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TWO YEARS LATER AND COUNTING: THE IMPLICATIONS OF THE SUPREME COURT'S TAXING POWER DECISION ON THE GOALS OF THE AFFORDABLE CARE ACT*

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I. INTRODUCTION

In 2012, in a highly anticipated decision, the United States Supreme Court upheld the constitutionality of a requirement that most Americans obtain health insurance or pay a monetary penalty.¹ The statute in question that contained this requirement, the Patient Protection and Affordable Care Act (Act or ACA), often labeled as “Obamacare,” or the Affordable Care Act, was a monumental piece of legislation (over 900 pages) that was passed by Congress and signed into law by President Barack Obama in 2010.² The Act represented a significant overhaul of the country’s health care system and structure. The primary objectives of this

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1. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) [hereinafter *National Federation*].

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified as amended in scattered sections of 26 and 42 U.S.C.).

legislation were to expand the number of individuals covered by health insurance and decrease the overall cost of health care in the country.³

Some have referred to the components of the Act as a three-legged stool: (1) make health insurance coverage available through Medicaid expansion and insurance reforms,⁴ (2) require everyone to buy health insurance and provide subsidies to help pay the costs,⁵ and (3) decrease reimbursement for providers (such as hospitals) to help fund expanded coverage.⁶ Without all three components working together, some experts believe it is unlikely that the reforms under the Act will work.⁷

Upon its passage by Congress and the President's signature, the Act immediately fell into legal challenge and wound its way through various federal district courts and courts of appeals.⁸ Finally, on a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, the Supreme Court reviewed certain key provisions of the Act and issued a decision on June 28, 2012.⁹ The two provisions of the Act subject to constitutional challenge were the individual mandate, requiring individuals to purchase a minimum level of health insurance or pay a penalty, and the expansion of Medicaid, including the increase in funds provided to the states conditioned on such states' participation in the Medicaid expansion.¹⁰

3. See, e.g., 26 U.S.C. § 5000A (2012) (requiring most individuals to maintain a certain basic level of health care, thereby expanding the pool of insured individuals and lowering overall costs); see also 42 U.S.C. § 300gg-18 (Supp. V 2006) (enacting specific provisions to save Americans money on health insurance).

4. See, e.g., Aaron Carroll, *Stools Need More Than Two Legs*, THE INCIDENTAL ECONOMIST (Nov. 11, 2010, 9:41 AM), <http://theincidentaleconomist.com/wordpress/stools-need-more-than-two-legs/> (describing the three legs as the expansion of coverage, the Individual Mandate, and tax subsidies); see also Susan Cancelosi, *What To Do, What To Do: Employer Health Benefit Plans During and After 2012's Uncertainty*, 51 U. LOUISVILLE L. REV. 569, 572-73, 587 (2013) (noting prohibitions on denial of coverage for pre-existing conditions and provisions that grant allowances for college-age students to be covered by their parents' insurance).

5. See 26 U.S.C. § 5000A (implementing the Individual Mandate); 42 U.S.C. § 18083 (Supp. V 2012) (providing for subsidies).

6. See 42 U.S.C. § 300gg-17 (Supp. V 2012) (implementing provisions for evidence-based reimbursement structures that tie payment to the quality of performance).

7. See, e.g., Carroll, *supra* note 4 (explaining that the Individual Mandate creates the financial base for expanded coverage while the subsidies enable individuals to afford buying health insurance).

8. On the day signed into law, thirteen states filed a complaint against the Act in the Federal District Court for the Northern District of Florida. Fla. ex rel. Bondi v. U.S. Dep't of Health and Human Serv., 780 F. Supp. 2d 1256 (N.D. Fla. 2011), *aff'd in part, rev'd in part sub nom*, Fla. ex rel. Attorney Gen. v. U.S. Dep't of Health and Human Serv., 648 F.3d 1235 (11th Cir. 2011); see *13 Attorneys General Sue Over Health Care Overhaul*, USA TODAY (Mar. 23, 2010), http://usatoday30.usatoday.com/news/nation/2010-03-23-attorneys-general-health-suit_N.htm.

9. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012).

10. *Id.*

Under the individual mandate, most residents of the United States will need to have health insurance coverage by January 1, 2014 or face a financial penalty that could, when fully phased in, range from \$695 to \$12,500 depending on the individual's filing status and number of dependents.¹¹ The Supreme Court's majority upheld the individual mandate as part of Congress's "taxing power" under the Constitution.¹² The Court held that the penalty under the individual mandate, otherwise known as the "shared responsibility payment," may be reasonably imposed as a "tax" on individuals under the taxing power of Congress.¹³ The Court found that even though the individual mandate was motivated by a regulatory purpose, it was nonetheless acceptable because an individual may choose to act and buy health insurance or not act and pay the financial penalty (tax).¹⁴ The Court stated that it was not its role to decide the "wisdom or fairness" of such a tax, only the constitutionality of it.¹⁵

The expansion of Medicaid as originally enacted required that states receiving federal Medicaid funding substantially expand their Medicaid programs.¹⁶ In order to continue to receive Medicaid funds, states would have been required to provide healthcare to all qualifying adults with income up to 133% of the Federal Poverty Level (FPL).¹⁷ Although Medicaid funding is optional, all fifty states receive it.¹⁸ Further, although federal funds have been allocated to support the expansion, after 2016, states are required to fund a portion of the Medicaid expansion themselves.¹⁹ States that did not wish to expand their Medicaid programs under the original Act would have lost all federal Medicaid funding, including funding for Medicaid programs in place since the program's inception in 1965.²⁰ However, the Supreme Court found the requirement to expand Medicaid to be unconstitutional "economic dragooning" under the Spending Clause.²¹ The Court took no issue with the expansion of Medicaid in general, only the portion of the Act that made expansion

11. *See id.* at 2580 (discussing the "penalty" liability incurred by noncompliance with the Individual Mandate).

12. *See id.* at 2600.

13. *Id.* at 2595, 2600.

14. *See id.* at 2600 (explaining that Congress's taxing power does not allow for the same kind of punitive regulatory force that other sanctions have, nor does it constrain freedom as other regulatory penalties do).

15. *Id.*

16. *See* 42 U.S.C. § 1396c (Supp. V 2012) (enabling the Secretary to withhold Medicaid payments to noncompliant states).

17. *See id.* § 1396a(a)(10)(A)(i)(VIII).

18. *See* Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2011 through September 30, 2012, 75 Fed. Reg. 69082, 69083 (Nov. 10, 2010) (showing that every state receives Medicaid assistance).

19. 42 U.S.C. § 1396d(y)(1) (Supp. V 2012).

20. 42 U.S.C. § 1396c (2011).

21. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2605 (2012).

a prerequisite for federal Medicaid funding.²² As a result of that decision, the Medicaid expansion became a voluntary option for the states, with no penalty for the states that have chosen not to participate.²³ Because the Act was originally designed to be implemented in a much larger healthcare market, the Supreme Court decision has had a notable impact on the efficacy of the Act.

In the 2012 elections, President Obama won re-election and Senate democrats strengthened their majority in the U.S. Senate.²⁴ Consequently, many experts believed the Act was here to stay;²⁵ however, questions remain regarding its implementation. Although the Supreme Court essentially ended two years of uncertainty on the legal status of the Act, it is now unclear whether the original goals of the Act and the individual mandate—adding millions of new consumers to the health insurance market and increasing the number and share of Americans who are insured²⁶—can still be met. This article explores the Court’s taxing power decision with respect to the individual mandate and the direct implications of that decision to not only the Act’s objectives for greater individual health insurance coverage, but also the possible impact in other health care areas. Two years after the Court’s decision, the Act’s overall implementation is still uncertain. As states work to implement the Act or choose to maintain their own healthcare models, the healthcare market is in a state of flux. Due partially to the Court’s decision to restrict the Medicaid expansion, the Act’s effectiveness is now more questionable than ever. Questions addressed by this Article include whether there really still is a legal individual mandate requiring the purchase of health insurance²⁷ and whether further legislation could be possible under Congress’s taxing power if the goals under the Act are not met.²⁸ This article also reviews the question of whether there

22. *Id.* at 2607 (“Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that states accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away existing Medicaid funding.”).

23. See KAISER FAMILY FOUND., A GUIDE TO THE SUPREME COURT’S DECISION ON THE ACA’S MEDICAID EXPANSION 10 (August 2012), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8347.pdf> (explaining that the Court’s holding gives states discretion on whether to expand Medicaid).

24. See, e.g., 2012 Presidential Election Results, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/politics/election-map-2012/president/> (last visited Jan. 31, 2014); Ted Barrett & Catherine E. Shoichet, *Democrats Keep Control of Senate*, CNN POLITICS (Nov. 7, 2012, 3:12 AM), <http://www.cnn.com/2012/11/06/politics/senate-preview/>.

25. See, e.g., Emily Jane Fox, *Obama’s Re-election Secures Health Care Reform*, CNN MONEY (Nov. 7, 2012, 1:29 PM), <http://money.cnn.com/2012/11/07/pf/health-care-reform-obama/> (stating that Obama’s re-election would “neutralize” challenges to the Affordable Care Act).

26. See 26 U.S.C. § 5000A (2012) (codifying the Individual Mandate, a manifestation of the overall goal of increasing the number of covered individuals); see also 42 U.S.C. § 300gg-18 (Supp. V 2012) (enacting specific provisions to save Americans money on health insurance).

27. See *infra* Part IV.A.

28. See *infra* Part IV.D.

has been an expansion of Congress's taxing power,²⁹ along with an analysis of current efforts at implementation and consideration of whether the Court's decision may ultimately have done more harm than good to the individual mandate.³⁰

II. THE AFFORDABLE CARE ACT

The Act consists of a number of key provisions. First, there is the individual mandate requiring individuals to maintain minimum essential coverage or pay a shared responsibility payment (the Individual Mandate).³¹ Certain classes of individuals are exempt from either the Individual Mandate or the tax penalty for non-compliance.³² Second, there is the expansion of Medicaid, which provides federal funding for states wishing to expand their Medicaid programs to include all adults earning 133% of the FPL or less (the Medicaid Expansion).³³ Third, there is the employer mandate, which imposes penalties on employers for failing to provide affordable healthcare to employees (the Employer Mandate).³⁴ The Employer Mandate, or more commonly referred to as the "play or pay" rules,³⁵ has been delayed and the penalty provisions will not become effective now until 2015.³⁶

A. Overview of the Act's Insurance Provisions

Under the Act, the federal and state governments, insurance companies, employers, and individuals "are given shared responsibility to reform and improve the availability, quality, and affordability of health insurance coverage in the United States."³⁷ The primary goal of the Act is to increase the number of individuals in the United States having health insurance.³⁸ The provisions of the

29. See *infra* Part V.A.

30. See *infra* Parts IV.B–C.

31. See 26 U.S.C. § 5000A (codifying the Individual Mandate).

32. See *id.* §§ 5000A(d)–(e) (exempting from the Individual Mandate, for example, incarcerated individuals, and from the penalty, individuals under the poverty line).

33. 42 U.S.C. § 1396A(a)(10)(A)(i)(VIII) (Supp. V 2012).

34. 26 U.S.C. § 4980H (2012) (codifying the Employer Mandate).

35. See Cancelosi, *supra* note 4, at 578 (discussing the details of the Act and ramifications for employers).

36. Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEP'T OF THE TREASURY (July 2, 2013), <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx> (discussing the delay of the Employer Mandate).

37. *IRS Q&A on the Individual Shared Responsibility Provision*, INTERNAL REVENUE SERV. (June 26, 2013), <http://www.irs.gov/uac/Questions-and-Answers-on-the-Individual-Shared-Responsibility-Provision> [hereinafter *IRS Q&A*].

38. See 26 U.S.C. § 5000A(a) (Supp. V 2012) (requiring all applicable individuals to maintain minimum essential coverage each month, starting January 1, 2014); see also Dinsmore & Shohl LLP, *Breaking Down the Affordable Care Act*, THE NAT'L LAW REV. (June 11, 2010), <http://www.natlawreview.com/article/breaking-down-affordable-care-act> (discussing the ACA's fundamental goals of improving the quality of health care and making health care more affordable and accessible).

Act that address health insurance coverage do so through a combination of incentives and penalties. Specifically, they (i) establish a legal mandate that most individuals in the United States obtain health insurance for themselves and their dependents or pay a financial penalty,³⁹ (ii) establish health insurance exchanges throughout the country in which individuals can, with subsidies, purchase health insurance,⁴⁰ (iii) expand Medicaid eligibility to certain nonelderly legal residents,⁴¹ and (iv) place a penalty on certain employers who do not provide minimum health benefits to their employees.⁴²

Starting in 2014, individuals and their families with family income at or below 133% (effectively 138%)⁴³ of the FPL will be eligible for Medicaid coverage if their state expands Medicaid eligibility.⁴⁴ In addition, premium assistance tax credits will be offered to low and middle income individuals and their families to purchase health insurance.⁴⁵ Individuals will be able to purchase health insurance from new health insurance exchanges at prices that reflect “community-rated,

39. 26 U.S.C. § 5000A(a) (describing the requirement of maintaining minimum essential coverage for all individuals and dependents of the individual, starting after 2013); *id.* § 5000A(b)(1) (imposing a penalty on any individual or dependent of the individual who does not maintain minimum essential coverage for one or more months).

40. 42 U.S.C. § 18031(b)(1) (Supp. V 2012) (requiring each State to establish an American Health Benefit Exchange prior to January 1, 2014); *id.* §18031(d)(2)(A) (requiring that the exchanges make available for purchase qualified health plans for individuals); *id.* §18031(d)(4)(G) (requiring that the exchange calculate the actual cost of coverage to the individual after applying any premium tax credits or cost-sharing reductions).

41. 42 U.S.C. §1396a(10)(A)(i)(VII) (Supp. V 2012) (expanding Medicaid to all individuals, beginning January 1, 2014, who are under the age of sixty-five and whose income does not exceed 133% of the FPL). However, as a result of the Supreme Court’s decision, Medicaid expansion in each state is now optional and not required. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607–08 (2012).

42. 26 U.S.C. § 4980(H)(a) (Supp. V 2012) (imposing on a large employer who does not offer health coverage an assessable payment if at least one full time employee has purchased a qualified health plan and qualifies for premium tax credits or cost-sharing reduction). This provision is now delayed until 2015 following a decision by the Department of Health and Human Services. *See JANEMARIE MULVEY ET AL., CONG. RESEARCH SERV., R43150, DELAY IN IMPLEMENTATION OF POTENTIAL EMPLOYER PENALTIES UNDER ACA 1* (2013).

43. 42 U.S.C. § 1396a(10)(A)(VIII) (Supp. V 2012). There is a 5% income disregard, so the effective rate is 138% of the FPL. *See BERNADETTE FERNANDEZ AND THOMAS GABE, CONG. RESEARCH SERV., R41137, HEALTH INSURANCE PREMIUM CREDITS IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (ACA) 6* (2013) (discussing the state option to expand Medicaid to individuals with income up to 133% FPL, with an ACA income disregard of 5% FPL).

44. 42 U.S.C. § 1396a(10)(A)(i)(VIII) (Supp. V 2012). For a family of four in 2014, 138% of the FPL would be around \$33,000. *See CONG. BUDGET OFFICE, CBO AND JCT’S ESTIMATES OF THE EFFECTS OF THE AFFORDABLE CARE ACT ON THE NUMBER OF PEOPLE OBTAINING EMPLOYMENT-BASED HEALTH INSURANCE 6* (March 2012) (discussing the effects that the ACA will have on the prevalence of employer-provided health care).

45. *See FERNANDEZ AND GABE, supra* note 43, at 4 (discussing the applicability of the premium tax credit to households with incomes between 100–400% of the FPL).

guaranteed-issue” insurance coverage.⁴⁶ Employed individuals with family income between 138% and 400% of the FPL will be eligible for some form of subsidy to purchase insurance through these insurance exchanges if their employer does not offer coverage.⁴⁷ Employers with more than fifty employees that do not offer health insurance and have at least one employee who receives a subsidy for the insurance exchange will be subject to a penalty.⁴⁸ Certain small employers may be eligible for a tax credit that covers a percentage of their contributions to health insurance premiums.⁴⁹

B. Individual Mandate Requirement

The Individual Mandate requiring most individuals to maintain minimum essential health insurance coverage was one of the key features of the Act.⁵⁰ Under the statute, individuals not exempt and who do not comply with the Individual Mandate must make a “shared responsibility payment” to the Government (i.e., include an additional payment with their federal income tax return).⁵¹ The Individual Mandate is incorporated into the Internal Revenue Code (the Code) as new Code Section 5000A, which is included as part of Subtitle D “Miscellaneous Excise Taxes” of the Code.⁵² Pursuant to Code Section 5000A, beginning January 1, 2014, an “applicable individual” must “ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage.”⁵³ The Individual Mandate applies to individuals, regardless of age, including children, and is required to be met each month in the calendar year.⁵⁴ For many Americans, the Individual Mandate will likely have little

46. See CBO AND JCT’S ESTIMATES OF THE EFFECTS OF THE AFFORDABLE CARE ACT ON THE NUMBER OF PEOPLE OBTAINING EMPLOYMENT-BASED HEALTH INSURANCE, *supra* note 44, at 6 (discussing how the ACA, in 2014, will enable individuals and families to purchase health insurance on exchanges at prices that do not depend on their health status).

