The Logical Flaws of the Supreme Court's Ruling on the Affordable Care Act

by Jeremy R. Hammond

I. Introduction

> *"An applicable individual shall ... ensure that the individual ... is covered under minimum essential coverage.... If an applicable individual fails to meet the requirement ... there is hereby imposed a penalty...."* — The Patient Protection and Affordable Care Act

On June 28, 2012, the U.S. Supreme Court decided to uphold the individual mandate to purchase health insurance in the Patient Protection and Affordable Care Act. In doing so, the Court effectively argued that the Congress has the power to force individuals to purchase health insurance under threat of penalty, which it did by construing it simply as being a matter of Congress using its constitutional authority to lay a tax on individuals who do not purchase insurance. It arrived at the judgment that the mandate is constitutional by means of deceptive legalistic arguments devoid of logical validity. An examination of the Court's judgment is a journey down the rabbit hole, to borrow from Lewis Carroll's *Alice's Adventures in Wonderland*, which satirized the British legal system. The Court's judgment, while logically sound in some respects, is a case study of linguistic contortionism and fallacious syllogisms when it comes to its claim that Congress may legitimately tax non-consumption. In declaring its opinion, the Court stated that it was conferring no new powers to the Congress, and yet this is patently untrue. In fact, the Supreme Court has with this decision set a dangerous precedent by acquiescing to the Congressional claim to an extraordinary new power neither authorized by the Constitution nor even contemplated by the Founders, an authoritarian power that poses a grave threat to the principles of limited government and individual liberty.

The Court's judgment begins by pointing out the stated purposes of the Act:

> In 2010, Congress enacted the Patient Protection and Affordable Care Act in order **to increase the number of Americans covered by health insurance and decrease the cost of health care**.[1]

In delivering the opinion of the Court, Chief Justice Roberts reviewed the enumerated powers of the Congress in the Constitution relevant to the case before them—the Commerce Clause, the Taxing Clause, and the Necessary and Proper Clause:

> This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal

[1] *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services, et al.*, No. 11-393 (June 28, 2012), p. 1 http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf. Bold emphasis has been added throughout this paper; all italic emphasis is in the original except where otherwise indicated.

authority akin to the police power. **The Constitution authorizes Congress to "regulate Commerce** with foreign Nations, and **among the several States**, and with the Indian Tribes." Art. I, §8, cl. 3….

Congress may also "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U. S. Const., Art. I, §8, cl. 1. Put simply, Congress may tax and spend….

The reach of the Federal Government's enumerated powers is broader still because **the Constitution authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."** Art. I, §8, cl. 18.[2]

Chief Justice Roberts briefly explained the portions of the Act relating to the mandate:

The individual mandate requires most Americans to maintain "minimum essential" health insurance coverage. 26 U.S.C. §5000A. The mandate does not apply to some individuals, such as prisoners and undocumented aliens. §5000A(d). Many individuals will receive the required coverage through their employer, or from a government pro-gram such as Medicaid or Medicare. See §5000A(f). But for individuals who are not exempt and do not receive health insurance through a third party, the means of satisfying the requirement is to purchase insurance from a private company.

Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. §5000A(b)(1). **That payment, which the Act describes as a "penalty,"** is calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the aver-age annual premium the individual would have to pay for qualifying private health insurance. §5000A(c)….

The Act provides that the penalty will be paid to the Internal Revenue Service with an individual's taxes, and "shall be assessed and collected in the same manner" as tax penalties, such as the penalty for claiming too large an income tax refund. 26 U. S. C. §5000A(g)(1). The Act, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies. §5000A(g)(2). And some individuals who are subject to the mandate are nonetheless exempt from the penalty—for example, those with income below a certain threshold and members of Indian tribes. §5000A(e).[3]

[2] Ibid., pp. 4-6.
[3] Ibid., p. 7.

