The Individual Mandate - A Tax in Penal Clothing - Ought the Judges to Close Their Eyes on the Constitution, and Only See the Law

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THE INDIVIDUAL MANDATE - A TAX IN PENAL CLOTHING - OUGHT THE JUDGES TO CLOSE THEIR EYES ON THE CONSTITUTION, AND ONLY SEE THE LAW? ¹

INTRODUCTION

New taxes are always contentious among the electorate. ² Taxes that are collected to fund the undertakings of private companies, such as those collected by states during the nineteenth century to fund the construction of privately owned railroads, have tended to be particularly unpopular. ³ 26 U.S.C. § 5000A (“Individual Mandate”) imposes a tax on Americans of certain means who fail to purchase health insurance products from privately owned insurance companies. ⁴

Despite indications that the Individual Mandate was intended by Congress to be a penalty authorized by the Commerce Clause, ⁵ when several states challenged the Individual Mandate’s constitutionality before the Supreme Court, the Federal Government also argued that the Taxing and Spending Clause ⁶ authorized it. ⁷ The Court held that the Individual Mandate was beyond Congress’s Commerce Clause authorities, but was within those authorities granted by the Taxing and Spending Clause. ⁸

Although the Supreme Court controversially expanded Congress’s powers under the Commerce Clause after 1937, it retained the authority to

¹ Marbury v. Madison, 5 U.S. 137, 179 (1803); see infra note 36 (quoting Marbury, 5 U.S. at 179).
² See infra note 39 and accompanying text (discussing political consequences of taxes being unpopular).
³ See infra note 49 and accompanying text (describing public outrage brought on by corrupt relationships between railroads and state legislatures).
⁴ See infra text accompanying note 19 (describing Individual Mandate).
⁵ See U.S. Const. art. I § 8, cl. 3 (authorizing Congress to regulate interstate commerce); see also infra note 22 and accompanying text (describing federal government’s initial position that Individual Mandate was penalty authorized by Commerce Clause).
⁶ See U.S. Const. art. I, § 8, cl. 1 (authorizing Congress to tax and spend pursuant to “general Welfare”). This clause also authorizes Congress to tax and spend pursuant to the “common defence,” but, as there has been no indication that the Individual Mandate is defensible as a national security measure, this note will remain focused on the “general Welfare” language. See id.
⁷ See infra note 23 and accompanying text (describing Solicitor General Verrilli’s argument that Individual Mandate is permissible under Taxing and Spending Clause).
define meaningful qualitative limits on Commerce-Clause Powers. Conversely, the Court has abdicated virtually all of its qualitative definitional power to Congress regarding the Taxing and Spending Clause. Several regulatory forces also promote those companies’ insurance products, including Congress being allowed to levy a tax against those who refuse to purchase health insurance from privately owned companies. As a result of these advantages, coupled with the Supreme Court abdicating its definitional authority regarding the term “general Welfare” in the Taxing and Spending Clause, Congress may now wield the authority bestowed by this clause as a constitutionally suspect, inefficient regulatory incentive for individuals to purchase private companies’ products.

This note will first describe how the Individual Mandate was passed, and relate commentary from many proponents and opponents of the law. It will then discuss the history of judges interpreting both states’ and the federal government’s taxing powers. Following this is an analysis of whether the Individual Mandate adheres to the constitutional requirement that federal taxes serve the “general Welfare.” The conclusion collects portions of this note that support an argument that the Individual Mandate does not serve the “general Welfare,” and that offer strategies for challenging its constitutionality in court.

9 See infra notes 51, 52 and accompanying text (describing rule created by, and criticisms of, Supreme Court’s expansion of Commerce Clause).
10 See infra note 38 and accompanying text (describing Supreme Court’s deference to Congress’s definition of “general Welfare” mentioned in Commerce Clause); see also infra text accompanying note 32 (explaining quantitative limits); accord infra note 33 and accompanying text (explaining difference between qualitative and quantitative).
11 See infra notes 57-60 and accompanying text (describing regulatory advantages to promoting large scale employer-provided health insurance).
12 This note addresses only Congress’s authority to collect taxes under the Taxing and Spending Clause, and the types of behavior that Congress may permissibly attempt to induce by doing so. Although Congress’s authority under the Taxing and Spending Clause to spend tax revenues toward one end or another, or to condition such expenditures on state cooperation with a federal program, was an issue in Sebelius, it is beyond the scope of this note. See Sebelius, 132 S. Ct. at 2607 (holding conditions on expenditures to states under Affordable Care Act unconstitutional).
13 See Thomas C. Buchmueller & Alan C. Monheit, Employer-Sponsored Health Insurance and the Promise of Health Insurance Reform 23, (Nat’l Bureau of Econ. Research, Working Paper No. 14839, 2009), available at http://goo.gl/935qM9 (case sensitive) (“[T]here are some who believe that the inefficiencies and inequities of the current system are so significant that it is time to replace [it with] a system of individually-purchased coverage.”); accord infra note 48 (describing corruption resulting from state legislature wielding taxing power on private railroad’s behalf).
14 See infra Part I.
15 See infra Part II.
16 See infra Part III.
17 See infra Part IV.; accord infra note 43 and accompanying text (explaining procedure for challenging Individual Mandate’s constitutionality).
I. FACTS

In 2010, as part of an overhaul of federal healthcare law, Congress passed the Individual Mandate, which imposes an exaction on Americans who fail to purchase health insurance and do not fall into one of several exempted groups, such as the poor and the incarcerated. Several parties, including states, private organizations, and individuals, brought suits alleging that the Individual Mandate was beyond Congress’s authorities under both the Commerce Clause and the Taxing and Spending