47. See *id.* (stating that employed individuals with income below 138% FPL will be eligible for Medicaid, while those with income between 200–400% FPL will be eligible for some amount of federal subsidies through the exchanges if they do not receive employer-sponsored health insurance).

48. *Id.* at 7.

49. *Id.* (explaining that eligibility for this credit is for small businesses that do not employ more than twenty-five workers and earn less than \$50,000 indexed to the Consumer Price Index (CPI) beginning in 2014).

50. See Alvin Tran, *FAQ: How Will The Individual Mandate Work?*, KAISER HEALTH NEWS (Sept. 3, 2013), <http://www.kaiserhealthnews.org/stories/2013/september/03/faq-on-individual-insurance-mandate-aca.aspx> (explaining why the Individual Mandate was established, who it applies to, and how to satisfy the mandate).

51. See 26 U.S.C. § 5000A(b)(1) (Supp. V 2012) (“If . . . an applicable individual . . . fails to meet the requirements of subsection (a) for 1 or more months . . . there is hereby imposed on the taxpayer a penalty with respect to such failures.”).

52. *Id.* § 5000A(a) (requiring every applicable individual to maintain minimum essential coverage each month).

53. *Id.*

54. See *IRS Q&A*, *supra* note 37, at 3.

impact on them as most people will either have health insurance from their employer or be covered under a Governmental or public program.⁵⁵ Ultimately, about one in ten Americans subject to the Individual Mandate will need to decide whether to obtain health insurance coverage or pay the penalty.⁵⁶

1. Minimum Essential Coverage

The requirement for individuals to maintain “minimum essential coverage” means that each individual needs to be covered under one of the following types of health insurance coverage:

(1) Government sponsored programs, such as (i) Medicare Part A, (ii) Medicaid, (iii) Children’s Health Insurance Program (“CHIP”), (iv) TRICARE, (v) a health care program administered by the Veterans Administration, (vi) a health care program for Peace Corps volunteers or (vii) a Non-appropriated Fund Health Benefits Program of the Department of Defense;

(2) Eligible employer-sponsored plans (i.e., generally a group health plan or group health insurance coverage offered by an employer to the employee, including COBRA and retiree coverage);

(3) Health plan coverage purchased in the individual market;

(4) Grandfathered health plans; or

(5) Other health benefits coverage, such as a State health benefits risk pool.⁵⁷

The Department of Health and Human Services (HHS) was granted authority by the Act to designate other types of “minimum essential coverage.”⁵⁸ HHS has already acted upon that authority and recently provided for the following additional acceptable coverages:

(1) Medicare Advantage plans.

55. See *Highlights 2012*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/hlthins/data/incpovhlth/2012/highlights.html> (last revised Sept. 17, 2013) (stating that 54.9% of individuals have employment-based health insurance, and 32.6% of individuals have health insurance through a government plan).

56. See *id.* (finding nearly 90% of people are covered by either employment-based health insurance or government health insurance).

57. 26 U.S.C. §5000A(f).

58. *Id.* § 5000A(f)(1)(E) (“Such other health benefits coverage . . . as the Secretary of Health and Human Services . . . recognizes for purposes of this subsection”).

(2) Refugee Medical Assistance supported by the Administration for Children and Families.

(3) State high risk pools for plan or policy years that begin on or before Dec. 31, 2014.

(4) Self-funded health coverage offered to students by universities for plan or policy years that begin on or before Dec. 31, 2014.⁵⁹

Minimum essential coverage, however, does not include coverage that provides for only limited benefits, such as only vision or dental care, Medicaid covering only family planning, workers' compensation, or disability policies.⁶⁰

Many Americans subject to the Individual Mandate will have the required coverage through either their employer or through the Medicaid or Medicare programs.⁶¹ If, however, an individual does not have any of the approved types of health coverage and does not qualify for an exemption, he or she will have to either make a shared responsibility payment or obtain insurance through a health insurance exchange or private company in the market in order to maintain minimum essential coverage.⁶²

2. *Applicable Individuals—Exemptions*

The Individual Mandate for minimum essential coverage only applies to “applicable individuals,” which includes most individual Americans (adults and children), but excludes several categories of individuals.⁶³ Specifically, the Act exempts the following four categories of individuals from the Individual Mandate:

(1) An individual holding a “religious conscience exemption” which certifies that the individual is a member of a recognized religious sect or division, and an adherent of established tenets or teachings of such sect or division.⁶⁴

59. See 45 C.F.R. §156.602 (2013).

60. 26 U.S.C. § 5000A(f)(3) (Supp. V 2012) (excluding from satisfying “minimum essential coverage” health care plans and benefits that are described in paragraphs (1), (2), (3), and (4) of subsection (c) of section 2791 of the Public Health Service Act (codified at 42 U.S.C. § 300gg-91(c)(2006)).

61. See *IRS Q&A*, *supra* note 37, at 1–2 (listing health insurance plans that qualify as minimum essential coverage, including employer-sponsored coverage, Medicare, and Medicaid).

62. 26 U.S.C. § 5000A(a) (requiring all applicable individuals to maintain minimum essential coverage); *id.* § 5000A(b)(1) (imposing a penalty if an applicable individual does not maintain minimum essential coverage); *id.* § 5000A(e) (establishing exceptions to the Individual Mandate for certain individuals); *id.* § 5000A(f) (defining what constitutes minimum essential coverage, including qualified health plans offered by private insurance companies in or out of the state exchanges).

63. *Id.* § 5000A(d) (defining individuals who are not “applicable individuals” and do not have to comply with the Individual Mandate).

64. *Id.* § 5000A(d)(2)(A).

(2) Any individual that is a member of a recognized “health care sharing ministry.”⁶⁵

(3) Any individual that is (i) not a United States citizen or United States national or (ii) an alien not lawfully present in the United States.⁶⁶

(4) Any individual that is incarcerated, other than incarceration pending the disposition of charges.⁶⁷

3. Shared Responsibility Payment

Beginning in 2014, persons subject to the Individual Mandate (i.e., those not exempted under the applicable individual definition described above) who do not obtain health insurance coverage will have to pay a penalty labeled a “shared responsibility payment” to the Internal Revenue Service (IRS) or demonstrate that they are separately exempt from such penalty.⁶⁸ The shared responsibility payment is imposed for each month the individual (or an individual for whom the taxpayer is liable such as a dependent) fails to have minimum essential health coverage.⁶⁹ The penalty is included as an additional payment owed with the individual’s federal income tax return for the year that the failure occurs.⁷⁰ For joint return filers, the spouse is jointly liable for the other spouse’s penalty obligation.⁷¹ For children, the person(s) who can claim a child or another individual as a dependent for tax purposes is the party responsible for making the shared responsibility payment if that child or dependent does not have coverage or qualify for an exemption.⁷²

The amount of the shared responsibility payment penalty is based on a complex formula that is calculated as a percentage of household income with floor and ceiling thresholds.⁷³ The floor is based on specified dollar amount and the

65. 26 U.S.C. § 5000A(d)(2)(B)(ii) (Supp. V 2012). A “health care sharing ministry” is generally a Section 501(c)(3) organization whose members share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to residence. *Id.*

66. *Id.* § 5000A(d)(3) (Supp. V 2012). Generally, all United States citizens, permanent residents and all foreign nationals who are in the United States long enough during a calendar year to qualify as resident aliens for tax purposes are subject to the Individual Mandate. *See IRS Q&A, supra* note 37, at 4.

67. 26 U.S.C. § 5000A(d)(4).

68. *Id.* § 5000A(b)(1).

69. *Id.* § 5000A(c)(2).

70. *Id.* § 5000A(b)(2).

71. *Id.* § 5000A(b)(3)(B).

72. 26 U.S.C. § 5000A(b)(3)(A) (Supp. V 2012). Although coverage is required, an individual’s spouse and dependent children do not have to be covered under the same policy or plan as the individual. *See IRS Q&A, supra* note 37, at 4.

73. *See* 26 U.S.C. § 5000A(c) (establishing that the penalty imposed on any taxpayer is the lesser of the sum of the monthly penalty amounts determined under § 5000A(c)(2) or an amount

ceiling is based on the average annual premium the individual would have to pay for qualifying private health insurance.⁷⁴

Specifically, the amount of the penalty charged to an individual for any tax year is equal to the sum of the “monthly penalty amounts” in the tax year.⁷⁵ Such penalty will generally be the greater of either a flat dollar amount or percentage of income.⁷⁶ However, in no case can the penalty be greater than an amount equal to the national average premium for a “bronze level” qualified health plan that provides coverage for the applicable family size involved and is offered through the new health insurance exchanges.⁷⁷ The average annual health insurance premium for bronze level coverage is projected to be around \$4,800 per year for a single plan and \$12,250 for a family plan.⁷⁸

The “monthly penalty amount” described above is an amount equal to 1/12 of the *greater* of:

(1) the “**Flat Dollar Amount**” - an amount equal to the *lesser* of (i) the sum of the “applicable dollar amounts” (\$95 in 2014, \$325 in 2015 and \$695 in 2016 and years after (children: \$47.50, \$162.50 and \$347.50 respectively)) for all individuals in the family with respect to whom such failure occurred during such month, or (ii) 300% of the “applicable dollar amount” for the year,⁷⁹ or

(2) the “**Percentage of Income**” - an amount equal to the percentage (1% in 2014, 2% in 2015 and 2.5% in 2016 and years after) of the excess of the taxpayer’s household income for the tax year over the amount of the Code Section 6012(a)(1) income tax filing threshold.⁸⁰

equal to the national average premium for a bronze level qualified health plan offered through the exchanges).

74. *Id.* § 5000A(c)(1).

75. *Id.* § 5000A(c)(1)(A).

76. *Id.* § 5000A(c)(2) (the monthly penalty will be equal to 1/12 the greater of either (A) an amount equal to the *lesser* of the “sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or (ii) 300 percent of the applicable dollar amount”, or (B) an “amount equal to the following percentage of the excess of the taxable year over the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer for the taxable year: (i) 1.0 percent for taxable years beginning in 2014. (ii) 2.0 percent for taxable years beginning in 2015. (iii) 2.5 percent for taxable years beginning after 2015”).

77. *Id.* § 5000A(c)(1) (establishing that the amount of the penalty “shall be equal to the lesser of (A) the sum of the monthly penalty amounts . . . or (B) an amount equal to the national average premium for qualified health plans which have a bronze level coverage”).

78. See DAVID NEWMAN, CONG. RESEARCH SERV., R41331, INDIVIDUAL MANDATE AND RELATED INFORMATION REQUIREMENTS UNDER PPACA 7, n.25 (2011) (discussing the cap on the penalty for an individual who does not maintain minimum essential coverage).

79. 26 U.S.C. § 5000A(c)(2)(A) (2011).

80. *Id.* § 5000A(c)(2)(B).

For example, in 2016, the penalty per adult will be equal to 2.5% of the individual's household income above the filing threshold;⁸¹ however, in no case less than \$695 and no more than the national average yearly premium for health insurance at the bronze level.⁸² In looking at how this would ultimately play out in 2016 for individuals and those with families, the following examples illustrate the impact of the penalty in the 2016 tax year:

- A single individual with income less than the filing threshold of \$10,250 would be exempt from the penalty since they don't earn enough income to file a return.⁸³
- A single individual making \$35,000 a year as household income would be expected to owe a penalty of about \$695 for that year if they do not have health insurance.⁸⁴
- A married couple with two dependents with income between 80% and 400% of the poverty level and who do not obtain health insurance would pay a penalty of about \$2,085.⁸⁵
- A single individual without health insurance making \$100,000 a year would likely owe about \$2,256.⁸⁶
- A large family without health insurance with income in excess of \$500,000 could owe as much as \$12,500 in penalty.⁸⁷

4. Penalty Exemptions

The Act, in an unusual way, provides for an additional layer of exemptions for certain individuals to be exempt from payment of the penalty. Even though one may fall into the "applicable individual" category and be subject to the Individual Mandate, the penalty provisions provide a separate list of individuals who, even though they fail to obtain minimum essential coverage, do not have to pay the

81. *Id.* § 5000A(c)(2)(B)(iii).

82. *Id.* § 5000A(c)(1)–(3)(A).

83. See David Auerbach et al., *Will Health Insurance Mandates Increase Coverage? Synthesizing Perspectives from the Literature in Health Economics, Tax Compliance, and Behavioral Economics* 8 (Cong. Budget Office, Working Paper 2010-05, 2010), available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/09-19-12-Indiv_Mandate_Penalty.pdf.

84. See *id.* (stating that a single person earning between roughly 90% and 300% of the FPL would be subject to a flat \$695 penalty). \$35,000 is roughly 300% of the projected 2016 FPL of \$12,000, and would therefore make an uncovered individual earning this amount subject to a flat dollar penalty rate of \$695. See CONG. BUDGET OFFICE, PAYMENTS OF PENALTIES FOR BEING UNINSURED UNDER THE AFFORDABLE CARE ACT 1 (2012), available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/09-19-12-Indiv_Mandate_Penalty.pdf.

85. See Auerbach et al., *supra* note 83, at 8–9.

86. See *id.* at 8 (stating that a single person whose income exceeds 300% of the projected 2016 FPL, but is less than about \$200,000, would be subject to a penalty of 2.5% of his or her taxable income).

87. *Id.* at 9.

shared responsibility payment.⁸⁸ Those individuals exempt from the penalty fall into a much larger group than the group of individuals exempt from the Individual Mandate and include the following:

(1) Individuals who cannot afford coverage. This includes individuals whose “required contribution” for health coverage for the month (on an annual basis) exceeds 8% of the individual’s household income for the tax year (i.e., those who would have to pay more than 8% of their income for health insurance).⁸⁹ The “required contribution” amount for an individual is (i) if eligible to purchase coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual for self-coverage, or (ii) if eligible only to purchase minimum essential coverage in the individual market, the annual premium for the lowest cost bronze plan available in the individual market through the state insurance exchange where the individual resides, reduced by the amount of the tax credit allowable under Code Section 36B.⁹⁰

(2) Individuals with income below the tax-filing threshold. This includes any individual whose household income for the tax year is less than the minimum amount of the Code’s income tax return filing requirement.⁹¹ Depending on the filing status of the individual, such amount is roughly 80 to 90% of the FPL.⁹² This provision essentially exempts those who have not earned enough income to be required to file a federal income tax return.⁹³

(3) Members of Indian tribes.⁹⁴

(4) Individuals with short coverage gaps. This includes any individual that was not covered by minimum essential coverage for a continuous period of less than three months.⁹⁵ Only one ninety-day period is allowed in a year.⁹⁶

(5) Individuals designated a hardship. This includes any individual who is determined by HHS to have suffered a hardship with respect to the capability to

88. 26 U.S.C. § 5000A(e)(1)–(5) (2011).

89. *Id.* § 5000A(e)(1)(A).

90. *Id.* § 5000A(e)(1)(B)(i)–(ii).

91. *Id.* § 5000A(e)(2) (2011); *see* 26 U.S.C. § 6012(a)(1) (2011) for filing requirements.

92. The CBO estimates that these amounts would be about \$10,000 for a single filer and \$19,000 for a married couple in 2016. *See* CONG. BUDGET OFFICE, ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION 3 n.5 (July 2012), *available at* <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43472-07-24-2012-CoverageEstimates.pdf>.

93. 26 U.S.C. § 5000A(e)(2).

94. *Id.* § 5000A(e)(3) (2011). *See* 26 U.S.C. § 45A(c)(6) (2013).

95. 26 U.S.C. § 5000A(e)(4)(A) (2011).

96. *Id.* § 5000A(e)(4)(B)(iii).

obtain health insurance coverage.⁹⁷ Specifically, a state insurance exchange has certified that the individual has suffered a hardship that makes him or her unable to obtain coverage.⁹⁸

The effect of the Act's exemptions is that it created two classes of individuals that ultimately will not have to pay any penalty: (i) those exempted from the "applicable individual" definition and (ii) those exempt from the "shared responsibility payment" penalty.⁹⁹

5. *IRS Administration and Procedure*

The shared responsibility payment penalty will be generally assessed and collected by the IRS in the same manner as any other penalty assessable by the IRS.¹⁰⁰ However, individuals who fail to timely pay the penalty cannot be subject to any criminal prosecution or other penalty by the IRS with respect to such failure to pay.¹⁰¹ In addition, the IRS cannot file a notice of lien with respect to any property of an individual who fails to pay the penalty or levy on any such property.¹⁰² One important enforcement tool that the IRS will be able to use is to offset any tax refunds owed to a taxpayer by the amount owed to the IRS for the shared responsibility payment penalty.¹⁰³

Demonstrating any exemption from the minimum essential coverage requirement or penalty will be necessary for the effective administration of the Individual Mandate. Individuals claiming a religious conscience exemption or certain hardship exemption generally will need to obtain an exemption certificate from the insurance exchange.¹⁰⁴ Those individuals who are a member of an Indian

97. *Id.* § 5000A(e)(5).