II. Congress Intended the Mandate as a "Penalty" Not a "Tax"

> *"'When* I *use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'"* — Humpty Dumpty in Lewis Carroll's *Through the Looking-Glass*[4]

The Court next addressed the question of whether it was barred from hearing the suit under the Anti-Injunction Act on the grounds that the penalty for non-compliance with the mandate is treated under the Internal Revenue Code as a tax. The Court dismissed this argument, ruling that the Anti-Injunction Act did not apply in this case, as Chief Justice Roberts explained:

> Before turning to the merits, we need to be sure we have the authority to do so. The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. §7421(a). This statute protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes. **Because of the Anti-Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund.** See *Enochs v. Williams Packing & Nav. Co.*, 370 U. S. 1, 7–8 (1962)….
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> The Anti-Injunction Act applies to suits "for the purpose of restraining the assessment or collection of any *tax*." §7421(a) (emphasis added). **Congress, however, chose to describe the "[s]hared responsibility payment" imposed on those who forgo health insurance not as a "tax," but as a "penalty."** §§5000A(b), (g)(2). There is no immediate reason to think that a statute applying to "any tax" would apply to a "penalty."
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> **Congress's decision to label this exaction a "penalty" rather than a "tax" is significant because the Affordable Care Act describes many other exactions it creates as "taxes."** See Thomas More, 651 F. 3d, at 551. **Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.** See *Russello v. United States*, 464 U. S. 16, 23 (1983).[5]

In sum, the Court made it clear that Congress's decision to describe the "shared responsibility payment" as a "penalty" rather than as a "tax" was purposeful. It was their clear intent to *penalize* individuals for not buying insurance. In fact, President Barack Obama, when selling the Act's reforms to the public, went so far as to insist that it *wasn't* a tax. He falsely claimed that it would not raise taxes, which he was able to do by defining the mandate as "absolutely not a tax increase".[6]

The Court pointed out that the government itself "argues that §5000A(g)(1) does not direct courts to apply the Anti-Injunction Act". The Court concluded:

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[4] http://www.gutenberg.org/files/12/12-h/12-h.htm.
[5] Ibid., pp. 11-12.
[6] Jacqueline Klingebiel, "Obama: Mandate is Not a Tax," ABC News, September 20, 2009, http://abcnews.go.com/blogs/politics/2009/09/obama-mandate-is-not-a-tax/.

> The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax **for purposes of the Anti-Injunction Act**. The Anti-Injunction Act therefore does not apply to this suit, and we may proceed to the merits.[7]

The Court nevertheless also stated:

> It is true that **Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other**.[8]

As we shall see, this caveat was necessary for the Court to conclude on one hand that is was able to hear the case because Congress intended the "shared responsibility payment" as a "penalty" while on the other that the mandate is not unconstitutional because it is "not a penalty".

III. Congress Has No Authority to Enact the Mandate under the Commerce Clause

> *"The Congress shall have Power … To regulate Commerce … among the several States…."* — Constitution of the United States, Article I, Section 8

The Court addressed two different arguments by which the government claimed that the mandate is constitutional. The first is that the Congress has the authority to force people to purchase insurance under the Commerce Clause, and the second that it has the authority to lay a tax on individuals who *don't* buy insurance under the Taxing Clause. Notice that for all intents and purposes, it doesn't matter which way one frames it, the consequence remains the same, which raises the question of whether it is the *ends* that are objectionable or only the *means*.

The Court correctly observed that the Congress does *not* have the authority under the Commerce Clause to force people to buy insurance. In delivering the Court's opinion in this regard, Chief Justice Roberts also instructively outlined the reason the mandate was deemed by Congress to be "necessary and proper" in the first place:

> In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues. It did so through the Act's "guaranteed-issue" and "community-rating" provisions. These provisions together prohibit insurance companies from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals. See §§300gg, 300gg–1, 300gg–3, 300gg–4.
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> The guaranteed-issue and community-rating reforms do not, however, address the issue of healthy individuals who choose not to purchase insurance to cover potential health care needs. **In fact, the reforms sharply exacerbate that problem, by providing an incentive for individuals to delay purchasing health insurance**

[7] *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services, et al.*, p. 15.
[8] Ibid., p. 12.

> **until they become sick**, relying on the promise of guaranteed and affordable coverage. The reforms also threaten to impose massive new costs on insurers, who are required to accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage. **This will lead insurers to significantly increase premiums on everyone.** See Brief for America's Health Insurance Plans et al. as *Amici Curiaein* No. 11– 393 etc. 8–9.
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> **The individual mandate was Congress's solution to these problems.** By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, **the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept.** The Government claims that Congress has power under the Commerce and Necessary and Proper Clauses to enact this solution.[9]

To reiterate, the dual purpose of the Act was to *increase* the number of Americans who are insured and at the same time to *decrease* the costs of health care. The means by which Congress sought to accomplish its first goal was to further attempt to eliminate any semblance of a free market in health care by forbidding insurance providers from rejecting individuals on the basis that they have a pre-existing condition or from charging higher premiums for those with existing conditions whose care therefore comes at a higher cost. The simplistic reasoning of proponents of the Act was that this would mean more Americans would be able to get insurance. Alas, too often legislation suffers the detriment of unintended consequences, which this case illustrates perfectly.