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19 26 U.S.C. § 5000A(d)(1)-(5) (2010) (describing various groups who are exempt from exaction even if refusal to purchase health insurance). The Individual Mandate was designed such that it “will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services, and will increase the number and share of Americans who are insured.” 42 U.S.C. § 18091(2)(C) (2010). It will be imposed in 2014, and the Congressional Budget Office estimates that in 2016, six million people will be required to pay the exaction, which will be either $695 or 2.5% of an individual’s income, whichever is greater. See CONGRESSIONAL BUDGET OFFICE, PAYMENTS OF PENALTIES FOR BEING UNINSURED UNDER THE AFFORDABLE CARE ACT, 1 (2012), available at http://goo.gl/orFwo (case sensitive). In addition to the Individual Mandate, Congress enacted a so-called Employer Mandate, codified at 26 U.S.C. § 4980H (2010), which would have also become effective in 2014, but the administration delayed its enforcement for a year in response to concerns expressed by businesses that would have been subject to it and by the unions of their employees. See Valerie Jarrett, We’re Listening to Businesses about the Health Care Law, THE WHITE HOUSE BLOG (July 02, 2013, 6:00 PM), http://goo.gl/PrZQHk (case sensitive) (“In our ongoing discussions with businesses we have heard that you need the time to get this right. We are listening. So in response to your concerns, we are making two changes.”); Avik Roy, Labor Unions: Obamacare Will ‘Shatter’ Our Health Benefits, Cause ‘Nightmare Scenarios’, FORBES (July 15, 2013, 10:12 AM), http://goo.gl/STkBza (case sensitive) (“[R]epresentatives of three of the nation’s largest unions fired off a letter to Harry Reid and Nancy Pelosi, warning that Obamacare would ‘shatter not only our hard-earned health benefits, but destroy the foundation of the 40 hour work week that is the backbone of the American middle class.’”). Since the White House announced the delay of the Employer Mandate, members of Congress and others have called for a similar delay of the Individual Mandate. See Jonathan Weisman & Robert Pear, Seeing Opening, House G.O.P. Pushes Delay on Individual Mandate in Health Law, N.Y. TIMES, July 9, 2013, at A15, available at http://goo.gl/3F1NyD (case sensitive) (“House leaders began devising strategies that would most likely start this month with multiple votes, the first to codify the one-year delay on the employer mandate, then another to demand a delay on the individual mandate.”). A bill was introduced in the House of Representatives that would repeal the Individual Mandate, H.R. 1200, 113th Cong. § 1003(b) (2013), available at http://goo.gl/L8zy7 (case sensitive), and Republicans in the House of Representatives forced a government shutdown while demanding a number of concessions, including a delay to the Individual Mandate, which a number of Democrats came to support after a troublesome rollout of federal online healthcare exchanges called for by the Act. See Marc A. Thiessen, Delaying the individual mandate won’t fix Obamacare, WASH. POST, Oct. 28, 2013, available at http://goo.gl/yR6wo (case sensitive) (“Remember when Democrats voted to keep the government shut down rather than accept a delay in the individual mandate? Now that the Obamacare implosion is dominating the news, they are falling over each to see who gets credit for a delay.”).
These cases originated in several circuits, and the Court granted Certiorari to review the decision of the Eleventh Circuit Court of Appeals, which held that the Individual Mandate was beyond Congress’s Commerce Clause authority, in that it was a penalty, not a tax, and therefore could not pass under the Taxing and Spending Clause. Although the Federal Government’s initial brief before the Supreme Court indicated that it viewed the Individual Mandate as a penalty rather than a tax, Solicitor General Verrilli argued that the Individual Mandate was authorized by both the Commerce Clause, and the Taxing and Spending Clause. The Obama

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20 Brief in Response for Private Respondents, Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (No. 11-393); 2011 WL 4874089, at *10 [hereinafter Private Brief]; Brief for State Respondents, Sebelius, 132 S. Ct. 2566 (No. 11-393), 2011 WL 5009040, at *9 [hereinafter States’ Brief]; Consolidated Brief for Respondents, Sebelius, 132 S. Ct. 2566 (No. 11-393), 2011 WL 4941020, at *9 [hereinafter Federal Brief]. While the argument that the Individual Mandate was authorized by the Necessary and Proper Clause, U.S. Const. art. 1, § 8, cl. 18, was made by several parties, it was ultimately rejected and is not germane to this note. See Sebelius, 132 S. Ct. at 2591-93, 2647.


22 Federal Brief, supra note 20, at *19 n.9 (“[The Individual Mandate] consistently refers to the exaction it imposes for failure to maintain minimum essential coverage as a ‘penalty.'”).

23 Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2595-96 (2012) (citing Bailey v. Drexel Furniture Co., 259 U.S. 20, 36-37 (1922)) (also known as Child Labor Tax Case) (articulating three-prong test for assessing permissibility of exaction under Taxing and Spending Clause); Transcript of Oral Argument of Donald B. Verrilli, Jr., on Behalf of Petitioners, Dep’t of Health and Human Servs. v. Florida, No. 10-1027, 120 S. Ct. 2420, at *49 (U.S. Mar. 27, 2012) (No. 11-398) [hereinafter Transcript of Oral Argument] (“[N]ot only is it fair to read this as an exercise of the tax power, but this Court has got an obligation to construe it as an exercise of the tax power, if it can be upheld on that basis.”). Just before making this argument, Solicitor General Verrilli referenced Senator Max Baucus arguing that the Individual Mandate is a valid exercise of Congress’s Taxing and Spending authority on the floor of the Senate during a December 23, 2009, Point of Order. Transcript of Oral Argument, supra, at *48 (citing Constitutional Point of Order with respect to the Reid Substitute Amendment to H.R. 3590, the Service Members Home Owners Tax Act, (C-Span television broadcast Dec. 23, 2009), available at http://gpo.gov/ftw9wd (case sensitive) (4:30:22-4:31:11; 5:34:31-5:35:14; 5:50:57) (responding to Point of Order regarding Individual Mandate’s constitutionality by defending it as tax) (“The floor sponsor, Senator Baucus, defended it as an exercise of the taxing power. In his response to the point of order, the Senate voted 60 to 39 on that proposition.”)). During oral arguments, Chief Justice Roberts asked why the Individual Mandate had been called a penalty if it was actually a tax; judging by his apparent satisfaction with Solicitor General Verrilli’s response that the name was designed to increase efficacy, this may have been the moment when the Chief Justice decided how he would go about saving the law. Transcript of Oral Argument, supra, at *49 (“CHIEF JUSTICE ROBERTS: You’re telling me they thought of it as a tax, they defended it on the tax power. Why didn’t they say it was a tax? GENERAL VERRILLI: They might have thought, Your Honor, that calling it a penalty as they did would make it more effective in accomplishing its objective . . . CHIEF JUSTICE ROBERTS: Well, that’s the reason. They thought it might be more effective if
Administration and other public officials have sent mixed signals as to whether they view the Individual Mandate as a tax or a penalty.  

The Supreme Court upheld the part of the Eleventh Circuit's opinion regarding the Individual Mandate being beyond Congress's Commerce Clause authority, but overturned another portion by holding that the Individual Mandate was within Congress's Taxing and Spending authority. The Court reasoned that statutorily, the Individual Mandate is a penalty, rendering the Anti-Injunction Act—which would otherwise prevent the suit from going forward—inapplicable, but that constitutionally, the Individual Mandate is a tax, allowing it to pass under the Taxing and Spending Clause. The only limits on the Taxing and Spending power that the Court
discussed were the distinction between permissible taxes and impermissible penalties, and between direct and in-direct taxes.28

Although Chief Justice Roberts quoted from Marbury v. Madison29 in his Sebelius opinion, he spent no time discussing the definitional authority enshrined in Marbury as it relates to the words “general Welfare” in the Taxing and Spending Clause.30 After dispensing with the argument that the Individual Mandate was a direct tax, the Chief Justice only discussed the quantitative difference between penalties and taxes, which centers on the amount of money to be exacted rather than any qualitative limits as to the ends that can justify a particular exaction under the Taxing and Spending Clause.31

