequences for the system. The Court responded that "[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent." *Id.* at 26. The Court also shot down a number of other arguments that the purchase of health insurance is different from other types of products or activities that Congress might mandate as well as efforts to invoke the "necessary and proper" clause. *Id.* at 27-30.

24. It was possible that the Court might have found the mandate unconstitutional, but somehow severable from the rest of the Act. Such a result, however, was largely considered unworkable, given how interrelated the various parts of the ACA are.

pretation—urged by the Government—was to view the SRP as a conditional tax on the failure to purchase health insurance.²⁵ Viewed that way, the whole thing takes on a different gloss and ultimately is sustainable as a valid exercise of Congress’s taxing power.²⁶ In Chief Justice Roberts’ words, “[u]nder that theory, the mandate is not a legal command to buy insurance. Rather it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income.”²⁷

Once the Court made this pivot to characterizing the SRP as a tax on the failure to purchase insurance, the constitutionality of the provision was almost a foregone conclusion. This is because, in the Court’s view, whereas there are limits to the scope of the reach of Congress’s regulatory authority, there are no such limits to the scope of Congress’s ability to impose a tax. Indeed, on the Court’s view, and on the view shared by most commentators, there are few limits to what Congress can do via the taxing power.²⁸ More to the point, there are things that Congress can do with the taxing power (and the correlative spending power) that it simply cannot do with its regulatory power. In the Court’s words,

[Congress’s taxing and spending power] gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control. And in exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with speci-

25. *Sebelius*, slip op. at 32 (“Under [the Government’s alternative] theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress’s constitutional power to tax.”).

26. *Id.* (“The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read. . .”).

27. *Id.* To be precise, the Court held that this tax characterization, which had been urged by the Government as an alternative to the Commerce-Clause argument, though perhaps not “the most natural interpretation of the mandate,” was at least a “fairly possible” one. *Id.* And because “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,” the Court adopted the tax interpretation. *Id.* So, from this perspective, Congress, at the time it enacted the ACA, could reasonably have been relying on its taxing power. And that is enough to pass muster with the Court. Thus, the Court acknowledges that there is a distinction between what the Constitution means and what the Court’s proper role when exercising judicial review of Congressional legislation is. Cooter & Siegel, *supra* note 5, at 1232.

28. The Constitution does impose some limits on the taxing power. There is, for example, a very burdensome apportionment requirement on “direct taxes.” *Sebelius*, slip op. at 40-41; see also Erik M. Jensen, *The Individual Mandate and the Taxing Power*, 134 TAX NOTES 97, 110-19 (2012). But the Court has rarely deployed that requirement to strike down a tax, and most commentators regard the direct-tax limitation as being extremely weak. See, e.g., Galle, *supra* note 5, at 32-36; But see Jensen, *supra* note 28 at 111-19. And the Court in *NFIB* held that the SRP was itself not a direct tax. *Sebelius*, *supra*, at 41. Congress must also, of course, exercise its taxing power in a way that is consistent with the Due Process and Equal Protection requirements of the Constitution.

fied conditions. These offers may well induce the States to adopt policies that the Federal Government itself could not impose.²⁹

Specifically, the Court made clear that, whereas the federal regulatory power may not be used to command inactive individuals into action, the taxing power most certainly can: “[I]t is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity. A capitation, after all, is a tax that everyone must pay simply for existing, and capitations are expressly contemplated by the Constitution.”³⁰ This is precisely the sense in which the Court meant that the taxing power is broader than the regulatory power. Thus, in the Court’s view, there is an important difference between when Congress uses its taxing power and when it uses its regulatory power. And nowhere has that difference been more important than in the *NFIB* case, where it determined the fate of the most significant federal social welfare program in a generation.