98. *ACA Statutory Exemptions from the Requirement to Obtain Minimum Essential Coverage*, NAT'L CONFERENCE OF STATE LEGISLATORS (Jan. 15, 2014), <http://www.ncsl.org/research/health/small-business-health-insurance.aspx#Exemptions>.

99. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2653 (2012) (Scalia, J., Kennedy, J., Thomas, J., and Alito, J., dissenting) (arguing that the Act exempts three classes of people from the "applicable individual" definition and also creates a separate set of exemptions excusing liability for certain individuals failing to maintain minimum coverage).

100. 26 U.S.C. § 5000A(g)(1).

101. *Id.* § 5000A(g)(2)(A).

102. *Id.* § 5000A(g)(2)(B)(i)–(ii) (stating the Secretary will not file a "notice of lien with respect to any property of a taxpayer by reason of failure to pay the penalty imposed by this section or levy any such property with respect to such failure").

103. Howard Gleckman, *Obamacare: Tax Or Penalty? Call It What You Want, But IRS Won't Be Able To Collect It*, FORBES (July 3, 2012, 2:42 PM), <http://www.forbes.com/sites/beltway/2012/07/03/some-tax-few-will-face-obamacare-uninsured-penalty-and-irs-hamstrung-to-collect/> (stating the IRS's only tool for collecting penalty will be subtracting penalty from a refund it owes penalized taxpayers).

104. *See IRS Q&A*, *supra* note 37, at 1 (stating religious conscience and hardship exemptions are only granted by going to Health Insurance Marketplace and applying for an exemption certificate).

tribe or health care sharing ministry, or are incarcerated may claim exemption on their federal income tax return or by obtaining an exemption certificate from the insurance exchange.¹⁰⁵ Those individuals claiming exemption due to unaffordable coverage, a short coverage gap, certain hardships or who are not lawfully present in the United States can only claim such exemption on their federal income tax return.¹⁰⁶ The exemption for those under the filing threshold is available automatically and requires no action.¹⁰⁷

The IRS will receive information on enrollees covered under a health plan from insurance companies and other payers each year, with similar information also sent to those insured.¹⁰⁸ The IRS will receive information on those who receive a hardship waiver, affordability exemption, or other type of exemption by the individual either claiming an exemption on their individual tax return or filing an exemption form.¹⁰⁹ The IRS will then use this information to identify those individuals who have not complied with the Individual Mandate and failed to pay the penalty.¹¹⁰

6. *Transition Relief*

The IRS has provided transition relief from the shared responsibility payment penalty for certain individuals who are eligible to enroll in an employer-sponsored health plan with a plan year other than a calendar year if the plan year begins in 2013 and ends in 2014.¹¹¹ This transition relief for such individuals begins January 1, 2014, and continues through the month in which the particular non-calendar plan year ends.¹¹²

C. *The Medicaid Expansion*

There is no deadline for state enrollment in the Medicaid Expansion, however there is currently nothing to indicate that states who choose not to enroll in 2014

105. *Id.*

106. *Id.*

107. *Id.*

108. Final Regulations on Information Reporting of Minimum Essential Coverage, 79 Fed. Reg. 13220 (March 10, 2014) (to be codified at 26 U.S.C. 6055), available at <https://federalregister.gov/a/2014-05051>. See Barbara Marquand, *How the Feds Will Know if You Have Health Insurance*, CAPITAL BLUECROSS.COM (Apr. 3, 2013), <https://www.capbluecross.com/wps/wcm/connect/cbc-public/cbc/healthcarereform/fedsarticle>.

109. *How do I Qualify for an Exemption from the Fee for Not Having Health Coverage?*, HEALTHCARE.GOV, <https://www.healthcare.gov/exemptions/> (last visited May 16, 2014).

110. See Marquand, *supra* note 108.

111. INTERNAL REVENUE SERV., INTERNAL REVENUE BULLETIN: TRANSITION RELIEF FOR EMPLOYEES AND RELATED INDIVIDUALS ELIGIBLE TO ENROLL IN ELIGIBLE EMPLOYER-SPONSORED HEALTH PLANS FOR NON-CALENDAR PLAN YEARS THAT BEGIN IN 2013 AND END IN 2014 NOTICE 2013-42, 61 (July 15, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-29.pdf>.

112. *Id.* at 62.

will readily change their minds.¹¹³ As of August 1, 2013, twenty-seven states had decided to participate or are leaning toward participation in the Medicaid Expansion.¹¹⁴ Four states are seeking approval to use federal funds to expand coverage under current state programs.¹¹⁵ Many of the states that have chosen not to participate cite budget concerns.¹¹⁶ Further, many report that insurance premiums are actually rising and moving toward unaffordability, and that employer subsidies may be less helpful than anticipated.¹¹⁷ Those states participating in the Medicaid Expansion and currently implementing preparatory programs report successes, but also report expected increases in Medicaid enrollment of 20-101%.¹¹⁸ Unfortunately, many of the states that have chosen not to participate have large populations of poor and uninsured adults.¹¹⁹ Resultantly, when the Act is fully realized in 2016, only slightly more than half of the states will currently be

113. See Emily Whelan Parento & Lawrence O. Gostin, *Better Health, But Less Justice: Widening Health Disparities After National Federation Of Independent Business v. Sebelius*, 27 NOTRE DAME J. L. ETHICS & PUB. POL'Y 481, 483 (2013) (noting that “[t]hrough states face no firm deadline for opting into the expansion, there is no reason to think participation rates will be materially higher in future years than in 2014, when funding will be at its most generous level.”).

114. See *Where Each State Stands on ACA's Medicaid Expansion: A Roundup of What Each State's Leadership Has Said About Their Medicaid Plans*, ADVISORY BD. CO. (June 14, 2013), <http://www.advisory.com/Daily-Briefing/2012/11/09/MedicaidMap> (listing each state that has decided to expand Medicaid coverage or is currently leaning towards expanding Medicaid coverage).

115. *Id.*

116. See *Where the States Stand on Medicaid Expansion: 26 States, D.C. Expanding Medicaid*, ADVISORY BD. CO. (Jan. 24, 2014), http://www.advisory.com/_apps/dailybriefingprint?i={C14C9308-36AF-401F-8802-334CE6B5D6AF} (stating that six state governors have specifically cited budget concerns when addressing their refusal to expand).

117. See, e.g., Lara Hoffmans, *ACA's Not-So-Great Rate Shock Debate*, FORBES (June 4, 2013), <http://www.forbes.com/sites/larahoffmans/2013/06/04/acas-not-so-great-rate-shock-debate/> (reporting that in states with their own exchanges, such as California and Oregon, plan premiums are likely to double); Bruce Rogers, *More Surprise from the Affordable Care Act*, FORBES (May 31, 2013), <http://www.forbes.com/sites/brucerogers/2013/05/31/more-surprises-from-the-affordable-care-act/> (discussing design limitations of employer subsidies within the ACA such as “no employer subsidies are required for the worker’s children or spouse” and that certain tax credits are available “only if *neither* spouse is offered and employer-subsidized policy”).

118. TERESA A. COUGHLIN ET AL., THE URBAN INST., ARE STATE MEDICAID MANAGED CARE PROGRAMS READY FOR 2014? A REVIEW OF EIGHT STATES, tbl.2 (May 2013), available at <http://www.urban.org/UploadedPDF/412826-Are-State-Medicaid-Managed-Care-Programs-Ready-for-2014.pdf>.

119. See Parento & Gostin, *supra* note 113, at 504 (“Among states that have decided against participating in the expansion, many have rates of uninsured considerably higher than the national average”); see also KAISER FAMILY FOUND., THE COVERAGE GAP: UNINSURED POOR ADULTS IN STATES THAT DO NOT EXPAND MEDICAID (Oct. 23, 2013), <http://kff.org/health-reform/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicare/> (reporting that in states that are not participating in expansion, nearly five million poor and uninsured adults that will fall into coverage gaps between Medicaid and Marketplace premium tax credits, making it very difficult for the poor and uninsured to obtain coverage).

participating, and the costs of national insurance will be dispersed over a much smaller population.¹²⁰

D. Employer Mandate: The “Play or Pay” Requirement

The Act requires large employers of fifty or more full-time equivalent employees provide affordable healthcare coverage to full-time employees.¹²¹ This requirement was intended to become effective in 2014, and provided for federal assistance in order to verify that employers were offering appropriate healthcare as part of the subsidy eligibility verification for state-based insurance exchanges.¹²² However, due to delays in the availability of federal assistance to ensure employer compliance, the requirement for employers to provide healthcare will not become effective until 2015.¹²³ Because employers will not be required by law to provide affordable healthcare options to employees at the Act’s outset, many have speculated that the number of uninsured may rise as a result.¹²⁴

Others, however, speculate the delay may stimulate enrollment in the health exchanges. According to one report, the success of the Act is:

largely dependent on how many people are willing to buy health plans through the government exchanges. Most of the people affected by Obama’s decision to delay the employer mandate to provide health care will now be eligible to use the exchange An increase in enrollment, particularly by young people such as restaurant workers, will help the exchanges by making their pool of customers less risky to cover. That could lead to lower premiums starting in 2015, said Jay Angoff, a Mehri & Skalet law partner who had been director of

120. See Editorial Board, *Millions Will Remain Uninsured Because of Blocked Medicaid Expansion in States*, WASH. POST (Nov. 15, 2013), http://www.washingtonpost.com/opinions/millions-will-remain-uninsured-because-of-blocked-medicaid-expansion-in-states/2013/11/15/9629bcfa-4b1c-11e3-be6b-d3d28122e6d4_story.html (reporting that Medicaid expansion has been blocked in half the states).

121. 26 U.S.C. § 4980H(a)-(c)(2)(A) (2011).

122. Mark J. Mazur, *Treasury Notes: Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEP’T OF THE TREASURY (July 2, 2013), <http://www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner.aspx> (stating the Obama administration will delay the start of the employer and insurer reporting mandates).

123. *Id.*

124. See, e.g., Jackie Calmes & Robert Pear, *Crucial Rule Is Delayed a Year for Obama’s Health Law*, N.Y. TIMES (July 2, 2013), <http://www.nytimes.com/2013/07/03/us/politics/obama-administration-to-delay-health-law-requirement-until-2015.html?ref=politics> (quoting George Washington Law Professor Sara Rosenbaum, “This step could significantly reduce the number of uninsured people who will gain coverage in 2014.”).

insurance oversight at the U.S. Department of Health and Human Services under Obama.¹²⁵

However, many experts remain worried.¹²⁶ The success of the Act largely depends on whether young and healthy individuals will relinquish part of their disposable income to pay for insurance. HHS figures shows nationwide there are 11.6 million people between ages eighteen and thirty-four who are uninsured.¹²⁷ Many young people may see insurance as a luxury, and they may be content not having it.¹²⁸ A failure to convince them otherwise will drive up the rates for others.¹²⁹

Despite such predictions, a recent study by the Urban Institute, using a methodology comparable to that of the Congressional Budget Office (CBO), has found that the delay in implementation of the Employer Mandate is likely to have negligible results on the number of uninsured, non-elderly individuals.¹³⁰ According to the study, the number of Americans uninsured under the Act without the Employer Mandate is predicted to be 28,264,000 individuals or 10.2% of the population, which is only 0.1% more than the 10.1% of the population (27,928,000 people) predicted to remain uninsured under the Act with the Employer Mandate fully intact.¹³¹ Instead, the data seems to indicate that the real heart of the Act is the Individual Mandate, which, if eliminated from the Act would leave a startling 41,969,000 Americans uninsured, or 15.1% of the population.¹³² It is possible that the Employer Mandate is somewhat inconsequential in shaping employer policy,

125. Alex Wayne, *Obama's Employer Health Care Delay May Goose Exchange Enrollment*, BLOOMBERG (July 15, 2013), <http://www.bloomberg.com/news/2013-07-15/obama-s-employer-health-care-delay-may-goose-exchange-enrollment.html>.

126. See Maggie Fox, *Delay in Health Insurance Law Won't Affect Many, Experts Say*, NBC NEWS (July 3, 2013, 11:43 AM), <http://www.nbcnews.com/health/delay-health-insurance-law-wont-affect-many-experts-say-6C10527171> (discussing the opposing views between experts on the effect of the employer health insurance delay).

127. Christopher Weaver & Louise Radnofsky, *New Health-Care Law's Success Rests on the Young*, WALL ST. J. (July 25, 2013), <http://online.wsj.com/news/articles/SB10001424127887324263404578613700273320428>.

128. See Kelli Kennedy, *Health Insurers Fear Young People Will Opt Out*, ASSOCIATED PRESS (July 5, 2103), <http://bigstory.ap.org/article/health-insurers-fear-young-people-will-opt-out> (discussing the concerns of many young Americans who do not see health insurance as a necessity).

129. See Lewis Krauskopf, *Obamacare May Get Sick if Young Americans Don't Sign Up*, REUTERS (Jan. 12, 2014), <http://www.reuters.com/article/2014/01/12/us-usa-healthcare-enrollment-idUSBREA0B07Y20140112> (discussing the need for young healthy adults to sign up for health insurance in order to offset the costs of the elderly).

130. See Linda Blumberg et al., *It's No Contest: The ACA's Employer Mandate Has Far Less Effect on Coverage and Costs Than the Individual Mandate*, URBAN INSTITUTE 1, 3 (July 2013), available at <http://www.urban.org/UploadedPDF/412865-ACA-Employer-Mandate.pdf>.

131. *Id.* at 2 tbl.1, 3.

132. *See id.* at 3.

which is instead shaped by the demands of high-quality employees.¹³³ That demand is in turn motivated by the Individual Mandate, which, although it seems to be the most effective means of promoting healthcare consumption, is still not completely effective.

E. Health Insurance Exchanges

One significant feature of the Act is the creation of health insurance exchanges in every state. These insurance exchanges referred to as “Health Insurance Marketplaces”¹³⁴ or “Affordable Insurance Exchanges”¹³⁵ opened for enrollment in October of 2013.¹³⁶ The goal of these insurance exchanges is to assist individuals in obtaining minimum essential coverage and potentially provide financial assistance to cover the cost of such insurance.¹³⁷ In addition, a function of the insurance exchanges will be to grant exemption certificates to those individuals who qualify.¹³⁸

F. Projections on the Individual Mandate and Penalty

The CBO originally estimated that, even with the Act in place, about thirty million individuals in America would be uninsured in 2016.¹³⁹ The CBO estimated this group would be mostly composed of (i) individuals who are unauthorized immigrants, (ii) individuals who will be eligible for Medicaid but fail to enroll, (iii) individuals who will be eligible for subsidies, but do not utilize them, (iv) individuals exempt from the Individual Mandate and (v) individuals who will be

133. *See id.* at 4 (discussing the relative unchanged premium spending by employers when the Employer Mandate is dropped); *see also Decision to Delay Employer Mandate Will Cause More Employers to Drop Coverage*, PRWEB (Jan. 29, 2014), <http://www.prweb.com/releases/health-insurance-exchange/private-exchange/prweb10899757.htm> (statement of Josh Hilgers) (“[E]mployers offer benefits for a variety of reasons . . . but the number one reason is to attract and retain employees.”).

134. *What is the Health Insurance Marketplace?*, HEALTHCARE.GOV, <https://www.healthcare.gov/what-is-the-health-insurance-marketplace/> (last visited Feb. 18, 2014).

135. *Creating a New Competitive Health Insurance Marketplace*, CTRS. FOR MEDICARE & MEDICAID SERVS., <http://www.cms.gov/CCHIO/Resources/Marketplace-Grants/> (last visited Feb. 18, 2014).

136. *State Health Insurance Marketplaces*, CTRS. FOR MEDICARE & MEDICAID SERVS., <http://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/state-marketplaces.html> (last updated Oct. 1, 2013).

137. *See supra* text accompanying note 3.

138. Patient Protection and Affordable Care Act; Exchange Functions; Eligibility for Exemptions; Miscellaneous Minimum Essential Coverage Provisions, 78 Fed. Reg. 39,494, 39,524 (July 1, 2013) (to be codified at 45 C.F.R. pts. 155 and 156).

139. PAYMENTS OF PENALTIES FOR BEING UNINSURED UNDER THE AFFORDABLE CARE ACT, *supra* note 84, at 1.

subject to the Individual Mandate, but do not comply.¹⁴⁰ The number of people estimated to fall within the Individual Mandate's exemption for unauthorized immigrants and the penalty exemption for members of Indian tribes, low income individuals, and unaffordable coverage individuals was estimated to be around eighteen to nineteen million individuals.¹⁴¹ According to those figures, a majority of the thirty million uninsured individuals would not have been subject to the Individual Mandate or the shared responsibility payment penalty.¹⁴²

When the Act was passed in 2010, the CBO had originally projected that, of the number of people ultimately subject to the Individual Mandate and penalty provision, approximately 3.9 million individuals would pay the shared responsibility penalty rather than purchase the required amount of health insurance.¹⁴³ After the Court's decision, the CBO increased that number to 5.9 million people who will pay a penalty rather than obtain health insurance.¹⁴⁴ About 85% of that increase is a result of changes to the CBO's baseline projections, including the effects of new legislation and economic outlook changes.¹⁴⁵ The remaining 15% of the increase is a direct result of the increase in the number of uninsured people expected to pay the penalty based on the Court's decision on the Medicaid Expansion.¹⁴⁶

Estimates were also provided by the CBO in terms of the monetary effect of the shared responsibility payment penalty that individuals would have to pay.¹⁴⁷ The shared responsibility payment penalty will generate revenue in the billions per year.¹⁴⁸ Specifically, the CBO now estimates that penalty payments by uninsured individuals will produce \$2 billion in revenue in 2015, \$4 billion per year in 2016 through 2018, and \$5 billion per year in 2019-2022.¹⁴⁹ By 2022, \$32 billion in total

140. *See id.* at 1–2 (discussing those who will not be insured by 2016); *see also* CONG. BUDGET OFFICE, CBO'S MAY 2013 ESTIMATE OF THE EFFECTS OF THE AFFORDABLE CARE ACT ON HEALTH INSURANCE COVERAGE 1 tbl.1 (2013), *available at* <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43900-2013-05-ACA.pdf> (estimating the number of uninsured nonelderly people under the ACA).