Quantitative limits only alter a thing’s magnitude or degree: the difference between a tax and a penalty depends not on the character of the exaction in question, but primarily on its size.32 Qualitative limits essen-
tially alter what a thing is: an exaction used as a means to provide for the general welfare is qualitatively different than one used for the benefit of private parties.\textsuperscript{33}

II. HISTORY

Our founding fathers were debating the ends toward which the federal taxing power might permissibly be exercised before the Constitution was ratified; James Madison advocated for a narrow interpretation, and Alexander Hamilton a broader one.\textsuperscript{34} However, the Supreme Court’s earliest discussions of Congress’s authority under the Taxing and Spending Clause declared that it was limited only by a distinction between direct and indirect taxes, with no mention of any requirement imposed by the words “general Welfare” in that clause.\textsuperscript{35}

\textsuperscript{33} See David Gray Carlson, Hegel’s Theory of Quantity, 23 CARDOZO L. REV. 2027, 2038-39 n.38 (2002) (citing Herbert Marcuse, Hegel’s Ontology and the Theory of Historicity, 64 (Seyla Benhabib trans., 1987)) (“Quality is... the character identical with being: so identical that a thing ceases to be what it is, if it loses its quality. Quantity... is the character external to being, and does not affect the being at all. Thus e.g. a house remains what it is, whether it be greater or smaller; and red remains red, whether it be brighter or darker.”);

\textsuperscript{34} United States v. Butler, 297 U.S. 1, 65-66 (1936). Madison asserted that the federal power to tax was confined to Congress’s constitutionally enumerated powers whereas Hamilton maintained that the taxing power is limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Id. (“Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position... Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one.”).

\textsuperscript{35} See U.S. CONST. art. I, § 8, cl. 1; Hylton v. United States, 3 U.S. 171, 175, 180-81, 183-84 (1796) (holding tax on carriages constitutional because not direct tax); Springer v. United States, 102 U.S. 586, 602 (1880) (alteration in original) (“Our conclusions are, that \textit{direct\textsuperscript{3}}\textit{taxes}, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate...”); Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429, 579 (1895) (“Be this as it may, it is conceded in all these cases, from that of \textit{Hylton} to that of \textit{Springer}, that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from land are not taxes on land.” (emphasis added)). This direct versus indirect distinction was essentially resolved by later precedent, as well as the Sixteenth Amendment, which exempted
In *Marbury*, the Supreme Court used another constitutional limit on the taxing power as a rhetorical device to underscore how important it is for the Court to enforce qualitative constitutional limits on congressional authority.\footnote{See Marbury v. Madison, 5 U.S. 137, 179 (1803).} Shortly thereafter, in another landmark decision, the Court linked Congress’s taxing power to the words “general Welfare” in the Constitution during a recitation of a number of Congress’s constitutional powers.\footnote{See McCulloch v. Maryland, 17 U.S. 316, 381 (1819).} However, it was eventually settled that “unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment,” it is for Congress, not the Supreme Court, to define what the “general Welfare” is.\footnote{Helvering v. Davis, 301 U.S. 619, 640 (1937).}

Although the taxing power is very broad, the political unpopularity of taxes has kept Congress from using it so extensively as to test all of its boundaries.\footnote{See David Orentlicher, *Constitutional Challenges To the Health Care Mandate: Based In Politics, Not Law*, 160 U. PA. L. REV. PENNUMBRA 19, 29 (2011) (“Congress and President Barack Obama characterized the 2.5% levy as a penalty rather than a tax because they knew that taxes are unpopular. It would be wrong, in this view, to allow Congress to disguise its motives when enacting a statute and thereby make it more difficult for the public to hold members of Congress responsible for their decisions.” (citing Florida v. U.S. Dep’t Health & Human Servs., 716 F. Supp. 2d 1120, 1142-43 (N.D. Fla. 2010) (“Because by far the most publicized and controversial part of the Act was the individual mandate and penalty, it would no doubt have been even more difficult to pass the penalty as a tax. Not only are taxes always unpopular, but to do so at that time would have arguably violated pledges by politicians (including the President) to not raise taxes, which could have made it that much more difficult to secure the necessary votes for passage. One could reasonably infer that Congress proceeded as it did specifically because it did not want the penalty to be scrutinized as a $4 billion annual tax increase, and it did not want at that time to be held accountable for taxes that they imposed.” (internal quotation marks omitted))).} Having a provision labeled as a penalty that is none-the-less authorized by the Taxing and Spending Clause provides a powerful, if not disingenuous, regulatory tool to counteract the unpopularity of taxation.\footnote{See Robert Alt, *Twisting a Statute Is Better Than Twisting the Constitution*, SCOTUSBLOG}
Many commentators either do not appreciate, or deliberately disregard the potential ramifications of the Supreme Court allowing Congress to use its Taxing and Spending power to pass a law that the President and others insist is not a tax.41 Others, in response to Congress’s perceived propensity to misuse its Taxing and Spending power, have proposed procedures to facilitate taxpayer challenges to the legality of congressional expenditures under the “general Welfare” provision of the Constitution.42 Although it

(See supra notes 22, 24 and accompanying text (discussing public officials’ mixed signals regarding whether Individual Mandate is tax or penalty); see e.g. Alberto R. Gonzales & Donald B. Stuart, Note and Comment, What Implications Will the Supreme Court’s Taxing Power Decision Have on the Goals of the Affordable Care Act and Healthcare?, 6 J. Health & Life Sci. L. 189, 224 (2013) (“As such, using the taxing power to influence behavior does not appear to be an expansion of the taxing power by the Court.”); Pamela S. Karlan, Foreword: Democracy and Disdain, 126 Harv. L. Rev. 1, 50-51 (2012) (discussing taxes’ unpopularity as political disincentive without mentioning politicians’ insistences that Individual Mandate not tax); Gillian E. Metzger, Comment, To Tax, to Spend, to Regulate, 126 Harv. L. Rev. 83, 112-15 (2012) (opining that Sebelius will impede judicial limitations on federal spending power, without discussing taxing power); Martha Minow, Comment, Affordable Convergence: “Reasonable Interpretation” and the Affordable Care Act, 126 Harv. L. Rev. 117, 128 n.205 (2012) (“[T]here is not a constitutional crisis . . . the controversy surrounding the Affordable Care Act, if a crisis at all, is political.”). But see Muise & Yerushalmi, supra note 28, at 298 (“Congress will employ the elastic tool the chief justice has provided to mandate all sorts of behavior under the rubric of the general welfare clause.”). Although mentioning “Justice Stone famously telling Secretary of Labor Frances Perkins, who was struggling to find a constitutional basis for the Social Security Act: ‘The taxing power, my dear, the taxing power. You can do anything under the taxing power,’” Metzger, supra at 91 (quoting Michelle Landis Dauber, The Sympathetic State, 23 Law & Hist. Rev. 387, 388 (2005) (quoting in turn Frances Perkins, Address Delivered at Social Security Headquarters in Baltimore, Md.: The Roots of Social Security (Oct. 23, 1962))), Dean Metzger predicts that Congress may respond to restrictions that Sebelius puts on “what can count as a tax” by refraining from using its taxing power, and instead exercising its Commerce Clause powers more broadly. Metzger, supra at 111-12. The potential for surreptitious use of the taxing power also eluded four former Solicitors General who offered their opinions regarding Sebelius in a New York Times article. See Theodore B. Olson, The Health Care Decision: Deliverance or Disaster? Four Former Solicitors General Weigh in on Roberts’ Ruling, TIME Ideas, June 29, 2012, available at http://goo.gl/Id2zu (case sensitive). After lamenting at the unenviable position that the Individual Mandate being upheld as a tax created for President Obama, former Solicitor General Olson remarked that “[liberals’] version of federal power was vindicated [in Sebelius] but only if they want to enact politically unpopular taxes,” without mentioning the likelihood that, despite their perils, the tactics used to sell the Individual Mandate as other-than a tax might be repeated. Id. Former Solicitors General Waxman, Katyal, and Sturr also offer their opinions regarding Sebelius, and each attempts to predict the lasting effect of Sebelius, but none mention its potential effect on the contours of the federal taxing power. Id.)
involves an exaction rather than an expenditure, such procedures could be brought to bear on the Individual Mandate, which some argue serves the welfare of private insurers, rather than the general public.