II. THE COURT’S APPROACH TO DISTINGUISHING TAXES AND PENALTIES: RELATIVE COERCIVENESS

Given the Court’s conclusion that the individual mandate is constitutional because its enforcement provision, the SRP, can be viewed as a tax, the critical part of the Court’s analysis lies in its short but crucial discussion of what a tax is—more precisely, how exactly a tax is distinguished from a penalty. The Roberts’ opinion begins this discussion by pointing out a few of the tax-like attributes that characterize the SRP provision. For example, the SRP requires taxpayers to transfer actual money to the government.³¹ For such transfers Roberts uses the term “exactions,” and it is true most taxes are also exactions in this sense.³² Also, the authorizing language of SRP itself is found in the Internal Revenue Code, which is, of course, where many other tax laws are located.³³ Moreover, the payment by the taxpayer must be made to the Internal Revenue Service,

29. *Sebelius*, slip op. at 5 (citations omitted).

30. *Id.* at 41.

31. *Id.* at 33 (“The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The ‘[s]hared responsibility payment,’ . . . is paid into the Treasury by ‘taxpayer[s]’ when they file their tax returns.”).

32. Whereas the Court does not expressly state that only exactions—mandates that money be transferred to the government—can be considered taxes, the Court’s analysis seems to assume so, precisely because the Court never considers the possibility that the insurance mandate itself could be a tax. Whether a tax must be also be an exaction is a separate question, to which I turn later in the Article. As will be discussed more fully below, few believe that the payment of money to the government is a sufficient condition to consider something a tax. (Some payments of money to the government are widely considered penalties or regulations.) The more interesting question is whether the payment of money to the government is a necessary condition for something to be considered a tax. I argue below that the answer should be no, and not merely because I believe the OED trumps Dictionary.com.

33. *Sebelius*, slip op. at 5. (“The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—must assess and collect it ‘in the same manner as taxes.’”).

which happens to be the official *tax* collection agency of the federal government.³⁴ In addition, the statute says that the payment is owed by individual “taxpayers” when they file their individual federal income *tax* returns.³⁵ Also, the Court notes that the amount of the tax is determined by factors that are often taken into account when calculating a tax—factors such as income, number of dependents, and the like.³⁶ Finally, the SRP was expected by Congress to, and does in fact, raise a fair amount of revenue.³⁷ All of these are characteristics of laws that we call tax laws.³⁸

Yet the Court argues that there are exactions that satisfy all of these formal criteria and that therefore look like taxes but that are functionally regulations or penalties. Such exactions, then, would be subject to the Commerce Clause limitations that apply to any type of federal regulatory action.³⁹ The key question in the Court’s opinion, then, is under what circumstances will a mandatory payment of money to the government be considered a penalty or a regulation and when will it be considered a tax.

To answer this question, the Court draws from its past decisions on the tax/penalty distinction to develop a test that relies heavily on the relative coerciveness of the exaction and the extent to which it is designed to impose social stigma for noncompliance.⁴⁰ Among the factors the Court regards as important to this determination is the magnitude of the burden imposed by the exaction itself. Under the Court’s formula, if the exaction imposes an “exceedingly heavy burden” on the taxpayer regardless of the type of the infraction giving rise to the penalty, the exaction will be, or is

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Again, whether they are necessary characteristics of laws that we consider “taxes” for constitutional law purposes is another question.

39. *Sebelius*, slip op. at 34 (“In the second case, however, we held that the same exaction, although labeled a tax, was not in fact authorized by Congress’s taxing power. *Drexel Furniture*, 259 U. S., at 38. That constitutional question was not controlled by Congress’s choice of label.”).

40. Key cases include *Bailey v. Drexel Furniture Co.* 259 U.S. 20 (1922) (holding that the provision in the Child Labor Tax Law that imposed a 10% tax on the net income of employers who hired workers under the age of 14 was a penalty rather than a tax); *U.S. v. Constantine*, 296 U.S. 287, 294 (1935) (holding that a “special excise tax” on businesses selling liquor in violation of state or local law is a penalty rather than a tax and is therefore unconstitutional because beyond Congressional regulatory power); *U.S. v. Reorganized CF&I Fabricators of Utah*, 518 U.S. 213, 225 (1996) (holding that ERISA’s 10% “tax” on any “accumulated funding deficiency” was not a tax but a penalty for bankruptcy purposes and therefore was not entitled to special priority in bankruptcy, because exaction was a punishment for an unlawful failure to fund the pension plan; obviously penal in character); *U.S. v. Sanchez*, 340 U.S. 42, 45 (1950) (holding that \$100 per ounce tax imposed by section 2590 of IRC on transferors of marijuana was indeed a tax, notwithstanding collateral regulatory effect, primarily because the tax does not require that the conduct be criminal, but rather is considered a civil infraction).