141. PAYMENTS OF PENALTIES FOR BEING UNINSURED UNDER THE AFFORDABLE CARE ACT, *supra* note 84, at 1.

142. *Id.*

143. *Id.*

144. *Id.* at 2 tbl.1.

145. *Id.* at 1.

146. *Id.*

147. *See id.* at 2 tbl.1 (displaying the estimated distribution of Individual Mandate penalties under the ACA).

148. *See id.* (showing that the CBO is predicating \$6.9 billion total penalty payments in the year 2016).

149. CONG. BUDGET OFFICE, INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT 2 tb.1 (2014), at 2 tb.1 *available at* <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43900-2014-04-ACAtables2.pdf>. [hereinafter INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT]

revenue is now expected to accrue from the shared responsibility payment penalty.¹⁵⁰

Unfortunately, new studies and predictions indicate that the number of Americans likely to remain without or lose health insurance once the health insurance exchanges go into effect has increased.¹⁵¹ Of those in states that have chosen not to implement the Medicaid Expansion, approximately 90% of the uninsured are predicted to be below 138% of the FPL.¹⁵² In states that will have adopted the Medicaid Expansion, 40% of Medicaid-eligible residents are predicted to remain uninsured in 2016.¹⁵³ Furthermore, federal revenue is likely to decrease due to the delay of the Employer Mandate.¹⁵⁴ The Government is anticipated to lose approximately \$3.7 billion in employer penalties during the extra year it will take to implement the Employer Mandate.¹⁵⁵ This is the most dramatic effect of the delay, which is otherwise predicted to have negligible results.

After full implementation of the Act, a significant number of people will now likely remain uninsured.¹⁵⁶ The five states that are expected to have the highest uninsurance rates are: Texas (where 191.3 in every 1,000 residents will not have insurance); Louisiana (167.8 in every 1,000 residents); Georgia (155.3 in every 1,000 residents); South Carolina (152.6 in every 1,000 residents); and Alaska (142.2 in every 1,000 residents).¹⁵⁷ None of these states has elected to participate in the Medicaid Expansion.¹⁵⁸ Some states, however, are expected to have higher rates of success. The lowest uninsurance rates are expected to occur in states adopting the Medicaid Expansion, namely, Massachusetts (where just 16.9 in every 1,000 residents will not have insurance); Hawaii (38.1 in every 1,000 residents); District of Columbia (42.7 in every 1,000 residents); Connecticut (45.1 in every 1,000 residents); and North Dakota (45.7 in every 1,000 residents).¹⁵⁹ Some results are mixed; Nevada is expected to see a 50.25% reduction in its uninsured

150. *See id.* (adding the total number of estimated penalties paid by 2022 is projected to be \$55 billion).

151. *See* Rachel Nardin et al., *The Uninsured After Implementation of the Affordable Care Act: A Demographic And Geographic Analysis*, HEALTH AFF. BLOG (June 6, 2013), <http://healthaffairs.org/blog/2013/06/06/the-uninsured-after-implementation-of-the-affordable-care-act-a-demographic-and-geographic-analysis/> (estimating that the Supreme Court's decision to allow states to opt-out of Medicaid expansion could increase the number of uninsured Americans by 1.2 million).

152. *Id.*

153. *Id.*

154. *See* Blumberg et al., *supra* note 130, at 4.

155. *Id.*

156. *See* PAYMENTS OF PENALTIES FOR BEING UNINSURED UNDER THE AFFORDABLE CARE ACT, *supra* note 84, at 1.

157. Juliette Mullin, et al., *Which States Will Have the Most Uninsured Residents in 2016?*, ADVISORY BD. CO. (June 18, 2013), <http://www.advisory.com/daily-briefing/blog/2013/06/which-states-will-have-the-most-uninsured-residents-in-2016>.

158. *Id.*

159. *Id.*

population after it implements the Medicaid Expansion, although 109.5 in every 1,000 residents are still expected to remain uninsured.¹⁶⁰

Since the issuance of the one-year delay of the Employer Mandate, there is also now a call to delay the Individual Mandate.¹⁶¹ Various bills in Congress have been prepared to implement such a delay, although the success of such legislation may be unlikely.¹⁶² Many, including the Obama Administration, have indicated that the impact of a delay of the Individual Mandate will cause an increase in health insurance premium rates and increase the number of uninsured and undermine the key elements of the Act.¹⁶³

III. THE SUPREME COURT DECISION

The Act came before the Supreme Court in 2012.¹⁶⁴ The Supreme Court considered the issue in several contexts, including the Anti-Injunction Act and the Congressional Taxing Authority before deciding the issue under the Taxing and Spending Power.¹⁶⁵ There was strong opposition to the decision by a four-Justice dissent.¹⁶⁶

A. *The Decision: Overview*

National Federation of Independent Business v. Sebelius was argued before the Supreme Court in March of 2012 and decided in June of 2012.¹⁶⁷ Although the Act itself is over nine hundred pages, only two provisions were challenged before the Court: the Individual Mandate and the Medicaid Expansion.¹⁶⁸ At issue here is the Individual Mandate, which was challenged in four different circuits.¹⁶⁹ The

160. *Id.*

161. See Emily Lee, *Costs of Delaying the Individual Mandate*, CTR. FOR AM. PROGRESS (Oct. 30, 2013), <http://www.americanprogress.org/issues/healthcare/news/2013/10/30/78415/the-costs-of-delaying-the-individual-mandate/> (stating that members of Congress are seeking to delay the Individual Mandate).

162. See John Parkinson, *House Votes to Delay Employer and Individual Mandates by One Year*, ABC NEWS (Jul. 17, 2013), <http://abcnews.go.com/blogs/politics/2013/07/house-votes-to-delay-employer-and-individual-mandates-by-one-year/> (discussing the numerous unsuccessful attempts to delay or repeal the Individual Mandate).

163. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2667 & H.R. 2668 (2013), available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr2667r_20130716.pdf (stating that the House's attempts at delaying the ACA would increase the costs of health insurance and the number of uninsured Americans).

164. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012).

165. See *id.* at 2582, 2601.

166. See *id.* at 2677 (stating in a dissent by Justice Scalia, joined by Justices Kennedy, Thomas, and Alito that they would hold "the Act invalid in its entirety") (Scalia, J., dissenting).

167. See *id.* at 2566.

168. See *id.* at 2580.

169. See *id.* at 2580–81 (stating that the Eleventh, Sixth, D.C., and Fourth Circuits heard challenges to the Individual Mandate).

Sixth Circuit and the D.C. Circuit upheld the Individual Mandate, and the Fourth Circuit held that the Anti-Injunction Act barred review at this point.¹⁷⁰ The decision on review before the Court here was a decision by the Eleventh Circuit declaring (i) the Individual Mandate in excess of Congressional authority and (ii) the Medicaid Expansion as an acceptable exercise.¹⁷¹ The appellate decision stood in contrast to the Florida district court decision in favor of the plaintiffs, including twenty-five states, which struck down the Act in its entirety.¹⁷²

The Supreme Court was sharply divided on the case.¹⁷³ Chief Justice Roberts authored the Majority Opinion, which held that the Individual Mandate was allowed as an exercise of Congress's taxing power, but it was won by a slim margin.¹⁷⁴ Justice Roberts also authored individual opinions addressing the Individual Mandate in other contexts, such as the Commerce Clause.¹⁷⁵ Justices Ginsburg, Breyer, Sotomayor, and Kagan joined in the Chief Justice's opinion with respect to the Facts, the non-applicability of the Anti-Injunction Act, and the Individual Mandate as construed under the Taxing and Spending Clause.¹⁷⁶ Justice Ginsburg wrote a separate opinion arguing to uphold the Act in its entirety under every aspect of Congressional authority, in which Justice Sotomayor joined, and in which Justices Breyer and Kagan joined in part.¹⁷⁷ Justice Scalia wrote for the dissent, in which Justices Kennedy, Thomas, and Alito joined, arguing that the Act should be struck down in its entirety.¹⁷⁸ Justice Thomas also wrote a solitary dissent.¹⁷⁹

B. *The Anti-Injunction Act*

Before proceeding to the merits, the majority first dismissed the Anti-Injunction Act as inapplicable.¹⁸⁰ The Anti-Injunction Act prohibits judicial review or impediment of any effort to collect a tax, and *Amicus* argued that this barred

170. *See id.* at 2581 (explaining that the “Sixth Circuit and the D.C. Circuit upheld the mandate as a valid exercise of Congress’s commerce power,” and the “Fourth Circuit determined that the Anti-Injunction Act prevents courts from considering the merits”).

171. *Id.* at 2582.

172. *Id.* at 2580.

173. *See id.* at 2609, 2677 (explaining that Justices Ginsburg, Sotomayor, Breyer, and Kagan agree with Chief Justice Roberts’ conclusions regarding the Anti-Injunction Act and that the minimum coverage provision is a valid exercise of Congress’s taxing power, while Justices Scalia, Kennedy, Thomas, and Alito dissent calling “the Act invalid in its entirety”).

174. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012).

175. *See id.* at 2583–84.

176. *Id.* at 2609 (Ginsburg, J., concurring in part, concurring in judgment in part, and dissenting in part).

177. *See id.*

178. *Id.* at 2642 (Scalia, J., dissenting).

179. *Id.* at 2677 (Thomas, J., dissenting).

180. *Id.* at 2584 (majority opinion).

review of the Individual Mandate.¹⁸¹ However, the Court disagreed, holding that the Individual Mandate was in fact a penalty rather than a tax due mostly to the classification afforded it by Congress.¹⁸² Congress in this case explicitly failed to categorize or label the penalty as a tax, despite having evidenced a willingness to do so elsewhere in the Act.¹⁸³ Because the Anti-Injunction Act is a creation of Congress, the Court deferred to Congress's discretion to dictate what does and does not fall under its scope.¹⁸⁴ The majority interpreted the legislative intent inherent in the language of the Act to communicate a relatively clear desire to consider the Individual Mandate as a penalty, and thus not subject to the strictures of the Anti-Injunction Act.¹⁸⁵

C. Congressional Taxing Authority

Congress has the power under Article 1, § 8 of the Constitution to lay and collect Taxes and Duties.¹⁸⁶ This is a broad authority, and the Court has historically refused to significantly limit that authority except in the case of taxes that are in fact punitive measures.¹⁸⁷ There are only two forms of tax: direct taxes and indirect taxes.¹⁸⁸ Direct taxes are the subject of the Direct Tax Clause of the Constitution, providing that such taxes must be collected in proportion to the Census.¹⁸⁹ Taxes taken under this authority must be apportioned amongst the states in relation to their populations rather than assessed individually.¹⁹⁰ Direct taxes have historically been very difficult to define, and have been limited by a number of key precedents.¹⁹¹ Examples would include capitations and real property taxes among others.¹⁹² Indirect taxes, on the other hand, are practically unlimited in their scope, and seem to include practically every other type of tax not explicitly considered direct by precedent.¹⁹³

181. *See id.* at 2582.

182. *See id.* at 2583–84.

183. *See id.* at 2583.

184. *Id.*

185. *Id.*

186. U.S. CONST. art. I, § 8, cl. 1.

187. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2599.

188. *See* U.S. CONST. art. I, § 8, cl. 1 (proclaiming that “Congress shall have Power To lay and collect Taxes,” which are direct taxes, and “Duties, Imposts and Excises,” which are indirect taxes).

189. *See* U.S. CONST. art. I, § 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.”).

190. *See* U.S. CONST. art. I, § 2, cl. 3.

191. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012) (discussing the history of the Court's interpretation of the Direct Tax Clause).

192. *See id.*

193. *See id.* at 2596 (citing a variety of taxes classified as “regulatory”).

National Federation cites several relevant precedents.¹⁹⁴ First, the Court notes that in 1881 a poll tax was determined to be a direct tax.¹⁹⁵ In 1796 it was determined that a tax on carriages was not.¹⁹⁶ Taxes on personal property and income from such were once considered direct taxes, as well as taxes on real estate.¹⁹⁷ However, the Sixteenth Amendment later disagreed with respect to personal property.¹⁹⁸ These limited categories have so far prescribed the only categories in which Congress may impose a direct tax proportionate to the population of each state.¹⁹⁹

Here, the majority made the determination that the Individual Mandate was in no way a direct tax, and therefore fell under the broad category of an indirect tax if it were indeed a tax at all.²⁰⁰ As an indirect tax, the Individual Mandate fell under the Taxing Authority of Congress without further Constitutional limitation.²⁰¹ The Taxing Authority, as opposed to the Commerce Authority, proved key to the survival of the Act due precisely to its breadth and scope.²⁰² In the Court's decision, both the broad nature of the Taxing Authority and the restriction in scope to monetary duties and penalties were key arguments in favor of the Individual Mandate.²⁰³

D. *The Individual Mandate*

Chief Justice Roberts authored the majority opinion discussing the Individual Mandate under Congressional Taxing and Spending Power.²⁰⁴ He first articulated several reasons as to why the Individual Mandate may be construed as a tax,²⁰⁵ and then proceeded to explain why this was an acceptable use of Congressional authority.²⁰⁶ In defining the Individual Mandate as a tax, the majority notes that it has the qualities of a tax: it is paid to the IRS, along with annual taxes, and thereby produces Government revenue.²⁰⁷ The Court distinguished the tax from an effective punishment or penalty based on precedent: it noted that the shared

194. *See id.* at 2598.

195. *Id.* at 2598 (citing *Springer v. United States*, 102 U.S. 586, 596–98 (1881)).

196. *Id.* at 2598 (citing *Hylton v. United States*, 3 Dall. 171, 174 (1796) (opinion of Chase, J.)).

197. *Id.* (citing *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618 (1895)).

198. *Id.* (citing *Eisner v. Macomber*, 252 U.S. 189, 218–219 (1920)).

199. *See id.* (stating that Article I, § 9, clause 4 of the Constitution “means that any ‘direct Tax’ must be apportioned so that each State pays in proportion to its population”).

200. *See id.* at 2599.

201. *See id.* at 2600.

202. *See id.* (stating that “the breadth of Congress's power to tax is greater than its power to regulate commerce,” and “[b]ecause the Constitution permits such a tax,” it is not [the Court's] role to forbid it, or to pass upon its wisdom or fairness.”).

203. *Id.*

204. *Id.* at 2577.

205. *Id.* at 2594–97.

206. *Id.* at 2597–600.

207. *See id.* at 2594.

responsibility payment was a tenable, perhaps more cost-effective alternative to purchasing insurance; that there was no scienter requirement (requiring a knowing violation of the law); and that it was collected as a normal tax by the IRS.²⁰⁸ Finally, the opinion indicated that taxes that influence behavior are acceptable, so long as they are not punishments for certain acts.²⁰⁹ Here, there are no negative legal consequences for failing to maintain health insurance, and payment fulfills all of an individual's obligations under the law.²¹⁰

The Court was not swayed by the fact that Congress did not directly label the payment as a tax, arguing that the payment was defined by its nature rather than by labels.²¹¹ Further, the Court held that any determinations made for the purposes of the Anti-Injunction Act were, conversely, based solely on Congressional labels rather than nature, and thus were inapplicable here.²¹² This neatly dismissed the contradiction of labeling the Individual Mandate as other than a tax for purposes of the Anti-Injunction Act.²¹³ Finally, the Court determined that the tax was acceptable Constitutionally as an indirect tax.²¹⁴

The Court attempted to assuage any doubts similar to those raised in regard to the Commerce Clause discussion. First, it noted that the Constitution does not guarantee that inactivity will result in a lack of taxation.²¹⁵ Second, it was held that this particular usage was not overwhelmingly punitive and that the payment may be defined under the narrowest definition of an acceptable tax.²¹⁶ Third, the majority stated that Congressional taxing power was more limited than its regulatory power, as the power to tax was only a power to collect funds, not a power to compel or punish beyond forced payment.²¹⁷ For these reasons, the Court held that the Individual Mandate was Constitutionally acceptable, and that therefore the Court had no authority to "pass on its wisdom or fairness."²¹⁸

E. The Medicaid Expansion

The Chief Justice also authored an opinion regarding the Medicaid Expansion, in which Justices Breyer and Kagan joined.²¹⁹ Justice Ginsburg also

208. *Id.* at 2595–96.

209. *See id.* at 2596.

210. *Id.* at 2596–97.