A courageous taxpayer wishing to challenge the Individual Mandate’s constitutionality could refrain from paying it when it came due, wait for a Notice of Deficiency from the I.R.S., and then petition the United States Tax Court to review the Notice of Deficiency. See U.S. TAX COURT INFORMATION ABOUT FILING A CASE IN THE UNITED STATES TAX COURT, available at http://goo.gl/sUjtG (case sensitive) (explaining how to challenge Notice of Deficiency in Tax Court). A taxpayer who wishes to take a more cautious tact could pay the Individual Mandate by filing his tax return, file a Claim for Refund and Request for Abatement by sending a completed I.R.S. Form 843 to the service center where he filed his tax return within three years of filing it, having marked it to indicate that he is challenging the Individual Mandate as an excise tax. See DEP’T OF THE TREASURY, I.R.S., FORM 843: CLAIM FOR REFUND AND REQUEST FOR ABATEMENT (2011), available at http://goo.gl/LGOIO (case sensitive); DEP’T OF THE TREASURY, I.R.S., INSTRUCTIONS FOR FORM 843 (2012), available at http://goo.gl/IflHF (case sensitive); see also 26 U.S.C. § 6511(a) (2008) (imposing three-year statute of limitation); 26 U.S.C. § 5000A (2010) (codified among “Miscellaneous Excise Taxes”). Then, assuming that his refund is not granted, he could file suit in a federal district court or a federal court of claims, alleging that the Individual Mandate was “illegally assessed or collected” because Congress lacked constitutional authority to enact it. See 28 U.S.C. § 1346(a) (2013) (“The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed...”); see also 26 U.S.C. § 7422(a) (1998) (“No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected... until a claim for refund or credit has been duly filed with the Secretary...”); United States v. Michel, 282 U.S. 656, 658 (1931) (construing § 7422(a)’s predecessor as waiver of sovereign immunity that would otherwise insulate government from suit).

See Representative Michael Burgess, Providing For Consideration of Senate Amendments to H.R. 4872, Health Care and Education Reconciliation Act of 2010, 156 CONG. REC. 2418-06 (2013), available at 2010 WL 1135551 (“And what about the insurance companies, their stock prices going up? Of course they went up. They got everything they wanted. What did they want this year started? They wanted an individual mandate and no public option.”). The public option that Representative Burgess referred to would have allowed Congress to create a publically owned insurer to compete with private insurers in order to bring down costs. See David Gauvey Herbert, Public Option, NATIONAL JOURNAL (Jan. 2, 2011, 10:22 PM), http://goo.gl/hfQHI (case sensitive) (explaining public option). A version of the public option was passed by the House of Representatives, see Health-Care Reform: How the Proposals Stack Up, WASH. POST, http://goo.gl/bxwWk7 (case sensitive), and it was more popular among voters than the Individual Mandate, see Representative John Sarbanes, The Need For a Health Care Public Option, 155 CONG. REC. 11114-06 (2009), available at 2009 WL 3230977 (“A survey was done recently, and the question was asked, Do you support an individual mandate, which is the requirement that people purchase insurance coverage? In answer to that, there was some ambivalence. People weren’t so sure. Then they asked the question this way, they said, What if we give you a public option, would you support an individual mandate? And a clear majority said, Absolutely, we would.”). Unlike the Individual Mandate, the public option failed in the Senate. Katharine Q.
from Health Insurers,

Millions Spent by Lobby Firms Fighting Obama Health Reforms,

National Spotlight, But Rarely in Details of Lobbying Reports,

industry,’ said Dr Steffie Woolhander, a GP, professor of medicine at Harvard University and co-

that the Act, especially the Individual Mandate, is favorable to large insurers is the fact that their

try,

24, 2010, 3:41 PM), http://goo.gl/hTPIO (case sensitive); Robert Pear, In House, Many Spoke


(case sensitive). Sentiment from the medical community has also reflected how beneficial the

AFFORDABILITY, QUALITY IMPROVEMENT AND MARKET REFORM

OF HEALTH CARE REFORM:

AMERICA’S HEALTH INSURANCE PLANS, BOARD OF DIRECTORS’ STATEMENT:

Now

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Peter Baker,

Obama Was Pushed by Drug Industry, E-Mails Suggest, N.Y. TIMES, June 8, 2012, at A1, avail-

able at http://goo.gl/wj0Oj (case sensitive). The administration’s friendliness toward private

business is also reflected in its decision to delay imposition of the Employer Mandate until 2015.