more likely to be, considered a penalty.⁴¹ In addition, if the burden of the exaction falls *only* on parties who knowingly breach the standards, the exaction is more likely to be considered a penalty.⁴² Penalties in this view punish morally bad behavior, presumably to discourage that behavior from happening at all. By contrast, although taxes influence behavior—indeed, many taxes are expressly designed for that purpose⁴³—they are not supposed to *prohibit* the behavior. Anything designed to prohibit behavior is more of a penalty. Or so the argument goes.

Applying this relative-coerciveness test to the case at hand, the Court ultimately concludes that the Social Responsibility Payment in the ACA is a tax rather than as a penalty. First, Court concludes that the burden on those who end up paying the SRP is not especially heavy. Indeed, as the Court points out, the amount of the SRP will often be less than the individual's health insurance premium.⁴⁴ Therefore, paying the SRP rather than purchasing health insurance will often be financially sensible, which is very different from the situation in the *Drexel* case, which, recall, involved a “prohibitive” 10 percent tax on net income.⁴⁵ Indeed, when the ACA was enacted, it was fully expected that many taxpayers would opt to pay the penalty rather than purchase insurance.⁴⁶ Second, the SRP does not fall only on those who knowingly violate the mandate.⁴⁷ In fact, anyone who violates the mandate must pay the SRP, unless they are below the income threshold. The rule applies on a sort of strict-liability basis. Finally, opting not to buy health insurance but instead to pay the SRP is not considered unlawful. There is no stigma attached. As the Court puts it, “[w]hile the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful.”⁴⁸ In fact, the Court notes roughly four million people each year are expected to pay the IRS rather than buy insurance and “[t]hat Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating

41. *Sebelius*, slip op. at 35-36 (“First, the tax [in *Drexel*] imposed an exceedingly heavy burden—10 percent of a company’s net income—on those who employed children, no matter how small their infraction.”).

42. *Id.* at 36.

43. *Id.* (“[T]axes that seek to influence conduct are nothing new.”).

44. *Id.* at 35.

45. *Id.* at 41 n.8 (“In 2016, for example, individuals making \$35,000 a year are expected to owe the IRS about \$60 for any month in which they do not have health insurance. Someone with an annual income of \$100,000 a year would likely owe about \$200. The price of a qualifying insurance policy is projected to be around \$400 per month. See D. Newman, CRS Report for Congress, Individual Mandate and Related Information Requirements Under PPACA 7, and n. 25 (2011).”).

46. *Id.* at 37 (“Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance.”).

47. *Id.* at 36.

48. *Id.*

four million outlaws.”⁴⁹ As a result of this analysis, the Court determines that the SRP is plausibly understood as a tax.⁵⁰ Building on this conclusion, and from the conclusion that none of the constitutional limitations on taxes applies to this particular tax,⁵¹ the Court holds that the individual mandate and the SRP are constitutional.