211. *See id.* at 2598.

212. *See id.* at 2594.

213. *See id.*

214. *See id.* at 2600.

215. *Id.* at 2599.

216. *See id.* at 2599–600.

217. *Id.* at 2600.

218. *Id.*

219. *See id.* at 2601–09 (opining that the Medicaid expansion violates the Constitution because it threatens states to accept the expansion program or lose funds for their existing Medicaid program).

filed an opinion, joined by Justice Sotomayor, concurring in that judgment but concurring and dissenting in part.²²⁰ The Chief Justice's opinion scrutinized the Medicaid Expansion as a product of the Congressional spending authority under the Spending Clause.²²¹ He noted that the Court has previously recognized limits on that authority, which he cited as being similar to a contractual authority.²²² Referencing the merits of federalism and state sovereignty, the Chief Justice stressed the need for knowing voluntariness when states contract with the federal government for funding provided by Spending Clause legislation.²²³ He emphasized that undue influence in such legislation undermines state sovereignty and the federal system of government.²²⁴ He found the Act to be an unduly coercive "gun to the head" of states, which intruded on state autonomy by threatening the loss of substantial portions of state budgets if they failed to comply with legislation that Congress could not enact directly under its enumerated powers.²²⁵

Justice Ginsburg argued that the Medicaid Expansion in its entirety was within Congress's authority under the Spending Clause.²²⁶ She noted that Medicaid has been expanded a number of times over the years, and thus that the recent expansion was not, as the Chief Justice argued, unforeseeable.²²⁷ She also found it relevant that Congress was not required to provide funding under its spending power, and that it was empowered to do so in pursuit of the general welfare as it sees fit.²²⁸ A majority of the Court felt that states' reliance on Medicaid prohibited Congress from altering the nature of the legislation too drastically based on a contract theory.²²⁹ Justice Ginsburg, however, felt that states had no right to anticipated funds, and that Congress had an unadulterated right to alter the preconditions for receipt of those funds at any point through legal legislation.²³⁰ Although she disagreed with the Chief Justice's opinion as to the Medicaid Expansion's undue influence, Justice Ginsburg joined in his judgment because he voted only to strike down the mandatory aspect of the Medicaid Expansion rather than the whole Act.²³¹

220. *See id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

221. *See id.* at 2601–09 (majority opinion).

222. *See id.* at 2602.

223. *See id.*

224. *See id.*

225. *Id.* at 2604.

226. *Id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

227. *See id.* at 2630.

228. *See id.* at 2633, 2641.

229. *See id.* at 2641.

230. *See id.* at 2633, 2641.

231. *See id.* at 2641–42.

F. The Dissent

Justice Scalia and Justices Kennedy, Thomas, and Alito joined in a joint dissent.²³² The dissent argued that the Individual Mandate (i) exceeded Congressional authority under the Commerce Clause,²³³ (ii) was a penalty rather than a tax and thus that consideration under the taxing power was irrelevant,²³⁴ and (iii) that the same arguments permitted review under the Anti-Injunction Act.²³⁵ The dissenters further concluded that the Medicaid Expansion was impermissibly coercive under the Spending Power,²³⁶ that these components were so critical to the Act as a whole that they could not be severed,²³⁷ and that the Act itself must be deemed unconstitutional on the whole.²³⁸ Finally, they noted that the majority's construction of the Act so as to be constitutionally permissible exceeded the boundaries of judicial authority.²³⁹

In regard to the taxing power, the joint dissenters believed that interpretation under this authority was improper because the language of the Individual Mandate clearly indicated that it was a mandate rather than a tax.²⁴⁰ They relied on precedent to determine that it was a mandate with an associated collectible penalty rather than a tax, as well as the wording of the statute (“the individual *shall* ensure”).²⁴¹ They further noted that the statute differentiated between those exempt from the penalty and those exempt from the Individual Mandate itself.²⁴² They felt it was error to construe what Congress actually did do, create a mandate with an associated penalty, as something that it might have permissibly done—create a healthcare tax.²⁴³ They also indicated that penalties are not associated with things that are lawful or correct, that is, by penalizing an act through statute the act is made unlawful.²⁴⁴ As such, the dissenters concluded that the Individual Mandate

232. *Id.* at 2642 (Scalia, J., dissenting).

233. *See id.* at 2648–50.

234. *See id.* at 2651–55.

235. *Id.* at 2656.

236. *Id.* at 2666.

237. *See id.* at 2671–75 (arguing that the Individual Mandate and Medicaid expansion are not severable from the Act's major provisions, which include insurance regulations and taxes, reductions in reimbursements to hospitals and other reductions in Medicare expenditures, health insurance exchanges and their federal subsidies, and the employer-responsibility assessment).

238. *Id.* at 2677.

239. *See id.* at 2676 (describing the Court's interpretation of the Act as “judicial overreaching.”).

240. *See id.* at 2655 (“[T]o say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it.”).

241. *See id.* at 2652–53 (citing *Powhatan Steamboat Co. v. Appomattox R. Co.*). 26 U.S.C. § 5000A(a) (Supp. V 2012).

242. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2653.

243. *Id.* at 2651, 2655.

244. *See id.* at 2652 (citing *Powhatan Steamboat Co. v. Appomattox R. Co.*, 65 S. Ct. 247, 252 (1861)).

was necessarily not a tax, and therefore could not fall under the taxing power.²⁴⁵ Although they noted the Court's obligation to construe statute as constitutional when possible, they drew the line on such construction at what seemed to him to be blatant reinterpretation.²⁴⁶

Finally, the dissent briefly indicated that for the same reasons the Individual Mandate was not a tax for purposes of the taxing power, namely plain language and precedential tax-penalty distinctions, it was not a tax for purposes of the Anti-Injunction Act.²⁴⁷ They indicated that the majority construction that used the same evidence to declare the Individual Mandate both a tax for the purposes of the Constitution but not a tax in regard to the Anti-Injunction Act was erroneous "verbal wizardry."²⁴⁸

The issue of universal healthcare itself became particularly relevant and controversial in the 2012 election cycle,²⁴⁹ and in spite of the President's re-election many Republicans continue to oppose the Act as a matter of policy and political doctrine.²⁵⁰ There was substantial expectation that the Court would strike down the case in its entirety, and its failure to do so was regarded by some as a failure to properly comport itself in the "political" process.²⁵¹ The Chief Justice especially has received a great deal of negative attention for his role in deciding the case.²⁵² Further, there is substantial dissatisfaction with the Court as a whole for a decision that many feel neglects their proper role as the ultimate decision-making body.²⁵³ However, the majority clearly states the Court's opinion that, should legislation be Constitutional, the Court ought not properly interfere.²⁵⁴ The majority stated that the Court was not meant to stand as a bulwark between the people and the fruits of their political decisions, good or bad.²⁵⁵

245. *Id.* at 2655.

246. *See id.* 132 S. Ct. at 2655.

247. *See* 2655–56.

248. *Id.* at 2656.

249. *See* Kate Pickert, *What Obama's Re-election Means for Health Care*, TIME.COM (Nov. 9, 2012, 7:19 AM), <http://www.cnn.com/2012/11/09/health/obama-reelection-healthcare-time/> (explaining how the results of the 2012 election would impact the health care system, as Mitt Romney vowed to stop the implementation and Obama vowed to have full implementation by 2014).

250. *See* Anne-Laure Beaussier, *The Patient Protection and Affordable Care Act: The Victory of Unorthodox Lawmaking*, 37 J. HEALTH POL. POL'Y & L. 741, 747 (2012).

251. *See* Dan Eggen, *Roberts's Health-Care Decision Stuns Many But Is In Line With His Outlook*, WASH. POST (June 28, 2012), http://www.washingtonpost.com/politics/robertss-health-care-decision-stuns-many-but-in-line-with-his-outlook/2012/06/28/gJQAFdv19V_story.html ("The decision stunned legal observers on both sides . . .").

252. *See id.* ("Roberts [was] the focus of heated invective from conservative activists and some Republican members of Congress, who derided him as a 'traitor.'").

253. *Id.*

254. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012).

255. *Id.* at 2579.

IV. IMPLICATIONS OF THE SUPREME COURT'S DECISION WITH RESPECT TO THE ACT'S IMPLEMENTATION

After the Court's decision, there is no question that the Act was impacted. The question in relation to the Individual Mandate is precisely how.²⁵⁶ It is arguable that there now essentially is no legal mandate, and possible that the Act's goal of increased insurance participation will now not be met. If so, there may be further healthcare legislation under the taxing power or an unexpected response by HHS. The public perception of the Court's decision is also a key component.

A. *Is There Really Still a Legal Individual Mandate Requiring the Purchase of Health Insurance?*

In reviewing the shared responsibility payment penalty, the Supreme Court noted that for most individuals the amount due under the penalty will be significantly less than the price of acquiring health insurance coverage since the penalty was capped.²⁵⁷ As a result, the Court believed an individual could make the "reasonable" financial decision to pay the penalty instead of purchasing health insurance.²⁵⁸ The Court did not believe the "tax," as it labeled the penalty, restricted the lawful choice of an individual on whether to partake or forgo in the activity subject to it.²⁵⁹ The Court's ultimate reading of the Individual Mandate was that it was only imposing a tax on individuals without health insurance and was reasonable under the taxing power.²⁶⁰ Basically, in the Court's eyes, those individuals subject to the Individual Mandate have two choices: (1) buy health insurance and pay lower taxes, or (2) not buy health insurance and pay higher taxes.²⁶¹

There are some who now argue that the Court's taxing power ruling essentially removes the "mandate" from the Act's Individual Mandate requirement in that the provisions requiring minimum coverage no longer exist as a direct legal command to individuals to purchase health insurance.²⁶² This would be based on the view that the legal command compelling individuals to buy health insurance

256. See, e.g., Martha Minow, *Affordable Convergence: "Reasonable Interpretation" and the Affordable Care Act*, 126 HARV. L. REV. 117, 118–19 (2012) (arguing that the fate of the Affordable Care Act after *Nat'l Fed'n of Indep. Bus. v. Sebelius* was a factor of which opinion controlled, and that the Chief Justice's commanding interpretation upheld "most of the law").

257. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2595–96.

258. *Id.* at 2596.

259. See *id.* (describing a penalty as a punishment and a tax as a means of influencing decisions, but not actually mandating one way or the other by imposing punitive sanctions).

260. *Id.* at 2597.

261. See *id.* at 2593–94.

262. See, e.g., *The Tax Ramifications of the Supreme Court's Ruling on the Democrats' Health Care Law: Hearing Before the H. Ways and Means Comm.* 112th Cong. 7 (2012) (testimony of Steven G. Bradbury).

was lost on the defeat of the Court's Commerce Clause holding.²⁶³ Such commentators point to the Court's decision as reading the mandate language out of the statute.²⁶⁴ Their argument basically states that instead of declaring that individuals "shall" maintain health insurance coverage, the Act is now rewritten that individuals "should try to" maintain health insurance coverage.²⁶⁵ These commentators claim that what is left of the Individual Mandate is solely a tax assessment—if you go without health insurance, the Government will tax you more.²⁶⁶ In fact, this was the Government's reading of the statute under the taxing power clause as not an order, but a tax on those who do not purchase the product, in this case health insurance.²⁶⁷ The result is a tax on inaction by an individual.²⁶⁸ The importance of this classification is discussed later in Part V.

One may think that the Government, or specifically the IRS, as the designated enforcer of the Individual Mandate provisions, may take some issue with those that believe the Individual Mandate has been gutted. The requirement that an individual "shall" ensure that he or she and their dependents have minimum essential coverage is contained in the Code.²⁶⁹ The term "shall" in a traditional legal definition is mandatory in nature and means an obligation or direction to do something.²⁷⁰ The IRS generally views the term "shall" when used in the Code as also meaning "must."²⁷¹ However, a closer review reveals that, in certain circumstances, particularly with respect to individuals, the use of the term "shall" in a statute, such as the Code, can be interpreted to mean "may."²⁷² Courts have noted that in cases where the true intent of a statutory provision is required to be interpreted, the use of the term "shall" can be viewed as permissive in the sense of "may."²⁷³ This would provide some additional support for the argument of a weakened Individual Mandate if the Court has really set the bar with a "may" or "should" standard to individuals to obtain health insurance. The IRS and HHS may also have to now

263. *See id.* at 3–4.

264. *See, e.g., id.* at 4 (arguing that the Court's interpretation of the statute renders the Individual Mandate without any "substantive meaning separate from the tax penalty").

265. *Id.* at 7.

266. *See, e.g., id.*

267. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593–94 (2012).

268. *See id.* at 2590.

269. *See* 26 U.S.C. § 5000A(a) (Supp. V 2012).

270. *See* BLACK'S LAW DICTIONARY 1499 (9th ed. 2009) (defining "shall" as "hav[ing] a duty to" in a "mandatory sense").

271. *See* Gertrude Block, *Language for Lawyers*, FED. LAW. 62, 62 (Oct. 2011), available at <http://www.fedbar.org/Federal-Lawyer-Magazine/2011/October/Departments/Language-for-Lawyers.aspx>.

272. *Id.*

273. *See* *Cairo & F. R. Co. v. Hecht*, 95 U.S. 168, 170 (1877) ("As against the Government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest."); *see also* *Nw. Bell Tel. Co. v. Wentz*, 103 N.W.2d 245, 254 (N.D. 1960) (noting that when the word "shall" is "used in constitutions and statutes," it is read as mandatory, "but where it is necessary to give effect to the intent the word will be construed as 'may'").

interpret the Individual Mandate requirement as merely a policy of encouragement of behavior and a trigger of only a different tax rate for individuals depending on how they behave. Broad authority was given to such agencies for issuing regulatory guidance under the Act²⁷⁴ and this interpretation may impact the type of guidance.

More precisely, perhaps the result is that it is not unlawful now to not buy health insurance, but instead is just a “suggestion” for individuals that they can lawfully choose to ignore. It is only unlawful for an individual to not buy health insurance and not pay the resulting tax increase.²⁷⁵ As a consequence, there is justification to the claim that the Individual Mandate as a requirement no longer exists since the Individual Mandate is now limited by its classification as a “tax” by the Court. It does not require individuals to purchase anything, only suggests what individuals should do if they don’t want to pay a higher tax. It may be a fine line, however, to say that the Individual Mandate has no component that compels. One could argue that the weakened Individual Mandate may actually now “compel” more individuals into greater inaction with respect to health insurance after making a reasonable financial decision and choice on the matter to not obtain coverage. Although the Individual Mandate is predicted to motivate the largest portion of the population to purchase healthcare, approximately thirty million individuals will likely remain uninsured regardless of the changes to the Act (such as the Medicaid Expansion and the Employer Mandate).²⁷⁶ A portion of these individuals will certainly choose to remain uninsured voluntarily.

*B. Implementation: Where the Act Stands
Two Years After the Court’s Decision*

Two years after the Supreme Court’s decision, many parts of the Act still remain uncertain. Many employers and individuals waited to see the outcome of the Supreme Court’s decision before taking action in anticipation of the Act.²⁷⁷ Many of those same employers and individuals then waited for the outcome of the

274. See CURTIS W. COPELAND, REGULATIONS PURSUANT TO THE PATIENT PROTECTION AFFORDABLE CARE ACT (P.L. 111-148), CONG. RESEARCH SERV. (Apr. 13, 2010) (noting that Congress has given regulatory agencies much discretion because the heads of those agencies have the broad authority to “prescribe such regulations as may be necessary”).

275. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2596 (2012) (noting that the Individual Mandate does not attach negative legal consequences for not purchasing health insurance beyond the required payment to the IRS, which is not a “punitive sanction”).

276. See UPDATED ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT, CONG. BUDGET OFFICE, 3 (Mar. 2012) [hereinafter UPDATED ESTIMATES FOR THE INSURANCE COVERAGE], available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/03-13-Coverage%20Estimates.pdf> (estimating around 26 to 27 million nonelderly residents will remain uninsured after 2016).

277. See, e.g., *NFIB v. Kathleen Sebelius and its Impact on Employers: Healthcare Reform Revisited*, NEW ENGLAND COUNCIL (2012), available at <http://newenglandcouncil.com/assets/HC-Update-Impact-of-ACA-ruling-on-Employers-07-05-12.pdf>.

2012 elections.²⁷⁸ Some have continued to wait for guidance as to how to proceed, but because the Act is such a massive undertaking the federal government has been slow to develop regulations needed for implementation.²⁷⁹ This has caused greater uncertainty, leaving employers unprepared and in part necessitating the delay in the Employer Mandate.²⁸⁰ While some states prepare to implement the Medicaid Expansion voluntarily, others have chosen different routes, and the impact on the healthcare market is notable.²⁸¹ As the IRS prepares to implement the first scaled tax penalty for the 2014 tax year, recent studies estimate that more and more people will likely remain without health insurance after the Act's full implementation.²⁸² Although numbers are in flux, the loss of almost half of the Act's originally anticipated patient population has caused volatility in the healthcare market and has in some cases paradoxically caused insurance prices to increase dramatically.²⁸³ Additionally, economists estimate that the classification of the Individual Mandate as a tax, in combination with the rate increases due partially to the voluntary nature of the Medicaid Expansion and the resultant decrease in the insurance population, is unlikely to result in increased insurance enrollment.²⁸⁴

278. See Cancelosi, *supra* note 4, at 569–70 (discussing the uncertainty faced by employers during the 2012 elections).

279. See, e.g., Mike Dorning & Alex Wayne, *Health-Law Employer Mandate Delayed by U.S. Until 2015*, BLOOMBERG (July 3, 2013, 7:51 AM), <http://www.bloomberg.com/news/2013-07-02/health-law-employer-mandate-said-to-be-delayed-to-2015.html> (discussing the Obama administration's decision to delay implementation of the Employer Mandate until reporting requirements and regulations are finalized).