See Jarrett, supra note 19 (“In our ongoing discussions with businesses we have heard that you

need the time to get this right. We are listening. So in response to your concerns, we are making

two changes.”). Within twenty-four hours of the House of Representatives casting its final vote

to send the Act to President Obama’s desk, Russ Britt from the Wall Street Journal’s Mar-

ketWatch forecasted increasing stock prices for a number of large corporations, which is another

indicator that both the Individual Mandate and the Act in general were designed to benefit large
Some state courts recognized similar general welfare restrictions, sometimes phrased as "public use," imposed by their states’ constitutions.\textsuperscript{45} However, when it came to states collecting taxes to fund privately constructed railroads, eighteenth-century state courts were reluctant to impose constitutional limits.\textsuperscript{46} Although many states were free to raise funds for private railroad companies, they were foreclosed from regulating those railroads by the Dormant Commerce Clause, a judicial interpretation of the federal Constitution that protects interstate commerce from state regulation.\textsuperscript{47} This deference to legislatures’ fundraising, alongside strict limits on corporations within the healthcare sector. See Russ Britt, \textit{Hospitals Gain, Insurers Fall, but is it a Harbinger?}, \textsc{MarketWatch} (Mar. 22, 2010, 4:20 PM), http://goo.gl/Se6s0 (case sensitive) ("[F]ueled by the prospect of $940 billion in government assistance to help pay for the care it will be giving, Tenet shares were up more than 9% at the close. Health Management Associates rose even more, climbing 11.3%. . . . [p]retty much everybody gets a pony, except for the taxpayers," said Les Funtleyder, analyst for Miller Tabak in New York . . . ."; see also OFFICE OF THE CLERK, U.S. H. REP., \textit{Final Vote Results For Roll Call 165} (Mar. 21, 2010, 10:49 PM), http://goo.gl/7wBpDc (case sensitive) (relating vote count for House’s final reconciliation vote on Senate’s amendments to Act). Mr. Britt noted that "insurers seemed to be taking it on the chin, though that could be deceiving, says [Dave] Shove[, an analyst for BMO Capital Markets in New York,]" and it appears that Mr. Shove was correct because the stocks of two of the three largest health insurers that lost value the day after the House vote have since more than doubled in value. See \textit{Stock Quotes for Humana and UnitedHealth Group} (2010-2013), \textsc{MarketWatch}, available at http://goo.gl/HqilVu (case sensitive) (showing Humana and UnitedHealth Group stock gains in years since Act was passed by Congress); Britt, supra (describing deceptive appearance that Act might be disfavorable to large health insurers).

\textsuperscript{45} See \textsc{Mass. Const. pt. 2, c. 1, § 1, art. 4} ("[The state legislature may] impose . . . reasonable . . . taxes . . . under the hand of the governor of this commonwealth . . . for the public service, in the necessary defence and support of the government of the said commonwealth, and the protection and preservation of the subjects thereof . . . ."). The Massachusetts Supreme Judicial Court considered a tax being imposed to raise money for a private owner of real estate destroyed by a fire and concluded that because the tax was for private, and not public use, the tax was unconstitutional. Lowell v. City of Boston, 111 Mass. 454, 461 (1873) (citing id.). Maine’s Supreme Judicial Court ruled a similar tax, which was being imposed for the benefit of local manufacturers, unconstitutional. Allen v. Inhabitants of Jay, 60 Me. 124, 142 (1872) ("[T]o tax . . . for purposes of private gain . . . would be to withdraw [the tax funds] from the protection of the constitution and submit it to the will of an irresponsible majority . . . . No surer or more effectual method could be devised . . . to render property insecure, and . . . paralyze industry.").

\textsuperscript{46} See Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 175 (1853) (listing eight decisions from different states’ courts allowing for unlimited taxation to fund private railroads). Iowa’s Supreme Court courageously bucked the trend of allowing taxes to be raised for the benefit of private railroads by declaring a law designed to do so contrary to the Iowa Constitution. Hanson v. Vernon, 27 Iowa 28, 50 (1869) (comparing tax power to power of eminent domain). The Hanson case concerned “the levy of a tax for a specific, designated purpose.” Id. The Hanson court held that “[w]hether this [specific, designated] purpose be public or private, whether the money thus required is in the nature of a tax or is an illegal exaction under the name and guise of a tax, are judicial questions.” Id. (emphasis in original).

\textsuperscript{47} See \textit{Wabash, St. Louis & Pac. Ry. Co. v. Illinois}, 118 U.S. 557, 563 (1886) (citing U.S. Const. art. I, § 8, cl. 3) ("[T]he transportation in question falls within the proper description of ‘commerce among the States,’ and as such can only be regulated by the congress of the United
their ability to regulate, fueled corrupt relationships between the large rail-
roads and the legislatures enacting taxing policies favorable to them.48 In
response to this corruption, New Jersey convened a commission and
amended its constitution to allow for a greater degree of judicial oversight
in an attempt to stem corruption in the legislature, and Oregon passed a cit-
zens’ initiative that spurned taxation designed to benefit private rail-
roads.49

Around the same time that the Supreme Court decided Helvering,
and thereby abdicated its qualitative definitional authority regarding the
“general Welfare” mentioned in the Taxing and Spending Clause in, the
Court also allowed Congress to expand its authority under the Commerce
Clause.50 Eventually it was settled that the Commerce Clause granted

48 See Hans W. Baade, Chapters in the History of the Supreme Court of Texas: Reconstruc-
tion and “Redemption” (1866-1882), 40 ST. MARY’S L. J. 17, 169 (2008) (relating instance of
Texas Supreme Court’s reluctance to condemn allegedly corrupt railroad legislation); Jon Lanck,
“The Organic Law of a Great Commonwealth”: The Framing of the South Dakota Constitution,
53 S.D. L. REV. 203, 249 (2008) (noting state legislature “was subject to corruption” in failing to
tax railroad company’s land holdings); Dale F. Rubin, The Public Pays, the Corporation Profits:
The Emanescation of the Public Purpose Doctrine and a Not-For-Profit Solution, 28 U. Rich. L.
REV. 1311, 1317 (1994) (“Commentators have observed that public sentiment in favor of requir-
ing, by constitutional amendment, states and local government to curtail their excessive propensi-
ties to incur debt and to spend tax monies, were in significant part based on the fraud by railroad
promoters and the corruption by public officials in subsidizing the construction of railway sys-
tems.”).

49 See Paula Abrams, The Majority Will: A Case Study of Misinformation, Manipulation, and
the Oregon Initiative Process, 87 OR. L. REV. 1025, 1037 (2008) (arguing “[c]orporate officers,
bankers, and railroad magnates . . . control[ing] the legislature” fomented “direct democracy move-
ment”); Peter J. Mazzei & Robert F. Williams, “Traces of Its Labors: The Constitutional
Commission, the Legislature, and Their Influence on the New Jersey State Constitution, 1873-
Railroad in New Jersey Politics (1951) (unpublished Ph.D. dissertation, Columbia University) (on
file with Widener Library, Harvard University) (“The unmitigated power of railroads and the
public’s hope for a general railroad law to put an end to their abuses, was without question the
main state political news of the day.” ). In Oregon, a slew of citizens’ initiatives were passed,
some of which focused on ending corruption in the state legislature. See Abrams, supra at 1040.