The problem with the Court’s tax/regulation distinction, however, is that (a) if taken seriously, it creates incentives for Congress to design policy instruments in non-optimal ways in order to maximize the chance that the law will survive constitutional muster and (b) it presents extraordinarily difficult line-drawing questions that can produce totally arbitrary results. As to the first point, imagine that some future Congress wants to discourage or even prevent a particular activity that produces a totally local harm, a harm that does not go beyond the state’s (or even the city’s) borders, but one that affects many localities—such as a totally local form of pollution. On the one hand, such a federal law is probably constitutional under the Court’s currently broad interpretation of Congress’s Commerce-Clause power to regulate commercial *activity*.⁵² On the other hand, that’s what most commentators ten years ago would have said about the individual mandate. And if the particular activity being regulated in this hypothetical were not one that fell squarely within a prior Supreme Court precedent, the current Court might conclude that “Congress has never attempted to rely on that power to compel individuals”⁵³ not to engage in an activity that produced such an insubstantial harm. Aware of this possibility and hoping to minimize the chance of a successful constitutional challenge, Members of Congress might be induced to design the hypothetical localized pollution law as a regulatory tax rather than as a direct command or as a performance standard.

Such an effect could be wildly inefficient. Regulatory taxes, performance standards, and command-and-control rules are alternative regulatory policy instruments, each with their own unique strengths and weaknesses.⁵⁴ For example, command-and-control regulation can be the most

49. *Id.* at 37-38. The Court also noted that the SRP was enforced by the IRS, which was one of the Court’s formalistic indicia of a tax. *Id.* at 33

50. The Court stated its conclusion at the beginning of the analysis. *Id.* at 30 (“The same analysis here [that the Court used to draw the tax/penalty distinction in prior cases] suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty.”).

51. *Id.* at 40-42.

52. *Id.* at 17-18 (“Congress’s power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others.”) (citing *Wickard*, 317 U.S. 111, 127-28).

53. This is obviously a play on the Court’s language in *Sebelius* justifying its conclusion that extending Congress’s regulatory reach to the individual mandate would be without known precedent. *Id.* at 18.

54. Kyle D. Logue, Response, *In Praise of (Some) Ex Post Regulation: A Response to Professor Galle*, 69 VAND. L. REV. EN BANC 97 (2016).

efficient type of regulation when the regulator is confident in the efficient outcome. For example, when the Consumer Product Safety Commission determines that a particular product's risks clearly exceed that product's benefits to society, the regulator should simply ban the product. However, when an activity produces negative externalities but the activity may produce more than compensating social benefits, a cost-internalizing tax can be more efficient.⁵⁵ To create a constitutional preference for one or another regulatory policy instruments is at best odd and at worst highly counterproductive, and the Court's holding in *NFIB*, and its doubling down on the tax/regulation distinction, definitely creates a constitutional preference for regulatory taxes.

Note also that the Court's relative-coerciveness test for drawing the tax/regulation distinction creates its own special form of inefficient policy-instrument design incentives. Specifically, the use of the relative-coerciveness test (as described above) not only creates an incentive for Congress to use regulatory taxes, but also creates an incentive for Congress to use *relatively weak* regulatory taxes to avoid the "penalty" characterization. To see this point, imagine that Congress determined that the optimal form of regulation for the hypothetical localized pollution was a regulatory ceiling—not an outright ban but a cap on the amount of pollution that any single individual or business could emit. If Congress were to adopt such a ceiling, however, and were to adopt strict enforcement provisions (steep fines or even jail time for noncompliance with the ceiling), there would be a chance that the law could be struck down as being beyond Congress's regulatory power. Moreover, the law would not be saved by the taxing power argument, because the fines would be considered penalties rather than taxes due to their extreme level of coerciveness.

Therefore, to avoid constitutional challenge, lawmakers might instead opt to structure the regulation as a regulatory tax, whose amount is calculated to produce roughly the same level of pollution emissions as the cap. Would such a tax be struck down as a penalty? Presumably not, so long as the tax was not so burdensome as to eliminate the incentive to engage in the activity entirely and so long as those subject to the tax would not be considered to be in violation of the law. But why should the constitutionality of the provision depend on whether it is structured as a mandate or as a tax? What's more, consider the difficult and counter-intuitive line-drawing problems that the test presents. How coercive or punitive is too coercive or punitive? The Court expressly declined to reach that question⁵⁶ and with good reason. It is a question that is almost impossible to answer, and, again, by making the line-drawing question a constitutional one, it forces lawmakers to think about it as well.