280. See *id.* (quoting Randy Johnson, Senior Vice President at the U.S. Chamber of Commerce) (“[E]mployers need more time and clarification of the rules of the road before implementing the employer mandate.”).

281. See KATIE KEITH & KEVIN W. LUCIA, THE COMMONWEALTH FUND, IMPLEMENTING THE AFFORDABLE CARE ACT: THE STATE OF THE STATES 14 (2014), *available at* <http://www.commonwealthfund.org/Publications/Fund-Reports/2014/Jan/Implementing-the-Affordable-Care-Act.aspx> (finding, in a state-by-state analysis, that more than half the states will expand their Medicaid programs, and about eighteen states will not pass new laws or regulations on insurance market reforms under the ACA).

282. See ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION, *supra* note 92, at 3 (citing estimates that predict more people will be uninsured as an effect of the ACA).

283. See, e.g., Avik Roy, *How Obamacare Dramatically Increases The Cost of Insurance for Young Workers*, FORBES (Mar. 22, 2012, 1:32 PM) (highlighting that in three states, premiums will actually increase for individuals as a result of the ACA).

284. See Benjamin D. Sommers & Arnold M. Epstein, *Medicaid Expansion – The Soft Underbelly of Health Care Reform?*, NEW ENG. J. MED. 2085, 2085 (2010) (noting that Medicaid expansion and increased eligibility for health insurance “does not always translate into actual enrollment”); see also CONNOR RYAN & CHRIS HOLT, TO BUY OR NOT TO BUY: UNINSURED YOUNG ADULTS AND THE PERVERSE ECONOMIC INCENTIVES OF THE AFFORDABLE CARE ACT, AMERICAN ACTION FORUM (Jan. 22, 2014), *available at* http://americanactionforum.org/uploads/files/research/To_Buy_or_Not_to_Buy_-_FINAL.pdf (arguing that young people are “financially incentivized to forego health insurance”).

C. *Possible Negative Impact on Goals and Objectives of the Act's Individual Mandate*

The Individual Mandate's goal of adding more people into the insurance market, when accomplished, positively impacts the premium levels and stability of the non-group and small group insurance markets.²⁸⁵ Millions more people added to the insurance markets could bring market changes benefiting the consumer.²⁸⁶ If these people for some reason choose not to join the market by not complying with the Individual Mandate, there will be a direct consequence to the markets and a corresponding loss of potential beneficial changes. This is a threat particularly notable in regard to young individuals who may be more willing to dismiss the Individual Mandate requirement or any moral persuasion because of the Court's interpretation and other factors.²⁸⁷ It is not an easy task to predict how many of that group of uninsured will ultimately obtain health insurance, pay the penalty, or do nothing.

A variety of factors will impact who of this group of uninsured would choose to pay the penalty rather than obtain health insurance. These include (1) moral factors, (2) the lack of a legal command, (3) public response, (4) how the penalty is labeled, and (5) employer response.

1. *Moral Factors*

A variable that is present in any analysis of the goals and objectives of the Individual Mandate is the impact of any moral persuasion the Individual Mandate has on individuals to have health insurance in order to satisfy the Individual Mandate and not pay a penalty.²⁸⁸ In the tax compliance world, the model of moral persuasion assumes compliance is gained when the governmental or taxing agency appeals to the individual taxpayer's morale because the individual has a moral and social obligation to comply.²⁸⁹ It is likely that Congress had used the penalty provision in the Individual Mandate and even the word "penalty" to try and better

285. See LINDA BLUMBERG ET AL., *THE INDIVIDUAL MANDATE IN PERSPECTIVE*, URBAN INSTITUTE 2 (2012), available at <http://www.urban.org/UploadedPDF/412533-the-individual-mandate.pdf>.

286. See *id.*

287. See Grant Bosse, *Obamacare's Problems are More Than Just the Website*, CONCORD MONITOR (Oct. 27, 2013), <http://www.concordmonitor.com/home/9049657-95/grant-bosse-obamacares-problems-are-more-than-just-a-website> (noting that healthy young people did not purchase health insurance to the same degree as the general population prior to Obamacare, and may find it financially advantageous to pay the penalty rather than buy health insurance).

288. See Nicholas Bagley & Jill R. Horwitz, *Why It's Called the Affordable Care Act*, 110 MICH. L. REV. FIRST IMPRESSIONS 1, 2 (2011), available at <http://www.michiganlawreview.org/assets/fi/110/bagleyhorwitz.pdf> (arguing that the implementation of the Act reflects a national moral choice to provide more affordable and available health insurance).

289. See Barak Ariel, *Deterrence and Moral Persuasion Effects on Corporate Tax Compliance: Findings from a Randomized Controlled Trial*, 50 CRIMINOLOGY 27, 28 (2012).

achieve the objectives of the Act by causing uninsured individuals to procure health insurance.²⁹⁰ A morally persuasive underpinning was present in the Individual Mandate provision from its beginning. Assuming that the Supreme Court's "tax" classification and decision has weakened the Individual Mandate to a mere suggestion for individuals,²⁹¹ the impact of any moral persuasion may now be less significant and less likely to cause insurance purchases. It was not the goal of Congress to have a large group of individuals, after full implementation of the Act, continue to go without health insurance and pay more in taxes,²⁹² yet that may now be an indirect consequence of the Court's decision.

2. *Lack of Legal Command*

Some observers now conclude that because of the lack of a "legal command" to buy health insurance, as previously discussed, there is a concern that the Individual Mandate will not fulfill the function that it was intended to do.²⁹³ Without a direct legal mandate to buy health insurance or a perceived risk of being in violation of federal law as interpreted by the Supreme Court and conveyed to the public, the question is now whether this interpretation will cause more of an increase in the number of individuals electing to pay the tax instead of buying health insurance than was originally projected. The argument is premised on the theory that if it was a true legal mandate, individuals would perhaps tend to morally have a greater desire to comply with the Individual Mandate and purchase the required health insurance.²⁹⁴ Individuals previously projected to obtain health insurance because of the Individual Mandate's "requirement" and penalty features may not be so morally compelled with the Supreme Court's softer version of the Individual Mandate and its "tax" classification. Both before and after the Court's decision, the dollar cost for individuals of the tax penalty would be less than the dollar cost of actually purchasing individual health insurance.²⁹⁵ For many

290. See Edward White, *Supreme Court Exceeded Authority Rewriting the ACA*, JURIST (July 21, 2012, 10:07 AM), <http://jurist.org/hotline/2012/07/edward-white-aca-rewrite.php> (asserting that Congress intentionally used the word penalty because it was not trying to raise revenue through the mandate as a tax, but was rather trying to push individuals towards purchasing health care).

291. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2651 (2012) (Scalia, J., dissenting) (arguing that labeling the mandate as a "tax" instead of a "penalty" trivializes the Act).

292. See Dinsmore & Shohl, LLP, *supra* note 38 (listing the ACA's three main goals as decreasing cost of health care, improving quality of health care, and making health care more accessible).

293. See *The Tax Ramifications of the Supreme Court's Ruling on the Democrats' Health Care Law: Hearing Before the H. Ways and Means Comm.* 112th Cong. 8 (2012) (testimony of Steven G. Bradbury).

294. See *id.* at 9.

295. See *supra* text accompanying note 77 (noting that the total penalty cannot exceed the average national cost of a bronze plan offered through the exchange).

individuals cost may be a more (or perhaps the most) important factor now as they weigh the moral factor, if at all, on whether to obtain health insurance.

3. Public Response

The CBO, after the Supreme Court's decision was released, issued an update on their estimates regarding the impact of the Act's insurance provisions.²⁹⁶ Interestingly, the CBO did not substantially change their estimate of the impact of the Individual Mandate and penalty provision on individuals and their likelihood to acquire health insurance or pay the penalty.²⁹⁷ The percentages remained relatively the same.²⁹⁸ The CBO's analysis was based on a comparison with other types of taxes and penalties and general compliance by the public with those other provisions.²⁹⁹ Based on that information, the CBO did believe and still apparently believes that even after the Court's decision that individual behavior would be the same and that people would perceive the Individual Mandate as a "requirement" to purchase health insurance.³⁰⁰ It is apparently an embedded behavioral response of people of either fulfilling their "civic" duty or having a fear of an IRS penalty that creates this behavior. However, it is not elaborated upon any further by the CBO.³⁰¹ It is unclear whether either the "civic duty" motivation or the penalty motivation is likely to produce the CBO's expected results. Interestingly, the most recent estimates from the CBO show a changing behavioral response of less people tilting to paying the penalty: estimated revenue from penalty collections from 2016–2022 has decreased from \$55 billion in 2012³⁰² to \$32 billion in 2014.³⁰³

At the time the Individual Mandate was moving through the legislative phase, there were a wide variety of opinions on how the public would react to the

296. ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION, *supra* note 92, at 14.

297. *See id.* at 3, 14.

298. *See id.* at 14 (noting that after the Supreme Court upheld the constitutionality of the ACA's Individual Mandate, the CBO and JCT did not change their estimates on the mandate's effect on coverage); *see also id.* at 18 tbl.1, 19 tbl.2, 20 tbl.3 (estimating the impact of the Supreme Court's decision on insurance coverage).

299. *See* ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION, *supra* note 92, at 14 (noting CBO and JCT's earlier approximations of the mandate's impact on people's decisions to obtain insurance were based on tax compliance literature and assessment of the strength of incentives, financial considerations, and nonmonetary considerations); Auerbach et. al., *supra* note 83, at 10–13, 16–20, 24–25 (assessing the impact of the Individual Mandate on coverage by examining other federal and state mandates and tax compliance generally).

300. *See* ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION, *supra* note 92, at 3.

301. *See id.* at 3.

302. *See* PAYMENTS OF PENALTIES FOR BEING UNINSURED UNDER THE AFFORDABLE CARE ACT, *supra* note 84, at 1.

303. *See* INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT, *supra* note 149.

Individual Mandate, ranging from the Individual Mandate strongly encouraging more people to buy health insurance to actually causing people to forgo buying insurance in favor of paying the penalty because the cost of the penalty was less than the insurance cost.³⁰⁴ Many studies of mandates on citizens look to three disciplines in estimating the impact a mandate has on individual decisions, the first being health economics and the other two being tax compliance and behavioral economics.³⁰⁵ The CBO had concluded, based on this type of analysis, that the Individual Mandate would indeed increase insurance coverage among the population.³⁰⁶ The CBO reasoned that although paying the penalty may, in direct dollars, cost less than the insurance premium, people who do buy insurance receive a benefit or return on their investment in the form of health insurance which the penalty does not provide.³⁰⁷ In the process of weighing which choice provides a better outcome or value for individuals, the CBO factored in economics and determined that people tend to respond more affirmatively than negatively because of the lower cost of compliance combined with benefit.³⁰⁸ In addition, the decision will likely be influenced by several intangible factors reviewed by the CBO, such as social norms and moral behavior.³⁰⁹

4. *The Label Analysis*

After the Court's decision, the Individual Mandate still seems to remain unpopular among certain groups regardless of whether the shared responsibility payment is labeled a "penalty" or "tax." One of the more interesting surveys that came out after the Court's decision was a poll done by the Kaiser Family Foundation on the number of people expected to pay the shared responsibility payment penalty when it is defined as a "tax" as opposed to a "fine."³¹⁰ When asked if they expected to have to pay a "fine" when the Individual Mandate takes effect, 12% expected to pay the fine while the rest would presumably comply with the Individual Mandate through current or new insurance coverage.³¹¹ When a different group of individuals were instead asked if they expected to have to pay a "tax" when the Individual Mandate takes effect, 26% expected to pay the tax with

304. See Auerbach et al., *supra* note 83, at 1–2.

305. See *id.* at 2 (stating that in the absence of empirical evidence, research from health economics, tax compliance, and behavioral economics may provide perspective on the consequence of the Individual Mandate).

306. *Id.* at 25.

307. *Id.* at 13.

308. See *id.* at 25.

309. See *id.*

310. KAISER FAMILY FOUND., KAISER HEALTH TRACKING POLL: PUBLIC OPINION ON HEALTH CARE ISSUES 6 (2012), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8339-f.pdf>.

311. *Id.*

the remainder presumably having or planning on acquiring health insurance.³¹² Classifying the shared responsibility payment as a “tax” rather than a “fine” apparently caused more than twice as many people to respond that they would pay it and forgo obtaining health insurance coverage.³¹³

What may be missing from the label analysis, however, is the moral factor regarding whether individuals may be motivated by doing what is right.³¹⁴ If the message is conveyed to individuals in a manner that encourages moral action, it could tip the scale back to compliance with the Individual Mandate. The optics, however, could easily suggest that as a result of the Court’s classification of the penalty as a “tax” and the way the Individual Mandate is conveyed to the public in the next few years, there could be an even greater number of people putting a lower emphasis on the Individual Mandate’s implicit requirement and not acquiring health insurance. Some in that group would opt to pay the tax penalty, but others could ignore both the Individual Mandate requirement and the tax penalty to create an even worse scenario: individuals that will not comply or pay the penalty for failure.

5. *Employer Response*

Another interesting variable is how many employers will respond to the Act’s insurance coverage provisions—specifically, what weight will employers give to the moral desire of employees to have health insurance to satisfy the Individual Mandate? Studies suggest that as employers place decreased weight on an employee’s desire for health insurance under the Individual Mandate, the number of people whose employers are projected to stop offering health insurance coverage in response to the Act increases.³¹⁵ By increasing the weight that employers place on an employee’s desire for health insurance, it “decreases the number of people whose employers are projected to stop offering coverage” in response to the Act.³¹⁶ The CBO had earlier projected that the Individual Mandate with its penalty provision would lead to more employees seeking health insurance coverage.³¹⁷ As a result, there would be a greater demand for health insurance and an increased incentive for employers to offer health insurance to attract and retain employees.³¹⁸

312. *Id.*

313. *See id.*

314. *See, e.g.,* Janet Dolgin & Katherine Dietrich, *Social And Legal Debate About The Affordable Care Act*, 80 UMKC L. REV. 45, 58–59 (2011) (suggesting that, “a far-reaching competition for ideological victory lies at the center of the health care reform effort and the counter-effort to repeal the Affordable Care Act”).

315. *See* CBO AND JCT’S ESTIMATES OF THE EFFECTS OF THE AFFORDABLE CARE ACT ON THE NUMBER OF PEOPLE OBTAINING EMPLOYMENT-BASED HEALTH INSURANCE, *supra* note 44, at 17.

316. *Id.* at 17–18.

317. *See id.* at 7.

318. *See id.* at 7.

The taxing power decision of the Court and the optics of a “tax” as opposed to a penalty fine may distort that outcome. Will employers now view the Individual Mandate as carrying less of a “stick” in regard to its potential consequences for individuals? If so, will that minimize the weight those employers would otherwise place on the moral desire of their employees and potential employees to have health insurance? As a result, a consequence of the Court’s decision may be that less employers offer health insurance coverage, and thus that their employees must either go into market themselves or pay the tax.

D. Could Further Legislation be Possible Under the Taxing Power if the Goal of Having More Insureds Under the Act is Not Met?

The economic reality of the Court’s decision may be the opposite of what Congress intended if more individuals forgo buying health insurance than previously projected and a void is created. The shift of labels from a penalty to a “tax” by the Court’s decision could be a determinative factor in any increase in the number of people in each of several subgroups. Those subgroups include (i) individuals opting to pay the penalty because the tax owed will be less than the cost of health insurance coverage, (ii) individuals adopting a public view that the only consequence of not buying insurance is a little more tax owed, or (iii) individuals minimizing any moral obligation to buy health insurance.

Some have predicted that Congress or the Administration could, in the future, try to increase the dollar amount of the shared responsibility payment penalty to push individuals back from the non-compliant end of the spectrum and on to the health insurance purchaser side.³¹⁹ It is not known how high the amount of the tax penalty could go before crossing the line into a true penalty and punitive territory. The argument made by those concerned is that individuals could be “coerced” into the health insurance market due to higher tax cost consequences in the future.³²⁰ The fact that this is considered to be an available tool is interesting, although there is room for debate as to whether such legislation could pass Congress. Research does suggest that the size of the penalty is one factor that will increase the number of individuals that comply with the Individual Mandate and obtain coverage.³²¹

319. See, e.g., Thomas A. Lambert, *How the Supreme Court Doomed the ACA to Failure*, 35 REG. 32, 35 (2013) (suggesting that proponents of the Act in Congress likely planned on raising the Individual Mandate penalty once the law went into effect in order to increase compliance).