50 See U.S. CONST. art. I, § 8, cl. 1, 3 (“Congress shall have Power To lay and collect Taxes . . . [for the] general Welfare of the United States . . . [and to] regulate Commerce . . . among the
several States . . .”); Alan R. Greenspan, The Constitutional Exercise of the Federal Police Pow-
er: A Functional Approach to Federalism, 41 VAND. L. REV. 1019, 1022-38 (1988) (relating de-
development of Commerce Clause from time of ratification forward). Although during the begin-
nning of the twentieth century the Supreme Court took a narrow view of the Commerce Clause, by
“nullifying several New Deal efforts,” it may have “fear[ed] . . . President Franklin Roosevelt’s ‘court-pack ing’ plan,” whereby an incumbent president could appoint a new Supreme Court jus-
tice for every current justice over the age of 70, so the Court “reversed its course and began sust-
aining congressional use of the commerce power to regulate the national economy.” Greenspan,
Congress authority to regulate interstate commerce, its channels and instrumentalities, those economic activities that, when viewed in the aggregate, substantially affect interstate commerce, and those non-economic activities that, even when disaggregated, individually have a substantial effect on interstate commerce. This expansion of the Commerce Clause has been severely criticized.

The final caveat in the Supreme Court’s Commerce Clause rule, which distinguishes between economic and non-economic activity, is a product of two recent decisions striking down federal criminal legislation as beyond Congress’s Commerce-Clause authority. Chief Justice Roberts spent a significant portion of his Sebelius opinion discussing the limits of the Commerce Clause that put the Individual Mandate outside of its reach.


See Stewart Jay, On Slippery Constitutional Slopes and the Affordable Care Act, 44 CONN. L. REV. 1133, 1145-69, 1208-12 (2012) (reviewing Commerce Clause precedent up to present and concluding that Individual Mandate’s fate is uncertain).

But see Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 HARV. L. REV. 924, 1007 (2000) (“[W]hatever Congress deems to be in need of national attention, be it kidnapping, alcohol consumption, bank robbery, fraud, or nondiscrimination, should be within its authority.”).
and four dissenting Justices agreed with him on this holding.54 There are indications that this discussion has had a narrowing effect on the scope of the authority granted by the Commerce Clause, but this is not certain.55

When Sebelius was decided, employers provided health insurance to over 57% of Americans who were both insured and employed in the private sector.56 This type of health insurance became popular in part due to federal policy decisions that excluded it from wage control laws, defined it as an ordinary business expense as opposed to a taxable form of income, and largely exempted it from state regulation.57

The wage caps from which employer-based insurance are exempted were a part of the Wage Stabilization Act of 1942.58

54 Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589 (2012) (Roberts, C.J.) (“The Framers gave Congress the power to regulate commerce, not to compel it . . . .”) (emphasis in original); id. at 2644 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (“To be sure, purchasing insurance is ‘Commerce’; but one does not regulate commerce that does not exist by compelling its existence.”) (emphasis in original). Chief Justice Roberts spent more than 80% of his individual opinion (more than eight out of about ten pages) discussing the Commerce Clause and its limits. Id. at 2585-93 (Roberts, C.J.).


56 Elizabeth Mendes, Fewer Americans Have Employer-Based Health Insurance, GALLUP WELL-BEING (Feb. 14, 2012), http://goo.gl/X0iKrR (case sensitive).


58 50 U.S.C. § 961 (1942) (repealed 1956). Within days of the Wage Stabilization Act becoming law, President Theodore Roosevelt issued an executive order exempting employer-
provided health insurance being exempt from income taxation is a function of a constellation of federal regulatory mechanisms, including an Internal Revenue Service private letter ruling, Supreme Court precedent, and a federal statute. Employer-provided health insurance being largely beyond the reach of state regulation is a result of a federal statute designed to provide national standards and curb mismanagement and fraud called the Employee Retirement Income Security Act of 1974 ("ERISA"). These poli-
cy decisions, which result in the majority of insured Americans’ health plans being tied to their current employer, have been severely criticized as giving large-scale insurers unfair advantages over their smaller would-be competitors.\(^{61}\)

III. ANALYSIS

By purporting to narrow the development of Congress’s powers under the Commerce Clause, *Sebelius* provides Congress with an incentive to find new Constitutional authority for measures of questionable constitutionality.\(^{62}\) One such constitutionally suspect purpose is raising tax revenues, not for the general welfare, but to induce the purchase of products from privately owned businesses.\(^{63}\)

The federal government’s use of its taxing power for the benefit of private insurance companies bears many similarities to states’ use of their taxing powers for the benefit of private railroad companies in the 1800s,

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\(^{61}\) See *AUSTIN & HUNGERFORD*, supra note 57, at 51 (“Other aspects of health insurance can reduce the sharpness of competition. Employers are typically reluctant to switch insurers, which could require a major overhaul of human resources department procedures and a reorientation of employees . . . tying health benefits to employment can reduce job mobility and hinder efficient matching of workers to positions that make the best use of their skills”); *LYKE*, supra note 59, at 12, 17, 19 (“The exclusion thus contributes to what some economists consider an excess of insurance coverage and a significant welfare (or efficiency) loss for insured individuals and society as a whole . . . [and it] sometimes is criticized for providing tax savings when employers pay for the insurance, while coverage purchased in the individual market generally has no tax savings. . . . For higher income taxpayers, the income tax savings would be greater.”). Specifically, these policy decisions have been criticized as inefficiently encouraging the purchase of excessive insurance, and inequitably advantaging large-scale insurers over small scale ones, and high-income employees over low-income ones. See Buchmueller & Monheit, supra note 13, at 23-24 (identifying four areas of concern posed by employer-provided health insurance); see also James A.J. Revels, *What Effect Will Health Reform Law Have on Businesses and the U.S. Economy?*, PHYSICIANS NEWS DIGEST (Aug. 21, 2012, 8:38 AM), http://goo.gl/Bycg6 (case sensitive) (“The new mandate could cause businesses to lay off employees and even prevent them from hiring in the future.”).

\(^{62}\) See supra notes 50-51 and accompanying text (describing Congress’s Commerce Clause powers pre-*Sebelius*); accord supra note 52 and accompanying text (describing criticisms that Court had allowed Congress’s Commerce Clause powers to become overbroad); supra note 25 and accompanying text (explaining holding in *Sebelius*); supra note 55 and accompanying text (describing potentially slimming effect of *Sebelius* on Congress’s Commerce Clause powers); supra notes 39-40 and accompanying text (describing *Sebelius’* potential to lead to abuses of Congress’s taxing power).

\(^{63}\) See supra note 46 and accompanying text (describing state court holding that use of tax power to fund private railroad violated state’s constitution).
such as the fact that the groups of private parties benefiting from the taxes are both largely exempt from state regulations. This favorable treatment, along with other incentives, such as tax breaks, exemption from wage control laws, and exemption from state regulation, give large insurance providers an unfair market advantage over smaller, would-be competitors, which decreases efficiency and increases costs.

The meaningful qualitative limits that the Supreme Court has defined for the Commerce Clause allowed it to prevent Congress from using its power under that clause for the benefit of privately owned, large-scale insurance companies. However, by allowing the Individual Mandate to pass under Congress’s Taxing and Spending power—a power whose qualitative boundaries the Court has left to Congress to define—the Court has opened the door to other exercises of this power that are even further removed from the “general Welfare.” Furthermore, the potentially limiting effect that taxes’ unpopularity has had on Congress’s willingness to raise them may now be ineffectual because—as was done with the Individual Mandate—politicians may vehemently deny that an exaction is a tax in order to get it passed, and then count on the Supreme Court to allow them to collect the exaction under Congress’s Taxing and Spending power.