This "solution" proposed would fundamentally change what "insurance" meant and recognizably incentivize individuals *not* to purchase health insurance *unless* and *until* they actually required costly health care. One may imagine the effects on the insurance industry if the government interfered in contracts by mandating that insurance providers allow people to buy fire "insurance" to recoup their losses *after* their houses have burned down. This obviously defeats the whole purpose of insurance, which is designed to insure against possible *future* needs by spreading the risk, and would instantly put these insurance companies out of business. An insurance business can only be profitable to the extent that most people pay more in than they ultimately end up needing to take back out. The "solution" of the Affordable Care Act would recognizably raise costs for insurance providers, who would then necessarily pass the increased costs on to their customers by charging higher premiums. This was not an intended consequence of the Act; however, it was a *predictable* and *understood* one. In sum, Congress's "solution" to the problem they perceived to exist not only would likely result in *fewer* Americans being insured, but would *increase* costs for those who were—precisely the *opposite* results from those Congress declared it intended to produce with the Act.

But rather than recognizing the fundamental flaws in their "solution", Congress simply decided to implement a further authoritarian "solution" by *mandating* that Americans purchase an insurance policy. The net effects of the Act, therefore, are that it "solves" the "problem" of having uninsured Americans by *forcing* them under threat of penalty to buy insurance, and the "problem" of insurance

[9] Ibid., pp. 16-17.

providers raising premiums by effectively *forcing* healthy individuals to subsidize the costs to unhealthy individuals. (There being no slight distinction between this and having a free market in which individuals *not* presently in need of health care may choose, voluntarily and out of their own self-interest, to purchase insurance and thus pay into a pool that pays out to those who *do* require it.)

The Court was careful to point out that its job was not to weigh in on the wisdom of legislation enacted by Congress, but only on whether Congress had the authority under the Constitution to enact it:

> Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. **It is not our job to protect the people from the consequences of their political choices.**[10]

That is to say, it didn't matter to the Court whether the Act offered reasonable solutions to perceived problems, whether it would produce the desired results or not, whether it was wise or not. The only question before the Court was whether it was constitutional.

Turning to the government's argument that Congress had such authority under the Commerce Clause, the Court observed that

> Congress has never attempted to rely on that power **to compel individuals not engaged in commerce to purchase an unwanted product.**[11]

This in itself, the Court argued, did not mean the Commerce Clause did not grant Congress the authority to do so. However, the Court rightfully observed that

> The Constitution grants Congress the power to "regulate Commerce." Art. I, §8, cl. 3 (emphasis added). **The power to regulate commerce presupposes the existence of commercial activity to be regulated**….
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> **The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated**….
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> **The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within**

[10] Ibid., p. 6.
[11] Ibid., p. 18.

> **the scope of federal regulation, and—under the Government's theory—empower Congress to make those decisions for him.**[12]

The Court illustrated the fallacy of the government's argument by citing a previous case and following its invalid logic through to its absurd conclusion:

> Applying the Government's logic to the familiar case of *Wickard v. Filburn* shows how far that logic would carry us from the notion of a government of limited powers. **In *Wickard*, the Court famously upheld a federal penalty imposed on a farmer for growing wheat for consumption on his own farm.** 317 U. S., at 114–115, 128–129. **That amount of wheat caused the farmer to exceed his quota under a program designed to support the price of wheat by limiting supply.** The Court rejected the farmer's argument that growing wheat for home consumption was beyond the reach of the commerce power. It did so on the ground that the farmer's decision to grow wheat for his own use allowed him to avoid purchasing wheat in the market.

In other words, the Court had already upheld that the Congress has the authority under the Commerce Clause to interfere in the market by forcing farmers *not* to grow wheat in an attempt to keep prices higher. It is beyond the scope of this paper to delve into the questions of either the validity of the Court's decision in that case or of the wisdom of this policy of interfering in the market for wheat. It will suffice, for our purposes here, to question the validity of the assumption that government bureaucrats know better than the market how best to price commodities, and to point out that such attempts by the government to interfere in the market and dictate what and how much farmers may or may not grow are anathema to the principles of free market capitalism and individual liberty. This does raise the question of whether such an outcome can really be what the Founders intended with Commerce Clause. But that's a separate question from the one we are examining here, and we need not show that the Court's decision in that case was in error to demonstrate that its determination in this one is egregiously mistaken.