55. *Id.* at 107.

56. *Sebelius*, slip op. at 43 ("Because the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it.").

III. AN ALTERNATIVE APPROACH: THE PRIMARY PURPOSE TEST

The lack of a solid normative grounding for the difference in the breadth of Congress's taxing power and its spending power and the mischief that accompanies the Court's particular way of drawing the tax/regulation distinction are probably good enough reasons to abandon the distinction altogether—to read Congress's regulatory and taxing powers as being coterminous or equal in extent. But before I go there and conclude that the Court should abandon its position that there is an important divergence between the taxing and regulatory powers, let me first make an effort to offer my own alternative justification for such a distinction, though a distinction that is based on functional differences that are at least coherent and that do not create perverse policy-instrument design incentives. Be warned, however. My alternative justification does not map precisely onto the Supreme Court's cases in this area. Nor is it supported by the history of the country's founding, nor, so far as I know, is it consistent with the views of the framers of the Constitution. Moreover, my alternative justification of the tax/regulation distinction has its own line-drawing problems, which I will discuss.

On this alternative view, the distinction between a law that is authorized under Congress's regulatory power and a law that is authorized under Congress's taxing power depends on whether or not the primary purpose of the law is regulatory.⁵⁷ A "regulatory law" on this account is a law whose primary function is to alter the behavior of individuals or organizations so as to promote allocative efficiency. To put the same point slightly differently, a regulatory law is intended primarily to correct market failures. Such regulatory laws, when enacted by Congress, are authorized under the Commerce Clause and are subject to what I am calling Commerce-Clause scrutiny. That means, of course, under the Court's current interpretation of the Commerce Clause, that there is some limit on how far a law can reach before it unconstitutionally encroaches on powers reserved to the states. By contrast, a law whose primary purpose is not to alter incentives in an effort to improve market efficiency is not, on this view, a regulatory law. To the contrary, a non-regulatory federal law should be treated as falling within the taxing power if the primary purpose of that law is to generate revenue or resources for a public purpose in a way that both minimizes distortions and attempts to allocate the tax burden according to ability to pay.

57. There was a time, long ago, when the Supreme Court itself articulated a sort of primary-purpose test:

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). That test was, however, over time abandoned for the coerciveness test, embodied most clearly in the Court's *NFIB* opinion.

To better understand this primary-purpose approach to distinguishing Congress's regulatory power from its taxing power, consider some relatively easy examples. According to this view, the vast majority of command-and-control regulations, including any bans on particular commercial activities, would be considered regulatory in nature for constitutional law purposes, because such laws are generally justified on regulatory, efficiency, or market-failure grounds.⁵⁸ What's more, such laws would be considered regulatory irrespective of how coercive those laws might be. And whether or not such laws would be deemed constitutional would then turn on whatever limit the Court decides to put on the reach of Congress's regulatory Commerce-Clause power.

Under this primary-purpose approach, even a tax—or, more precisely, an exaction—would be considered regulatory if its primary purpose were regulatory. Therefore, federal taxes that are primarily regulatory in function would receive the same Commerce-Clause scrutiny as command-and-control regulations, performance-based regulations, or any other policy instrument designed primarily for the purpose of achieving a regulatory end. The advantage of such an approach is that, when Congress is deciding how best to respond to a particular market failure, the choice can be made without a concern for how the design of the regulatory policy instrument will affect the provision's susceptibility to constitutional challenge. Furthermore, this result seems entirely consistent with the idea that the extent of the federal law's encroachment on state sovereignty—which is the concern that seems to motivate this analysis in the first place—is not a function of the choice of the particular regulatory instrument.