By relinquishing virtually all of its qualitative definitional authority

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64 See supra note 19 and accompanying text (describing exaction imposed by Individual Mandate on those failing to purchase health insurance); accord supra note 47 and accompanying text (explaining railroad companies’ exemption from state regulation under Dormant Commerce Clause); supra note 60 and accompanying text (explaining private insurers’ exemption from state regulation under ERISA). State governments funded private railroads by paying them tax revenues, and Congress is now helping large-scale insurers by taxing those who fail to purchase their products; in both instances a net effect is for the private businesses to achieve larger revenues, so the comparison between the two is apt.

65 See Buchmuller & Monheit, supra note 13, at 23-24 (describing opinion that current system of employer-provided health insurance is inefficient and inequitable); supra notes 57-59, 61 and accompanying text (explaining large insurers’ tax breaks, regulatory exemptions, and unfair advantage they thereby obtain).

66 See supra note 51 and accompanying text (explaining limits that Court has placed on Congress’s power under Commerce Clause); see also supra note 25 and accompanying text (describing Court’s holding that Individual Mandate was beyond Congress’s Commerce Clause powers).

67 See supra note 6 and accompanying text (describing Congress’s Constitutional power to tax and spend pursuant to “general Welfare”); accord supra note 38 and accompanying text (describing Court’s holding that Congress controls definition of “general Welfare” in Taxing and Spending Clause); supra note 25 and accompanying text (describing Court’s holding in Sebelius that Individual Mandate was within Congress’s Taxing and Spending power); supra note 40 and accompanying text (describing potential expansion of congressional taxing power under Sebelius).

68 See supra note 39 and accompanying text (describing effect of taxes’ unpopularity on decision to initially label Individual Mandate as penalty); see also supra note 24 and accompanying text (describing Obama administration’s change of position regarding Constitutional authorization for Individual Mandate).
under *Marbury* regarding exactions under the Taxing and Spending clause, the Supreme Court has now relegated itself to a quantitative role, thereby allowing unbridled expansion as to the types of behavior Congress may attempt to induce by taxing those who do otherwise.\(^{69}\) The only remaining qualitative judicial limit on Congress’s taxing power is a ban against taxes that, relative to the “general Welfare,” are “clearly wrong, a display of arbitrary power, not an exercise of judgment,”\(^{70}\) and neither *Sebelius*, nor any subsequent federal cases, address whether the Individual Mandate meets that standard.\(^{71}\)

It is not beyond imagination that the Supreme Court might muster the courage that the Iowa Supreme Court exercised in 1869 when it held, regarding “the levy of a tax for a specific, designated purpose,” that “[w]hether this purpose be public or private, whether the money thus required is in the nature of a tax or is an illegal exaction under the name and guise of a tax, are judicial questions.”\(^{72}\) However, it is unlikely that such a holding will appear in the United States Reports any time soon, especially in light of the fact that the Court recently quoted *Marbury* as standing for the fact that “deference in matters of policy cannot . . . become abdication in matters of law,”\(^{73}\) and in the same opinion contravened *Marbury*’s admonition to judges not to “close their eyes on the constitution, and only see the law.”\(^{74}\)

\(^{69}\) See supra note 36 and accompanying text (relating Court’s mention of qualitative limit on taxing power in *Marbury*). If the Court had retained more of its authority to define qualitative limits on Congress’ taxing power, it could more easily prevent Congress from taxing those who do not purchase private companies’ products by holding that such taxes are not in the “general Welfare.” See sources cited supra note 33 and accompanying text (explaining relevance of difference between quality and quantity to Court’s powers under *Marbury*). Instead, the Supreme Court’s primary power to prevent congressional misuse of the taxing power is to declare an exaction so “onerous” as to preclude “genuine choice,” which is a purely quantitative inquiry. See supra note 32 and accompanying text (explaining standard that Supreme Court applies to distinguish taxes from penalties); see also Metzger, supra note 41, at 111 (opining that *Sebelius*’s holding that tax’s constitutionally depends on individuals’ having “genuine choice” is novel).


\(^{71}\) Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2575-2609 (2012) (failing to address whether Individual Mandate serves general welfare). As of the date of publication, a search of the federal reports indicates that no federal courts have addressed whether the Individual Mandate satisfies the Constitution’s general welfare requirement.

\(^{72}\) Hanson, 27 Iowa at 50 (emphasis in original).

\(^{73}\) Sebelius, 132 S. Ct. at 2579 (quoting Marbury v. Madison, 5 U.S. 137, 176 (1803)).

\(^{74}\) Marbury v. Madison, 5 U.S. 137, 179 (1803); see also supra note 30 (describing Chief Justice Robert’s reference to *Marbury* in *Sebelius* opinion).
IV. CONCLUSION

“It is far easier to keep power from the hands of government officials than it is to wrest it back from them once it has been conferred. We had our chance with the commerce clause, and we have lost it.”

It appears that, after Sebelius, Professor Epstein’s asseveration regarding the Commerce Clause may also be true of the Taxing and Spending Clause. By allowing Congress not only to tax those who do not purchase products from a group of privately owned companies, but also to cloak that tax in penal clothing, the Supreme Court has opened the door to new and innovative exercises of Congress’s Taxing and Spending power, and has foreclosed the possibility of cabining such innovation with anything short of a constitutional amendment or a federal court willing to candidly address whether the Individual Mandate complies with the Constitution’s general welfare requirement.

If federal courts are to give some teeth to the Constitution’s command that Congress is to tax and spend only for the “general Welfare,”

they will not be without a framework for doing so. Professor Robert G. Natelson has put forth the interesting idea of applying founding era-fiduciary law to congressional expenditures made under the Taxing and Spending Clause to determine their constitutionality. Professor Natelson suggests that, when faced with a preliminary showing of a tax’s private partiality, courts should call upon the government to “justify any apparent partiality by showing how the appropriation furthers an actual, legitimate purpose,” under a standard that is “higher than that now applied (if any is really applied), but not high enough to be intrusive or unworkable . . . .”