Returning to the matter at hand, the Court's argument continued:

> Under *Wickard* it is within Congress's power to regulate the market for wheat by supporting its price. But price can be supported by increasing demand as well as by decreasing supply. The aggregated decisions of some consumers not to purchase wheat have a substantial effect on the price of wheat, just as decisions not to purchase health insurance have on the price of insurance. **Congress can therefore [according to the government's logic] command that those not buying wheat do so, just as it argues here that it may command that those not buying health insurance do so. The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government's theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.**

[12] Ibid., pp. 18-21.

> **Indeed, the Government's logic would justify a mandatory purchase to solve almost any problem…. To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance.** See, *e.g.*, Dept. of Agriculture and Dept. of Health and Human Services, Dietary Guidelines for Americans 1 (2010). **The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance.** See, *e.g.,* Finkelstein, Trogdon, Cohen, & Dietz, Annual Medical Spending Attributable to Obesity: Payer- and Service-Specific Estimates, 28 Health Affairs w822 (2009) (detailing the "undeniable link between rising rates of obesity and rising medical spending," and estimating that "the annual medical burden of obesity has risen to almost 10 percent of all medical spending and could amount to $147 billion per year in 2008"). **Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured.** See Center for Applied Ethics, Voluntary Health Risks: Who Should Pay?, 6 Issues in Ethics 6 (1993) (noting "overwhelming evidence that individuals with unhealthy habits pay only a fraction of the costs associated with their behaviors; most of the expense is borne by the rest of society in the form of higher insurance premiums, government expenditures for health care, and disability benefits"). **Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables.** See Dietary Guidelines, supra, at 19 ("Improved nutrition, appropriate eating behaviors, and increased physical activity have tremendous potential to . . . reduce health care costs").
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> People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. **Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.**
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> **That is not the country the Framers of our Constitution envisioned…. Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.**[13]

Indeed. The Court in this regard exercised very sound reasoning. It continued:

> **The Framers gave Congress the power to regulate commerce, not to compel it**, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now….
>
> The individual mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity. **The mandate primarily affects healthy, often young adults who are less likely to need significant**

[13] Ibid., pp. 21-23.

> **health care and have other priorities for spending their money. It is precisely because these individuals, as an actuarial class, incur relatively low health care costs that the mandate helps counter the effect of forcing insurance companies to cover others who impose greater costs than their premiums are allowed to reflect.** See 42 U. S. C. §18091(2)(I) (recognizing that the mandate would "broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums"). **If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature.**[14]

It is important to emphasize the Court's explicit recognition of the fact that *the purpose of the mandate is to subsidize the costs of insurance premiums for unhealthy individuals by forcing healthy individuals who are on the whole financially better off without it to purchase an insurance policy*. The Act does nothing to solve the problem of Americans choosing unhealthy lifestyles; on the contrary, its incentives are perversely *contrary* to that goal. Rather, it *rewards* people for doing so while individuals who eat a healthful diet and otherwise make healthy lifestyle choices are *penalized* by making them pay for the health care costs of their fellow Americans who choose less wisely. This is not to say that choosing a healthy lifestyle can guarantee one will never require health care, and there are certainly times when care is needed for unexpected illnesses or injuries that are no fault of an individual's lifestyle choices. Nevertheless, the choice of many Americans to live unhealthy lifestyles, as the Court points out, contributes significantly to the problem of the high costs of health care. Despite its name, the Affordable Care Act does nothing to address such underlying *causes* of unaffordable care. With it, Congress set out from the beginning only to deal with one of the *symptoms*—namely, high insurance premiums—and did so in a manner that they recognized would only *exacerbate* the problem, thus making it "necessary" to enact the individual mandate.