It should be noted, however, that under this primary-purpose approach many federal tax provisions that are currently considered to fall under Congress's taxing power might fall instead under the Commerce-Clause power. The vast majority of federal revenue comes from the income tax and from the various social insurance taxes imposed on wages.⁵⁹ And one might reasonably conclude that the primary function of those taxes is not regulatory but rather is raising revenue and distributing the tax burden according to ability to pay—and that any effect on incentives is secondary, a necessary evil. Indeed, this is why so many economists and other academic commentators support a broad-based income tax or consumption tax: such taxes are relatively efficient (i.e., non-distortive) and fair (i.e., allocating tax burdens according to taxpayers' ability to pay). Under the actual federal income tax, however, and not the idealized one, there are numerous "tax expenditures," provisions that diverge from the idealized or "normal" (i.e., relatively non-distortive) income tax and that are often

58. See, e.g., STEPHEN BREYER, *REGULATION AND ITS REFORM* (1984).

59. *Historical Tables*, OFF. OF MGMT. AND BUDGET tbl. 2.2 <https://www.whitehouse.gov/omb/budget/Historicals> (last visited Apr. 28, 2016). In 2015, for example, 47.4% of federal revenue came from the individual income tax, 10.6% from the corporate income tax, and 32.8% from social insurance taxes such as Medicare and Social Security. That's almost 91% of all federal revenue. By contrast, only 3% of federal revenue came from excise taxes. *Id.*

indistinguishable from regulations.⁶⁰ Therefore, under the primary-purpose test, such provisions, despite their location within the Internal Revenue Code, would get the same sort of Commerce-Clause judicial scrutiny as would other regulatory provisions.⁶¹

This approach would have the advantage already mentioned: preventing undue distortions on Congressional policy instrument design. Thus, under my primary-purpose approach to distinguishing taxes from regulations, when Congress is choosing the best policy instrument for any particular purpose, its decisions would not be distorted by the Constitution's apparent preference for taxes over mandates.

There are a number of obvious objections to this primary-purpose proposal. First, the tax expenditure distinction presents a problem. That is, if we are going to treat tax expenditures found in the tax code *constitutionally* different from other provisions in the tax code, we need a very clear way of distinguishing one from the other. But to the contrary, there is considerable debate about whether the tax-expenditure/non-tax-expenditure distinction can be drawn at all.⁶² Second, some might argue that any tax-and-transfer program could in theory be replicated with a set of regulations and mandates.⁶³ Further, it could be argued that, as a practical matter, all real world examples of tax laws and regulatory laws have some combination of regulatory and distributional effects.

IV. APPLYING THE PRIMARY-PURPOSE TEST TO THE INDIVIDUAL MANDATE

Now let's apply the primary-purpose test to the ACA's individual mandate. Under the primary-purpose test, should the mandate be subject to Commerce-Clause review or taxing-power review? Recall that the mandate requires all individuals to have "minimum essential coverage,"⁶⁴

60. See Stanley S. Surrey & Paul R. McDaniel, *TAX EXPENDITURES* (1985) (discussing tax expenditures); Lily Batchelder, *Tax Expenditures: What are They and How are They Structured?*, *TAX POL'Y CTR BRIEFING BOOK* (July 17, 2009), <http://www.taxpolicycenter.org/briefing-book/background/shelters/expenditures.cfm>. ("Tax expenditures are revenue losses attributable to tax provisions that often result from the use of the tax system to promote social goals without incurring direct expenditures.")

61. On the other hand, if there are tax expenditure provisions whose primary function is not to alter behavior but to achieve some redistributive goal, perhaps those would get taxing-power treatment. See SURREY & MCDANIEL, *supra* note 60.

62. For arguments that the concept of tax expenditures is problematic because there is no definitive definition of a baseline income tax from which tax-expenditure diverges can be reliably measured, see Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 *NAT'L LAW J.* 244, 260 (1969). See also Douglas Kahn and Jeffrey Lehman, *Tax Expenditure Budgets: A Critical View*, 54 *Tax Notes* 1661 (March 30, 1992).