In the context of such an analysis as it applies to expenditures, a showing that the expenditure served “an actual, legitimate purpose,” would be two prong: first, the government would have to point to language in the Constitution, aside from the words “tax and spend,” that authorizes Con-

75 Epstein, supra note 52, at 1455.
76 See supra note 38 and accompanying text (describing Court’s abdication of definitional authority over “general Welfare” limit on congressional taxing power).
77 See supra note 37 and accompanying text (describing early case linking congressional taxing power to “general Welfare” limitation); see also supra note 36 and accompanying text (describing limit on congressional taxing power that was used as rhetorical device in Marbury).
78 See Natelson, supra note 42, at 269-80 (discussing application of fiduciary law to taxpayers’ challenges of expenditures’ constitutionality).
79 See id.
80 See id. at 280; see also Helvering v. Davis, 301 U.S. 619, 640 (1937) (citing U.S. Const. art. I, § 8, cl. 1) (holding that unless “a display of arbitrary power,” tax is immune from judicial invalidation).
gress to work toward the end toward which the money is being spent; and second, the government would have to demonstrate that the money is actually being spent toward that end, and not for some other purpose.81

A similar analysis could allow for challenges to congressional ex-

actions of money made pursuant to the Taxing and Spending Clause.82 This would require those wishing to challenge the constitutionality of a particular tax to offer prima facie evidence that its purpose, when viewed from the perspective of the “general Welfare,” is “clearly wrong, a display of arbitrary power, not an exercise of judgment.”83 Such a showing might be made with proof of the following assertions:

- the Individual Mandate was designed to give effect to private insurers’ desire to pressure individuals into purchasing their products;84

- it will succeed in doing so by penalizing millions of Americans who do not purchase such products, and raising $7 billion in the process;85

- private healthcare companies called for the Individual Mandate years before it was enacted, spent large sums of money on lobbying efforts in the lead up to the Affordable Care Act becoming law, and the ten United States Senators who received the most money from them refrained from endorsing a public option, which was an alternative to the Mandate that more Americans supported;86

81 See Natelson, supra note 42, at 269-80.
82 See supra note 43 and accompanying text (explaining procedure for challenging Individual Mandate’s constitutionality).
83 U.S. CONST. art. I, § 8, cl. 1 (authorizing Congress to tax and spend pursuant to “general Welfare”); see also Helvering, 301 U.S. at 640 (citing U.S. CONST. art. I, § 8, cl. 1).
84 See supra note 44 and accompanying text (describing accounts of how private insurers lobbied for and benefit from Individual Mandate); McGregor, supra note 44 (quoting Harvard Professor and co-founder of Physicians for National Health Programme Dr. Steffie Woolhandler) (“[The Individual Mandate] ‘use[s] the coercive power of the state to force people to hand their money over to a private entity which is the private insurance industry. That is not what people were promised.’”).
85 See Congressional Budget Office, supra note 19, at 1 (“[A]bout 6 million people will pay a penalty because they are uninsured in 2016... [and] total collections will be about $7 billion in 2016...”).
86 See AMERICA’S HEALTH INSURANCE PLANS, supra note 44, at 1-11; Kiersh, supra note 44 (“Health care PACs alone have already donated $4.9 million to federal candidates this year after contributing $49.3 million and $39.8 million in the 2008 and 2006 cycles, respectively.”).
• politicians used disingenuous techniques to coopt public support for the Individual Mandate;\(^{87}\)

• politicians went so far as to read lobbyists’ statements verbatim into the public record in efforts to enact legislation favorable to private entities;\(^{88}\) and

• the administration has explicitly voiced its intent to cooperate with private businesses regarding the Employer Mandate, while rebuffing calls from Congress to delay the Individual Mandate.\(^{89}\)

The weight of this evidence, and the fact that the Supreme Court has not yet been asked to pass upon whether the Individual Mandate was enacted pursuant to the general welfare,\(^{90}\) may serve to ameliorate lower

\(^{87}\) See supra note 24 and accompanying text (analyzing administration denying that Individual Mandate is tax, but then describing it as one); supra note 40 and accompanying text (describing negative ramifications of coopting support for tax by denying that it is tax). Marc. A. Thiessen described Obamacare as involving the “involuntary transfer of millions of people out of private health insurance they were happy with into Obamacare plans they did not want — all in violation of President Obama’s promise that if you’ve got health insurance you like ‘you can keep your plan.’” Thiessen, supra note 19.

\(^{88}\) See Pear, supra note 44, at A1.

\(^{89}\) See Jarrett, supra note 19; Weisman & Pear, supra note 19, at A15 (quoting House Speaker John Boehner) (“Is it fair for the president of the United States to give American businesses an exemption from his healthcare law’s mandates without giving the same exemption to the rest of America? Hell no, it’s not fair.”); Thiessen, supra note 19 (“Remember when Democrats voted to keep the government shut down rather than accept a delay in the individual mandate? Now that the Obamacare implosion is dominating the news, they are falling over each to see who gets credit for a delay.”). Congressman Michael Burgess’s comment that insurance companies “got everything they wanted” when the Individual Mandate was enacted provides excellent fodder for a claim that passage of the Individual Mandate is a function of serving private interests, not the general welfare. See Burgess, supra note 44.

\(^{90}\) One group of plaintiffs’ pre-Sebelius brief challenged the Individual Mandate’s compliance with the General Welfare Clause by perfunctorily arguing that “Congress’ actions and its words clearly communicate that the penalty provisions in the individual and employer mandates are penalties, not taxes, and therefore could not have been enacted pursuant to Congress’ power to tax and spend for the general welfare under Article I, §8.” Opening Brief of Appellants, Liberty University, Inc. v. Lew, 733 F.3d 72 (4th Cir. 2012) (No. 10–2347), 2011 WL 145515, at *43. Their reply brief noted that, while “the issue of Congress’ power to enact the Mandates under the Taxing and Spending Clause [is] not before this Court,” and that many pre-Sebelius decisions, as well as President Obama in the Stephanopoulos interview, had rejected the notion that the Individual Mandate was a tax. Reply Brief of Appellants, Liberty University, Inc. v. Lew, 733 F.3d 72 (4th Cir. 2012) (No. 10–2347), 2011 WL 758478, at *26-*27. However, the Plaintiff’s supplemental post-Sebelius brief made no mention of the General Welfare Clause. Supplemental Opening Brief on Remand of Appellants, Liberty University, Inc. v. Lew, 733 F.3d 72 (4th Cir.
federal courts’ fear of reversal on appeal if they are to decide that the Mandate contravenes this constitutional limit. Moreover, the Supreme Court has now signed off on politicians selling a tax by cloaking it in penal clothing,\textsuperscript{91} and this constrains voters who wish to politically prevent Congress from enacting taxes that they oppose. Voters must be armed with accurate information in order to properly decide which candidates to vote for, and so long as politicians are allowed to pull the wool over constituents’ eyes, there is no way to prospectively ascertain what Members of Congress intend to do with Congress’s taxing authorities. Hopefully federal courts will come around to the fact that this unbridled and disingenuous exercise of the federal taxing power, which is and should be an essentially legislative function, has now gone too far, and therefore calls out for a judicial remedy.

\textit{Luke J. Rosseel}

\textsuperscript{91} See Stephanopoulos, supra note 24 (relating instance of President Obama rejecting notion that Individual Mandate is tax); supra notes 25-27 (describing Court’s holding in Sebelius).