320. See Jeffrey H. Anderson, *Taking Aim at Obamacare’s Coercive Core*, THE WEEKLY STANDARD (Sept. 28, 2013), http://www.weeklystandard.com/blogs/taking-aim-obamacare-s-coercive-core_757288.html (arguing that an estimated 40% of the ACA enrollment may be attributable to coercion from the Individual Mandate).

321. See David Auerbach et. al., *supra* note 83, at 2–3 (explaining that research suggests that the success of mandates may be contingent on the size of the penalty relative to the cost of compliance); see also Sherry A. Glied et al., *Consider It Done? The Likely Efficacy Of Mandates For Health Insurance*, 26 HEALTH AFF. 1612, 1618 (2007) (noting that the effectiveness of obedience to mandates increases relative to the fine, but only up to a certain point).

Nevertheless, the Court was firm in its position that the extension of the penalizing features of a tax can cause it to become a mere penalty and that the “power to tax is not the power to destroy.”³²² The Court, however, did not believe that it was the appropriate time to further decide at what point the Individual Mandate tax crossed the line into a punitive penalty.³²³ It is hard to see that there is much room for any movement of the Individual Mandate penalty cost that would not run afoul of the Constitutional limitations raised by the Court.

The Court did not believe that the shared responsibility payment crossed the line to become an actual penalty and solely a tool to punish for several reasons.³²⁴ The “tax” characteristics of the shared responsibility payment penalty remain within the parameters of the Court’s practical definition of a tax.³²⁵ The process of the payment of the shared responsibility payment penalty via payment with one’s tax return, the calculation of the payment based on taxable income, dependents and filing status, and enforcement by the IRS demonstrated for the Court a payment that looks and acts like a “tax.”³²⁶ Labels of exactions are not fatal according to the Court, at least with respect to the exercise of Congress’s taxing power, and the Court was adamant that labels not control in this case.³²⁷ While Congress could attempt to motivate a shift from the uninsured pool to the insured pool by further increasing the amount of the penalty or increasing the IRS’s enforcement tools, such actions would clearly be problematic under the Court’s taxing power holding.

The CBO predicted that the IRS’s ability to require tax reporting from individuals and insurance companies in order to match up data of those with insurance coverage would result in a higher rate of compliance with the Individual Mandate than without such an enforcement tool.³²⁸ The use of such matching programs by the IRS in other tax areas tends to result in greater compliance.³²⁹ The IRS, by utilizing additional information reporting and matching programs to determine compliance along with the penalty, could increase the incentive for people to comply with an Individual Mandate. The broad regulatory authority

322. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012) (internal quotation marks omitted).

323. *See id.* (arguing that because the mandate is currently within the narrow limits of a tax, it is currently not necessary for the Court to decide at what point the mandate would be prohibited under the taxing power).

324. *See id.* at 2599–600.

325. *See id.* at 2600.

326. *See id.* at 2594.

327. *See id.* at 2597–98.

328. *See Auerbach et al., supra* note 83, at 18 (finding that the IRS’s enforcement of the ACA’s Individual Mandate would “yield higher rates of compliance” using information-reporting and data matching programs as compared to penalties alone).

329. *See id.* at 18 (noting higher tax compliance rates when the IRS uses third-party data matching systems).

given under the Act to the IRS³³⁰ may be an avenue for such action. Following the Court's decision, there has been some concern that Congress could avail itself of additional tax enforcement mechanisms, including criminal prosecution, tax audits, liens, etc., to create greater compliance with the Individual Mandate.³³¹ Studies suggest that increasing the likelihood that a penalty will be levied and collected via enforcement increases the incentive for individuals to comply with the law.³³² The IRS's general enforcement reputation is another factor that could increase compliance with the Individual Mandate.

The Court cautioned that the taxing power does not allow Congress the same degree of control over the particular individual subject to it.³³³ An individual who disobeys a regulation that is constitutional under the Commerce Clause may be subject to a full range of consequences, including criminal sanctions and loss of certain rights.³³⁴ Under the taxing power, an individual is required to pay money to the IRS as a consequence of not taking the designated action and, if the "tax" is properly paid, the Government cannot punish the individual any further.³³⁵ It is noteworthy that the Court also stated that "individuals do not have a lawful choice not to pay a tax due" and can in some cases "face prosecution for failing to do so."³³⁶ However, this is not true in the case of the shared responsibility payment penalty where criminal prosecution is not currently allowed under the Act for failure to pay.³³⁷ If further legislation was proposed to add tax enforcement mechanisms, including criminal prosecution, to create greater compliance with the Individual Mandate and to increase the number of insureds, this would likely invalidate the Individual Mandate under the taxing power.

330. *See id.* (noting that under the ACA, the IRS could combine penalties with matching programs to increase compliance); *The IRS and its 46 New Powers to Enforce ObamaCare*, GALEN INST. (June 5, 2013), <http://www.galen.org/2013/46-new-irs-powers-to-enforce-obamacare> (noting the unprecedented power granted to the IRS through forty six new powers under the ACA). *But see* Jordan M. Barry & Bryan T. Camp, *Is the Individual Mandate Really Mandatory?*, 135 TAX NOTES 1633, 1638 (2012) (noting that while the ACA authorizes the IRS to administer and collect the Individual Mandate broadly "in the same manner as an assessable penalty," the ACA significantly limits the tools the IRS can use to collect the Individual Mandate as compared to other taxes).

331. *IRS May Be Unable To Enforce The ACA's Individual Mandate*, ADVISORY BD. CO. (May 15, 2014), <http://www.advisory.com/daily-briefing/2013/10/31/irs-may-be-unable-to-enforce-the-aca-individual-mandate>; John DiMugno, *Navigating Health Care Reform: The Supreme Court's Ruling and the Choppy Waters Ahead*, 24 Cal. Ins. L. & Reg. Rep. 1 (2012).

332. *See* Auerbach et al., *supra* note 85, at 18.

333. *Nat'l. Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012).

334. *See id.* (noting that under the Commerce Clause, Congress can subject an individual to various sanctions, including criminal prosecution and deprivation of civil rights).

335. *See id.*

336. *Id.* at 2600 n.11.

337. *See id.* at 2597 (finding that neither the Act nor any other law creates an allowance for criminal prosecution for not buying health insurance).

E. Impact of Waivers Granted to Individuals in States that Refuse to Participate in the Expansion of Medicaid

As discussed, the number of newly insured predicted under the Act has become a slippery number as a result of the Court's decision.³³⁸ For example, many of these individuals will have income that falls below the filing thresholds.³³⁹ Others will be exempt because they would have to pay more than 8% of their income for health insurance.³⁴⁰ Finally, some of these individuals are likely to receive a hardship exemption from HHS.³⁴¹

The issuance of the hardship exemptions by HHS raises an interesting question as to whether a larger involvement of HHS with the Individual Mandate impacts the "tax" classification of the penalty that was addressed by the Court. In order for the Court to reach its taxing power position it looked to the agency that essentially was involved in the administration of the penalty (tax).³⁴² In this case the IRS was the sole agency viewed by the Court.³⁴³ If HHS takes on a bigger and more influential role with the Individual Mandate in deciding who is exempt and who is not exempt, it could result in the Individual Mandate provision becoming more regulatory or punitive and convert the tax back into a penalty classification.

F. Reaction to the Taxing Power Argument

The Court's conclusion in *National Federation* was poorly received by many, especially Republicans and legal conservatives.³⁴⁴ There was substantial expectation that the Court would strike down the case in its entirety, and its failure to do so was regarded by some as a failure to properly comport itself in the "political" process.³⁴⁵ The Chief Justice especially has received a great deal of

338. See *supra* Parts IV.B, IV.C.3. (discussing how many employers and individuals waited for the Court's decision before taking any action, and the CBO's analyses in predicting how the Court's decision would impact an individual's likelihood to acquire health insurance or pay the penalty, respectively).

339. See ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION, *supra* note 92, at 4, 16.

340. 26 U.S.C. § 5000A(e)(1)(A) (Supp. V 2012) (exempting individuals whose coverage for the month exceeds 8% of their household income for the taxable year).

341. See *id.* § 5000A(e)(5).

342. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2580 (discussing how the IRS will collect the payment through its means of taxation).

343. See *id.* (discussing how the IRS is the sole agency that collects the payment).

344. See Bill Mears & Tom Cohen, *Emotions High After Supreme Court Upholds Health Care Law*, CNN (June 28, 2012), <http://www.cnn.com/2012/06/28/politics/supreme-court-health-ruling/> (reporting that many Republicans criticized the Court's holding and vowed to repeal the Act).

345. See John S. Hoff, *Obamacare: Chief Justice Robert's Political Doge*, 18 INDEP. REV. 5, 5 (2013) (arguing that the Court's decision was one of several "rule-bending steps" taken to protect the ACA, and that the Court has stretched its boundaries and failed to adhere to the political process). See, e.g., Gregory P. Magarian, *Chief Justice Robert's Individual Mandate: The Lawless Medicine of NFIB v. Sebelius*, 108 NW. U. L. REV. 15, 15 (2013) (discussing how many in the legal world were shocked by the outcome of *National Federation*).

negative attention for his role in deciding the case.³⁴⁶ As a Justice who is popularly identified as a judicial conservative appointed by a conservative Republican president, there was a public expectation (if not hope within conservative circles) that he would be more inclined to strike down the case than uphold it.³⁴⁷ The issue of universal healthcare itself had become particularly relevant and controversial given it was an election year, and many Republicans opposed the Act as a matter of policy and political doctrine.³⁴⁸

Because of this controversy, it is surprising that the decision as a whole seems to be an exercise in legal moderation—that is, adherence to judicial restraint and avoidance. This is in keeping with the Chief Justice’s judicial philosophy, and might have been more foreseeable from him than a strong political stance.³⁴⁹ Nonetheless, many conservatives hold him personally accountable for failing to uphold a Constitutional interpretation more similar to their own.³⁵⁰ Further, there is substantial dissatisfaction with the Court as a whole for a decision that many feel neglects their proper role as the ultimate decision-making body.³⁵¹ However, the opinion clearly states the Court’s opinion that, should legislation be Constitutional, the Court ought not properly interfere.³⁵² The Chief Justice, for the majority, stated

346. See, e.g., Magarian, *supra* note 345, at 15 (discussing how Justice Robert’s leadership role in *National Federation* left Republicans “fuming”).

347. See *id.* (discussing how despite popular belief, Chief Justice John Roberts surprised conservatives and liberals by upholding the constitutionality of the ACA); see also Hoff, *supra* note 345, at 5 (discussing how Chief Justice Roberts “surprised practically everyone” by being the swing vote to uphold the constitutionality of the ACA).

348. See generally Ezra Klein, *Do Republicans Really Want Universal Health Care*, BLOOMBERG (June 27, 2012), <http://www.bloomberg.com/news/2012-06-27/do-republicans-really-want-universal-health-care-.html> (discussing that in post-ACA elections, voters would have to choose between one party that supported universal health care and one that did not).

349. See John Dean, *Why Chief Justice Roberts Dared Not Overturn President Obama’s Healthcare Plan*, JUSTIA (June 29, 2012), <http://verdict.justia.com/2012/06/29/why-chief-justice-roberts-dared-not-overturn-president-obamas-healthcare-plan> (arguing that although many were surprised with Chief Justice’s decision in *Nat’l Fed’n of Indep. Bus. v. Sebelius*, they should not have been because his decision was consistent with his philosophy); Stephen M. Feldman, *Chief Justice Roberts’s Marbury Moment: The Affordable Care Act Case* (NFIB v. Sebelius), 13 WYO. L. REV. 335, 348 (2013) (noting that in *National Federation*, Roberts “articulated conservative constitutional doctrine”, and urged the Court to decide the case without considering politics).

350. See Benjamin Hart, *John Roberts Criticism: Conservatives Continue to Attack Justice After Health Care Ruling*, HUFFINGTON POST (June 29, 2012), http://www.huffingtonpost.com/2012/06/29/john-roberts-criticism-continues_n_1637410.html (discussing the conservative backlash and criticisms of Chief Justice Roberts in the wake of his “surprise majority opinion”); *The Roberts Rule: The Chief Justice Rewrites ObamaCare in Order to Save It*, WALL ST. J. (July 2, 2012), <http://online.wsj.com/news/articles/SB10001424052702304058404577494400059173634> (blaming Chief Justice Roberts for his “infinitely elastic” and “dangerous interpretation” of the taxing power).

351. See, e.g., Magarian, *supra* 345, at 16 (arguing that Chief Justice Roberts’s legal analyses neglects the proper role of the Court and exemplifies a sense of lawlessness).

352. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012).

that the Court was not meant to stand as a bulwark between the people and the fruits of their political decisions, good or bad.³⁵³

V. WILL THE COURT'S DECISION OPEN UP THE GATES FOR THE FEDERAL GOVERNMENT TO INFLUENCE OTHER ACTIONS/INACTIONS WITH RESPECT TO HEALTHCARE UNDER CONGRESS'S TAXING POWER?

A. *Is There a New Expansion of the Taxing Power?*

One question raised since the Court's decision came out is whether there has been an expansion of Congress's taxing power.³⁵⁴ With its taxing power argument, the Government urged the Court that the Act's Individual Mandate should be read in a different manner.³⁵⁵ Instead of an order to do something (i.e., buy health insurance), the Individual Mandate should be interpreted as one that solely imposes a tax on individuals who do not buy health insurance or who "do nothing."³⁵⁶ A significant concern for the Court was the issue of whether Congress is permitted to impose a tax on individuals who abstain or do nothing.³⁵⁷ It was clear that the Court in its Commerce Clause analysis and holding found it unconstitutional for Congress to regulate those who do not buy health insurance via a command to buy such health insurance.³⁵⁸ Unlike Congress's power to regulate commerce, however, Congress's taxing power is broad and the question for the Court was not whether Congress can tax but whether Congress exercised its taxing power properly.³⁵⁹ In a threefold response, the Court found that the Constitution directly or indirectly does not permit individuals to avoid taxes through inactivity and therefore the use of the taxing power was proper.³⁶⁰

The decision may not herald an expansion of the taxing power, but it certainly confirmed the use of it in situations of inaction by individuals. The Court noted that Congress's use of its taxing power to encourage buying something is not something new.³⁶¹ Influencing or promoting conduct with tax incentives is not uncommon—for example, buying a house with the mortgage interest deduction

353. *See id.*

354. *See* Barry Cushman, *NFIB v. Sebelius and the Transformation of the Taxing Power*, 89 NOTRE DAME L. REV. 133, 197 (2013) (arguing that Chief Justice Roberts's opinion leaves unclear the future of taxing power jurisprudence and the uncertainty of Congress's ability to use its taxing power).

355. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2593–94.

356. *See id.*

357. *See* Comments, *National Federation of Independent Business v. Sebelius: The Patient Protection and Affordable Care Act*, 126 HARV. L. REV. 72, 76–77 (2012).

358. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601 (2012).

359. *See id.* at 2599.

360. *Id.* at 2599–600.

361. *See id.* at 2599.

incentive.³⁶² To the Court, influencing the purchase of health insurance was no different.³⁶³ Raising revenue may be the main reason for taxes, but also influencing individual conduct may be another purpose (e.g., cigarette taxes to deter smoking).³⁶⁴ The Court specifically noted that the Act's ability to influence whether to buy health insurance does not invalidate it under the taxing power.³⁶⁵ Further, due to the Court's makeup and analysis of the historical uses of the taxing power by Congress, it has been proposed that, "history and pragmatism suggest that this case will have a marginal jurisprudential impact."³⁶⁶ As such, using the taxing power to influence behavior does not appear to be an expansion of the taxing power by the Court.³⁶⁷

B. Other Areas to Improve the Nation's Health—A Tax on Individuals for Not Eating Their Broccoli?

In its simplistic form, if an individual does not maintain health insurance under the Individual Mandate, the basic consequence is that he or she needs to make an additional payment to the IRS at tax time or, alternatively if the individual is due a refund from the IRS, have his or her income tax refund amount decreased by the IRS.³⁶⁸ The Government argued that the inaction of individuals not obtaining health insurance is a "condition" triggering a tax payment to the IRS, and, like many other "conditions," can be subject to a tax.³⁶⁹ The Supreme Court did not disagree.³⁷⁰ This raises the question as to what other areas could this "payment in lieu of" argument for inaction be utilized to improve the nation's health? It should be put into perspective the claim by some that Congress is now able to tax one for the failure to take action in whatever context.

There seems to be perhaps an understated view from the Court about when something is an unlawful activity. The CBO had predicted that a significant number of people will elect to pay a penalty to the IRS instead of paying for health insurance, a number which, as earlier discussed, could now be even higher as a

362. *See id.* (discussing how Congress has used tax incentives to promote purchasing homes and professional educations).

363. *See id.*

364. *See id.* at 2596.

365. *See id.*

366. Robert Pushaw & Grant Nelson, *The Likely Impact Of National Federation On Commerce Clause Jurisprudence*, 40 PEPP. L. REV. 975, 979–980 (2013).

367. *See* Mystica M. Alexander & Timothy Gagnon, *The Roberts Court: Using The Taxing Power To Shape Individual Behavior*, 23 U. FLA. J.L. & PUB. POL'Y 345, 346 (2012) (arguing that the Court's holding in *Nat'l Fed'n of Indep. Bus. v. Sebelius* was "not an indefensible stretch" of the taxing power as the Act was "simply another use by Congress of the taxing power as a stick to regulate individual behavior").