63. See Galle, *supra* note 5, at 30. Galle points out how spending programs and taxing programs are interchangeable.

64. 26 U.S.C. § 5000A(a) (2015) ("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.")

which is defined to include a range of health insurance options, from government-provided coverage, to employer-provided coverage, to privately-purchased coverage on one of the now-famous health insurance exchanges. Furthermore the mandate is enforced—albeit weakly—through the SRP provision, discussed above. Given these characteristics, it is clear that the mandate has all of the important indicia of a taxing-power law: it requires all individuals (excepting those below a certain level of income) to make payments of cash to be used for a public purpose. For some individuals, these mandatory payments are made to the government in return for government-provided coverage.⁶⁵ For other individuals, these mandatory payments are made to private health-insurance companies, but those can be understood as taxes as well. My point here is that, in defining what constitutes a “tax” for constitutional purposes, it does not—or should not—matter whether the mandatory payment is required to be made to the government. What should matter is that the payment is (a) mandatory, (b) non-regulatory, (c) for a public purpose, and (d) is calculated in a manner that takes into account the individual’s ability to pay. The individual mandate satisfies all of these requirements.⁶⁶

The counterargument that the primary purpose of the individual mandate is the regulatory function of reducing adverse selection is unconvincing. According to this argument, which ironically was advanced by the defenders of the ACA in the *NFIB* case, given the laws guaranteed issuance and community-rating provisions, in the absence of the mandate, relatively sick individuals would be the only ones buying health insurance, as the healthy would wait until they get sick to purchase coverage. This adverse selection by the sick would lead insurers to increase premiums, cause more healthy people to stop buying insurance, which would in turn lead to more premium increases, with all of this ultimately resulting in “death spirals” for insurance pools. The mandate, on the regulatory view of the law, was the response needed to prevent this adverse selection from happening, by discouraging healthy people from waiting until they are sick to buy health coverage.

65. By this I mean that, for those individuals who are covered by Medicare (which in most cases counts as minimum essential coverage), the federal payroll taxes that they are required to pay during their lifetime, as well as the Medicare enrollee surtaxes, can be understood as the taxes that fund the benefit. *See generally supra* note 20, 21.

66. Some formalists will insist that the word tax always means the mandatory payments of money to *the government*, and some dictionaries use that definition. For example, the first entry in Dictionary.com for “tax” is “a sum of money demanded by the government for its support or for specific facilities or services, levied upon incomes, property, sales, etc.” *Tax*, DICTIONARY.COM, <http://dictionary.reference.com/browse/tax> (last visited Mar. 20, 2015). That sounds like an exaction. But the Oxford English Dictionary’s definition does not mention money expressly. Rather, it defines a tax, arguably more generally, as “a compulsory contribution to the support of government.” *Tax*, OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/198260?rskey=D2sEOu&result=1#eid> (last visited Mar. 21, 2016). Mandatory health insurance premiums are clearly compulsory contributions in support of government; the OED clearly trumps Dictionary.com.

The problem with this story is that the adverse selection that the mandate was designed to address is, in effect, a product of the ACA itself. That is, the mandate was needed precisely because of the ACA's redistributive provisions—the guaranteed issuance and community-rating provisions, which were intended to expand health coverage to the uninsured. This is precisely the sort of primarily redistributive, non-regulatory function that motivated the creation of our other social insurance programs, which undoubtedly fall under Congress's taxing and spending powers rather than its regulatory power. In sum, the individual mandate, together with the ACA's anti-discrimination provisions and health-insurance subsidies for the poor, are best understood as falling under Congress's taxing and spending power. This analysis is strengthened by a direct comparison with the most obvious alternative policy instrument for achieving the same set of goals: a single-payer government-provided health insurance regime, such as Medicare, for example. The only difference is that the ACA approach attempts to harness market forces, via competition among private health insurers, as a way to enhance efficiency, reduce costs, and improve the provision of services. In contrast, the single-payer approach rejects the use of insurance markets in the provision of health care, arguing that such markets are inherently and irretrievably flawed. Whichever side of that debate one comes down on, it is my argument that Congress's choice between such alternative policy instruments should not have constitutional consequences, for reasons that should now be familiar.