The fact that a law may be foolish, however, does not necessarily mean that it is unconstitutional. The Court continued by addressing the government's argument that it doesn't matter that the mandate targets inactivity rather than activity on the grounds that:

> **The Government regards it as sufficient to trigger Congress's authority that almost all those who are uninsured will, at some unknown point in the future, engage in a health care transaction.** Asserting that "[t]here is no temporal limitation in the Commerce Clause," the Government argues that because "[e]veryone subject to this regulation is in or will be in the health care market," they can be "regulated in advance." Tr. of Oral Arg. 109 (Mar. 27, 2012).
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> **The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. We have said that Congress can anticipate the effects on commerce of an economic activity.** See, e.g., Consolidated Edison Co. v. NLRB, 305 U. S. 197 (1938) (regulating the labor practices of utility companies); Heart of Atlanta Motel, Inc. v. United States, 379 U. S. 241 (1964) (prohibiting discrimination by hotel operators); Katzenbach v. McClung, 379 U. S. 294 (1964) (prohibiting discrimination

[14] Ibid., p. 24.

> by restaurant owners). **But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce.** Each one of our cases, including those cited by JUSTICE GINSBURG, post, at 20–21, involved preexisting economic activity. See, e.g., Wickard, 317 U. S., at 127–129 (producing wheat); Raich, supra, at 25 (growing marijuana).
>
> **Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions.**[15]

The Court's argument here is well reasoned. Its final word on the matter is that:

> The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. **Such a law cannot be sustained under a clause authorizing Congress to "regulate Commerce."**[16]

IV. Congress Has No Authority to Enact the Mandate under the Necessary and Proper Clause

> *"The Congress shall have Power … To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers…."* — Constitution of the United States, Article I, Section 8

The Supreme Court next turned its attention to the government's argument that the mandate is constitutional under the Necessary and Proper Clause, an argument which in turn was dependent upon the faulty assumption that Congress has authority to enact it under the Commerce Clause. The Necessary and Proper Clause does not grant Congress an authority *additional* to the enumerated powers that precede it. If the mandate is not authorized under the preceding Commerce Clause, then neither does the Necessary and Proper Clause separately grant such authority to Congress. As the Court explained:

> **The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an "integral part of a comprehensive scheme of economic regulation"**—the guaranteed-issue and community-rating insurance reforms….
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> As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress's determination that a regulation is "necessary." … But we have also carried out **our responsibility to declare unconstitutional those laws that undermine the structure of government established by the**

[15] Ibid., p. 26.
[16] Ibid., p. 27.

> **Constitution. Such laws, which are not "consist[ent] with the letter and spirit of the constitution,"** *McCulloch, supra*, at 421, **are not "*proper* [means] for carrying into Execution" Congress's enumerated powers. Rather, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.'"** *Printz v. United States*, 521 U. S. 898, 924 (1997) (alterations omitted) (quoting The Federalist No. 33, at 204 (A. Hamilton)); see also *New York*, 505 U. S., at 177; *Comstock, supra*, at ___ (slip op., at 5) (KENNEDY, J., concurring in judgment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause . . .").
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> Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power…. The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.
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> This is in no way an authority that is "narrow in scope," *Comstock, supra*, at ___ (slip op., at 20), or "incidental" to the exercise of the commerce power, *McCulloch, supra*, at 418. **Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. Even if the individual mandate is "necessary" to the Act's insurance reforms, such an expansion of federal power is not a "proper" means for making those reforms effective**….
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> **Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a "necessary and proper" component of the insurance re-forms. The commerce power thus does not authorize the mandate.**[17]

Here again we may see that the Court's argument was well reasoned.

V. Congress Has No Authority to Enact the Mandate under Its Power to Collect Taxes (the Court's Judgment Notwithstanding)

> *"The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises …; but all Duties, Imposts and Excises shall be uniform throughout the United States"* — Constitution of the United States, Article I, Section 8

[17] Ibid., pp. 27-30.

> *"[D]irect Taxes shall be apportioned among the several States"* — Constitution of the United States, Article I, Section 2

Up until this point, the Supreme Court's arguments have been logical and consistent with the plain meaning and intent of the Constitution. Clearly, the Court was correct in its judgment that the Congress has no authority under the Commerce Clause or the Necessary and Proper Clause to enact the mandate. It next turned its attention, however, to the government's argument that it has such authority under the power to collect taxes. We now enter the rabbit hole.