368. *See id.* at 361–363, 368 (discussing the requirements of the Individual Mandate as interpreted by the Supreme Court).

369. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2593–94.

370. *See id.* at 2593–2594.

result of the Court's decision.³⁷¹ The Court believed that if such a large number of people failing to buy health insurance was acceptable to the Government, their inaction could hardly be considered unlawful, but instead is a payment in lieu of action.³⁷² The Court noted that the Act does not declare that failing to buy health insurance is unlawful.³⁷³ If an individual has instead paid the appropriate amount to the IRS, he or she has fully complied with the law.³⁷⁴ For the Court, penalties equate to punishment for something unlawful and this inaction of not buying health insurance and the resulting tax is not a penalty.³⁷⁵

Is there a legitimate choice between action and inaction in other health areas? The Court was clear that the Individual Mandate in effect is just a tax hike on certain taxpayers who do not have health insurance.³⁷⁶ Does it make going without an annual health examination just another thing the Government can tax? Where does Congress's constitutional power to tax end? The majority opinion addresses the usage of taxation to influence behavior and its long-standing historical precedent.³⁷⁷ So long as a tax is not unnecessarily punitive, or is such that there is no feasibly desirable option other than to pay, then taxes as incentives or as regulation are acceptable.³⁷⁸ Taxes have long been used to influence behavior such as smoking and drinking, or purchasing property.³⁷⁹ The tax on not acquiring health insurance is not substantially different.

The Court's decision in this case was so dependent on the limited nature of the statute, and the limited nature of the taxing power, that it is unlikely that future expansion in other areas of health care will follow. The Chief Justice heavily advocated a case-by-case analysis in his opinions, and here the specific facts were key in his decision. Had the penalty (tax) been too large or been enforceable in any other context (e.g., criminal or civil liability), then it would likely not have succeeded. The Court clearly noted that punitive actions masquerading as taxes would not be permissible.³⁸⁰ Further, the use of labels seems to be made insignificant by this case, thus lessening any possibility of avoiding political accountability. If the Court will construe what is labeled a penalty as both a tax and not a tax (for Anti-Injunction purposes) based on what it perceives the true

371. See ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION, *supra* note 92, at 3 (estimating an increase in the number of people uninsured predicted by the CBO in March 2012).

372. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566, 2597 (2012).

373. See *id.*

374. See *id.*

375. See *id.* at 2596–98.

376. See *id.* at 2594.

377. See *id.* at 2598–600.

378. See *id.* at 2596.

379. *Id.*

380. See *id.* at 2596 (clarifying that while the IRS has the power to tax normally, the IRS cannot use taxation as a “punitive sanction”).

nature of the statute to be, then any effort to abuse the taxing power is unlikely to be allowed solely on the basis of a label.

As Justice Scalia pointed out, Congress does have the authority to tax the failure to purchase broccoli.³⁸¹ But the dissent and the Chief Justice seem to agree that allowing Congress to tax a failure to purchase, even if it solved a national crisis, would impermissibly extend the bounds of Congressional authority.³⁸² Further, broccoli on the whole is relatively inexpensive. Any permissible tax would have to offer a real choice between owning broccoli and the alternative, as the majority interpreted the Individual Mandate to do, and thus as a tax would be negligible.

VI. CONCLUSION

The primary goal of the Individual Mandate is to increase the number of individuals in the United States having health insurance.³⁸³ When the Act was challenged in the courts, the Administration and other supporters of the Act believed that Congress had the power under the Commerce Clause to require or compel individuals to purchase health insurance.³⁸⁴ Five members of the Supreme Court disagreed with the Administration and found that Congress had no authority under the Commerce Clause to impose the Individual Mandate.³⁸⁵ The Individual Mandate was, nevertheless, upheld under Congress's taxing power authority, which was viewed by many in the public as a victory for health care reform.³⁸⁶ On closer examination, however, the outcome of the decision can perhaps be better characterized as creating an unintended obstacle to meeting the overall goals and objectives of the Act.³⁸⁷ The lack of a true mandate requiring the purchase of

381. See *id.* at 2650 (Scalia, J., dissenting).

382. See *id.* at 2589 (2012); see also *id.* at 2650 (2012) (Scalia, J., dissenting).

383. See 26 U.S.C. § 5000A(a) (Supp. V 2012) (requiring all applicable individuals to maintain minimum essential coverage each month, starting January 1, 2014). See Dinsmore & Shehi, LLP, *supra* note 38 (discussing the ACA's three fundamental goals of improving the quality of health care and making health care more affordable and accessible).

384. See *Experts Debate Congress' Authority Over Health Insurance*, NPR (June 9, 2011), <http://www.npr.org/2011/06/09/137080510/does-congress-have-the-power-to-mandate-health-insurance-enrollment> (discussing how President Obama believed that Congress had the power under the Commerce Clause to regulate the health care industry, and why Congress has the power to regulate health care).

385. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593, 2608 (2012).

386. See *id.*; Richard Wolf & David Jackson, *Supreme Court Upholds Obama Health Care Mandate*, USA TODAY (June 28, 2012, 4:12 PM), <http://usatoday30.usatoday.com/news/washington/judicial/story/2012-06-28/supreme-court-health-care-ruling/55888742/1> (quoting Yale law professor Akhil Reed Amar, who argued that the decision to uphold the Individual Mandate "save[d] the health care law").

387. See Brietta Clark, *Safeguarding Federalism by Saving Health Reform: Implications of National Federation of Independent Business v. Sebelius*, 47 LOY. L.A. L. REV. 541, 549 (2013) (questioning the long term impact of *National Federation* and whether its holding will further

health insurance, because of the Court's taxing power decision and the "tax" classification of the penalty, may likely result in the Individual Mandate not fulfilling the function it was intended to do.

In addition, the Court's decision that makes the Medicaid Expansion optional for states created another obstacle on top of the taxing power "tax" classification, as many states will not expand their Medicaid eligibility programs.³⁸⁸ This has resulted in projections of a larger number of low-income people without health insurance based on the Court's decision on the Medicaid Expansion.³⁸⁹ Other individuals will not carry insurance because of exemptions, or because now they believe a better choice is to pay the tax.³⁹⁰ Some may ignore both the Individual Mandate and the tax penalty if not persuaded by any moral obligation. So while the Court's decision may be viewed as a political victory, the decision may actually make it more difficult to achieve the Act's objective of increasing the number of insureds in America.

The Court's decision is unlikely to create any expansion of Congress' taxing power or open up a new avenue for the Administration or Congress to influence other activities with respect to health care under the taxing power.³⁹¹ However, there is still great uncertainty about the future of health care in America. There are still over a dozen lawsuits challenging the provisions of the Act requiring

limit the federal government's freedom to spend money in changing the health care market in the future).

388. See A GUIDE TO THE SUPREME COURT'S DECISION ON THE ACA'S MEDICAID EXPANSION, *supra* note 23, at 10 (noting that the Supreme Court's decision will leave it up to the choice of each state as to whether or not to expand Medicaid); Jon Perr, *Better Dead and Red: How the GOP Blocked Health Care for Red State Americans*, DAILY KOS (Sept. 29, 2013, 7:30 AM), <http://www.dailykos.com/story/2013/09/29/1241710/-Better-Dead-and-Red-How-the-GOP-blocked-health-care-for-red-state-Americans> (explaining that many Republican-led states refuse to expand Medicaid).

389. See THE COVERAGE GAP: UNINSURED POOR ADULTS IN STATES THAT DO NOT EXPAND MEDICAID, *supra* note 119 (finding that about five million poor uninsured adults in states that do not expand Medicaid will likely remain uninsured).

390. See Tami Luhby, *No Thanks, Obamacare. I'll Pay the Penalty*, CNN MONEY (Sept. 20, 2013, 9:55 AM), <http://money.cnn.com/2013/09/20/news/economy/obamacare-penalty/> (showcasing the different perspectives of citizens who refuse to get health insurance, choosing to pay the penalty instead); Rachael Bade & Brett Norman, *Obamacare: Who will ignore law's requirements?*, POLITICO (Oct. 13, 2013, 4:30 PM), <http://www.politico.com/story/2013/10/obamacare-mandate-some-americans-will-ignore-requirement-98236.html> (describing how many feel that it is cheaper to pay the penalty, but that what they do not realize is that the penalty will get more expensive each year); Joseph Antos & Michael R. Strain, *If You Don't Buy Insurance, Will You Really Pay the Tax?*, THE AMERICAN (July 17, 2012), <http://www.american.com/archive/2012/july/if-you-dont-buy-insurance-will-you-really-pay-the-tax> (stating that many may be exempt from buying health insurance, such as low income individuals exempt from filing taxes, illegal aliens, Native Americans, and prisoners).

391. See Sallie Sanford, *Unexpected Twists in the Affordable Care Act Decision*, JURIST (July 13, 2012), <http://jurist.org/forum/2012/07/sallie-sanford-scotus-aca.php> (questioning whether the Court's decision expands Congressional power, but acknowledging that typically taxes are used to encourage behaviors, and that the Court's decision may be a unique circumstance of the extension of Congressional ability to tax those who do not receive health care).

employers to pay for coverage of certain medical services.³⁹² Additionally, the President and Congress will be making significant decisions about reforming entitlement programs like Medicare and Medicaid, and reducing the federal deficit.³⁹³ It is possible that provisions of the Act will be amended as part of a grand compromise between our elected branches.

Furthermore, decisions regarding the expansion of Medicaid coverage and the creation of state insurance exchanges will be in the hands of various state officials, and this has added to the uncertainty.³⁹⁴ Health care policy has historically been negotiated and developed between traditional stakeholders: the carriers and the providers.³⁹⁵ Change, while tedious and incremental, was possible.³⁹⁶ Today, as a result of the requirements of the Act and the Court's decision, political forces now control the outcome of policy. These new political forces, such as state governors and legislatures, often take radically opposed and extreme views on policy, thus making compromise difficult.³⁹⁷ In Texas, for example, every traditional participant in the development of health care policy is in favor of Medicaid

392. See Jodi Jacobson, *Eighteen For-Profit Companies Fighting to Eliminate the Birth Control Benefit*, RH REALITY CHECK (Mar. 7, 2013, 5:35 PM), <http://rhrealitycheck.org/article/2013/03/07/the-18-for-profit-companies-fighting-to-eliminate-the-birth-control-benefit/> (reporting that eighteen companies have filed lawsuits to fight against the ACA's mandate that employers cover all forms of basic preventative care, which includes reproductive and sexual-health-care services).

393. See Mary Agnes Carey, *Five Ways The President's Budget Would Change Medicare*, KAISER HEALTH NEWS (Apr. 15, 2013), <http://www.kaiserhealthnews.org/stories/2013/april/15/medicare-and-obama-budget.aspx> (discussing President Obama's 2014 budget proposal, which includes reforms to Medicare and Medicaid); CONG. BUDGET OFFICE, AN ANALYSIS OF THE PRESIDENT'S 2014 BUDGET 1–3 (2013), http://www.cbo.gov/sites/default/files/cbofiles/attachments/44173-APB_0.pdf (analyzing the impact President Obama's 2014 budget proposal would have on the federal deficit).

394. See ADVISORY BD. CO., *Where Each State Stands on ACA's Medicaid Expansion* (June 14, 2013), <http://www.advisory.com/Daily-Briefing/2012/11/09/MedicaidMap> (stating that the choice of expanding Medicaid coverage will be up to each state's governor and state leaders); see also Robert E. Moffit & Edmund F. Haislmaier, *Obamacare's Insurance Exchanges: "Private Coverage" in Name Only*, 2846 BACKGROUNDERS 1, 3 (2013), <http://www.heritage.org/research/reports/2013/09/obamacares-insurance-exchanges-private-coverage-in-name-only> (explaining how state officials are expected to set up required insurance exchanges, but that only seventeen states and the District of Columbia plan to facilitate their own exchanges); David K. Jones et al., *Pascal's Wager: Health Insurance Exchanges, Obamacare, and the Republican Dilemma*, 39 J. HEALTH POL., POL'Y & L. 97, 131 (2014) (noting that future Republican electoral victories "could create more uncertainty over the future of exchanges and the ACA").

395. Randall Ellis et al., *Comparisons of Health Insurance Systems in Developed Countries* 15, in *ENCYCLOPEDIA OF HEALTH ECONOMICS* (Anthony Culver ed., forthcoming 2014), available at <https://www.bu.edu/law/faculty/scholarship/documents/EllisPaper.pdf>.

396. See Paul G. Ginsburg, *Competition in Health Care: Its Evolution Over The Past Decade*, 24 HEALTH AFF. 1512, 1514 (2005) (recognizing that there had been change in health care policy, particularly with hospital mergers, but that this trend proceeded slowly).

397. See Kyle Thomson, *State-Run Insurance Exchanges in Federal Healthcare Reform: A Case Study in Dysfunctional Federalism*, 38 AM. J.L. & MED. 548, 559–61 (2012).

expansion, as well as many local governments and the business community.³⁹⁸ However, the political leadership of a conservative governor and a Republican-controlled legislature have blocked any effort at Medicaid expansion.³⁹⁹ The decision by the Court to allow states to opt out of Medicaid expansion has allowed similar Republican-controlled state governors and legislatures in other states to undermine one of the fundamental components of the Act.⁴⁰⁰

The way forward will depend in part upon government policy and political outcomes both at the national and state level. House Republicans have voted numerous times to repeal the Act.⁴⁰¹ Now they have turned their sights to blocking measures that fund the Act.⁴⁰² This is a risky strategy with the potential for troublesome consequences, as evidenced by the government shutdown in 2013.⁴⁰³ Another problem with this strategy, if successful, is that the Act would continue to be the law, but without the funding necessary for the Executive Branch to implement and enforce it. Republicans have, in the past, criticized the President for selective enforcement of laws such as immigration.⁴⁰⁴ This strategy would, in essence, make Republicans responsible for a similar selective enforcement should the President become unable to implement and enforce due to funding. Furthermore, because the Act's key provisions, such as the Individual Mandate and the Employer Mandate, would still be good law, some companies and individuals

398. See Christopher Brauchli, *Perry and the Poor*, HUFFINGTON POST (June 7, 2013, 3:50 PM), http://www.huffingtonpost.com/christopher-brauchli/perry-and-the-poor_b_3398827.html (describing how a Texas U.S. Representative and ten others from the Texas Congressional delegation urged the Texas Governor Perry to expand Medicaid); see also Bonnie Kavoussi, *Texas Medicaid Expansion Supporters Demand Gov. Rick Perry Reverse His Position*, HUFFINGTON POST (Mar. 5, 2013, 10:45 AM), http://www.huffingtonpost.com/2013/03/05/texas-medicaid-expansion_n_2810892.html (reporting that more than 1,000 supporters of Medicaid planned to march on the Texas state capital to protest against Governor Perry's decision to forego Medicaid expansion).

399. See *Where the States Stand on Medicaid Expansion*, *supra* note 116 (noting that Texas Governor Rick Perry and the Republican majority in the Texas state Legislature have "unanimously rejected the Medicaid expansion").

400. See Perr, *supra* note 388.

401. See Sahil Kapur, *House Has Now Voted 46 Times To Repeal Or Dismantle Obamacare*, TALKING POINTS MEMO (Oct. 1, 2013, 11:46 AM), <http://talkingpointsmemo.com/livewire/house-has-now-voted-46-times-to-repeal-or-dismantle-obamacare> (noting that the House Republicans have voted forty-six times to "repeal, defund or dismantle" Obamacare).

402. See Neera Tanden, *If at First You Don't Succeed*, POLITICO MAGAZINE (Jan. 30, 2014), http://www.politico.com/magazine/story/2014/01/house-republicans-obamacare-repeal-votes-102911_full.html?print#.UvuotEJdXnQ (outlining the House's attempts to fight the Act, and describing how in August of 2013, the House changed its tactics from voting to repeal the Act to trying to prevent funding for Act).

403. See *id.*

404. See Andrew Stiles, *Why Republicans Don't Trust Obama on Immigration Reform*, NAT'L REVIEW ONLINE (Oct. 23, 2013, 4:46 PM), <http://www.nationalreview.com/corner/361834/why-republicans-dont-trust-obama-immigration-reform-andrew-stiles> (stating that Republicans distrust Obama on issues like immigration reform since he has discriminated in which laws to enforce without congressional approval).

might continue to try to comply, whereas others may not. What are employers and states to do in such a circumstance? Contrary to conventional wisdom, with the passage of time more questions, not fewer, arise regarding the Act.⁴⁰⁵ The Supreme Court decision answered some questions and raised others. While it may be undebatable that Americans want and need more affordable and better quality health care, it is certainly debatable whether or how the goals and objectives of the Act can still be met in its current state.

405. See Bruce F. Howell, *One More Time with Feeling: PPACA Cases Post 2012*, 9 ABA HEALTH ESOURCE (2013), http://www.americanbar.org/content/newsletter/publications/aba_health_esource_home/aba_health_law_esource_1308_howell.html (discussing the various Constitutional challenges pending against the ACA after the Supreme Court's ruling).