Also, to the extent we believe that the taxing-power/Commerce-Clause-power distinction should turn on differences in political salience (as suggested above), there should be little doubt that the ACA was the most politically salient law adopted in a generation. The level of public scrutiny was intense, in large part because the public understood what was happening: the adoption of new, massively redistributive social insurance program—a market-based version of Medicare. Even though the Obama administration and the proponents of the law attempted to play down the program's redistributive features, and even labeled the SRP a penalty rather than a tax to avoid setting off alarms among those who oppose all new taxes, the massively redistributive nature of the program was generally known.

V. CONCLUSION

This Article has argued that, if the Court is going to continue to hold that Congress's taxing power is broader than its spending power, several things should happen. First, the Court should articulate precisely why, as a normative matter, such a distinction should exist. What is it about taxing-power laws that should make them much less likely to be struck down as being unconstitutional than regulatory laws? Put differently, how are taxing power laws more likely to interfere with states' sovereign authority and the beneficial experimentation that occurs when states' independent

and exclusive areas of governance are protected?⁶⁷ Second, the Court should articulate the distinction between taxes and regulations, and between taxes and penalties, in a way that is consistent with the Court's normative rationale for drawing the distinction in the first place. Third, the Court should not draw the distinction between Congress's taxing power and its regulatory power on the basis of whether the law satisfies a hodgepodge of formalistic factors (such as whether the law is enforced by the IRS) or whether the law is sufficiently—or excessively—coercive. The grounds for drawing the distinction, if taken seriously, may give federal lawmakers non-optimal incentives when they are designing policy instruments. Fourth, if the Court is going to continue to treat the taxing power as being broader than the Commerce-Clause power, I offer an alternative way of drawing the distinction between taxes and regulations, a distinction based largely on whether the law's primary purpose is regulatory or redistributive. This approach has the advantages of not distorting Congress's policy-instrument design choices and of being consistent with a plausible normative rationale for the taxing-power, regulatory-power differential. Fifth, I argue that this alternative account of the differences between taxes and regulations provides a taxing-power rationale for upholding the Affordable Care Act's individual mandate that is more coherent and persuasive than the Court's (Chief Justice Roberts') taxing-power argument for the same result.

Let me conclude, however, by stepping back from all of this. At the end of the day, although I do think my rationale for interpreting Congress's taxing power as being broader than its regulatory power is better than anything on offer from the Court or from any other commentator, I am not ultimately persuaded by it. If I were on the Court, I would probably vote to abandon the distinction and treat Congress's taxing and regulatory powers as being coextensive.⁶⁸ Doing so would eliminate the untoward effects of the Court's approach to drawing the tax/regulation line *and* would eliminate the need for the primary purpose line-drawing exercise that my approach requires.

If Congress's taxing power and its regulatory power are going to be made equivalent, and if the gap between the two is to be eliminated as I have suggested, the important next question is whether congressional law-making power is to be interpreted relatively broadly or relatively narrowly. That is, should we expand the boundary of Congress's Commerce-Clause power from where Chief Justice Roberts drew it in *NFIB* to be coterminous with Congress's largely unlimited taxing power, or should we

67. *But see* Ruth Mason, *Federalism and the Taxing Power*, 99 CAL. L. REV. 975, 977 (2011) (arguing that Congress's use of conditional taxation is just as likely to raise federalism concerns as conditional spending, by "crowding out" regulatory competition among and between the states and the federal government).

68. *See also* Jonathan S. Sidhu, *For the General Welfare: Finding a Limit on the Taxing Power After NFIB v. Sebelius*, 103 CAL. L. REV. 103 (2015) (arguing, based on the text, structure, and history of the Constitution, that Congress's taxing power should "track" its commerce-clause power).

shrink Congress's previously unlimited taxing power to be coterminous with the recently drawn *NFIB* limits on Congress's regulatory power? It seems obvious that the only feasible move would be the former. The latter might not only result in the unconstitutionality of the core provision of the ACA, but also call into question Medicare, Medicaid, Social Security, and any other social insurance program Congress might enact. Congress should have the constitutional authority to enact social insurance legislation, however it wants.