> The Government's tax power argument asks us to view the statute differently than we did in considering its commerce power theory. In making its Commerce Clause argument, the Government defended the mandate as a regulation requiring individuals to purchase health insurance. **The Government does not claim that the taxing power allows Congress to issue such a command. Instead, the Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product…. And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.**[18]

Of course, if a statute has two possible meanings, *both* of which violate the Constitution, the courts have a duty to overthrow the law. The Supreme Court, as we shall see, acted in dereliction of its duty by upholding the government's second interpretation of the statute with absurd reasoning.

The Court acknowledged that

> **The most straightforward reading of the mandate is that it commands individuals to purchase insurance.** After all, it states that individuals "shall" maintain health insurance. 26 U. S. C. §5000A(a). Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis.[19]

Indeed, this is not only the "most straightforward" reading of the mandate, but the *only* reasonable interpretation. It is simply not possible to read the mandate as anything other than a command to individuals to purchase insurance. Section 5000A(a) of the Act states:

> An applicable individual **shall** for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.[20]

That is clearly not a suggestion; particularly not when coupled with Section 5000A(b), which states:

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[18] Ibid., p. 31.
[19] Ibid., p. 32.
[20] Public Law 111-148, "The Patient Protection and Affordable Care Act," 111th Congress, March 23, 2010, http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf.

> **If an applicable individual fails to meet the requirement** of subsection (a) for 1 or more months during any calendar year beginning after 2013, then, except as provided in subsection (d), **there is hereby imposed a penalty** with respect to the individual in the amount determined under subsection (c).[21]

The Act states clearly that individuals "shall" purchase health insurance, a command explicitly described as a "requirement" for which any failure to comply will incur a "penalty". *That means that under the Act, not purchasing insurance is* ipso facto *considered unlawful inactivity*. Whether the penalty is in the form of a tax or not is irrelevant to the question of whether or not this Act "commands individuals to purchase insurance", which it plainly and inarguably does.

It should also be noted that the Court in its own language explicitly refers to it as a "mandate", which is by definition "any mandatory order or requirement under statute, regulation, or by a public agency".[22] The Court's suggestion that what is admittedly a "mandate" may not necessarily be a command is patent nonsense, inasmuch as words are intended to actually have meaning. One might just as well argue that the act of acquiring a marriage license does not mean that you are requesting permission from the state to get married. This is plainly ridiculous, inasmuch as a "license" is *defined* as "governmental permission to perform a particular act (like getting married)…", and inasmuch as words are actually intended to have meaning.[23] Simply stated, if there is no command, then neither is there a *mandate*. The converse is also true.

Yet that the admitted "mandate" is not a command is the very argument the Court considered seriously:

> But, for the reasons explained above, the Commerce Clause does not give Congress that power. Under our precedent, **it is therefore necessary to ask whether the Government's alternative reading of the statute—that it only imposes a tax on those without insurance—is a reasonable one.**[24]

We must recognize that there is no practical difference between saying that the mandate commands individuals to purchase insurance and saying that it merely imposes a tax on those who do not. It's the same thing. The consequence is the same either way one may choose to look at it. The fact that the "penalty" may be viewed as a "tax" is irrelevant. Whether a "tax" or not, *it remains, under the law, a "penalty" incurred for failure to obey the command to purchase insurance*, and there is no other possible interpretation that remains practically meaningful. We must also ask whether it is not the *ends* that are objectionable here and not only the *means*.

Furthermore, while the Court may have a duty to uphold a law if one possible meaning of it is not found to be unconstitutional, the task of *interpreting* the law does not extend to ascribing to it a meaning that does not conform with the way it is actually written. That is to say, the Court may have a duty to *interpret* the law, but it does *not* have the authority to *rewrite* it by simply declaring it to mean

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[21] Ibid.
[22] Definition of "mandate", Gerald and Kathleen Hill, *The People's Law Dictionary*, from http://dictionary.law.com.
[23] Definition of "license", Ibid.
[24] *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services, et al.*, p. 32.

something other than what it actually says. Yet effectively *rewriting* the law is precisely what the Court set out to do.

Apart from any alternative reading being plainly nonsensical, we may recall the Court's own observations that Congress acted intentionally in describing the "shared responsibility payment" as a "penalty". One may stipulate that the required payment is a "tax", but this is inconsequential, as it yet it remains, under the law, a "penalty" for failing to comply with the command to purchase insurance. The Court's implied logic here is that *if* the mandate is a "tax", *then* it is not a "penalty". This is a *non sequitur*, for the obvious reason that it can be both. Even if considered a "tax", it remains a "penalty" under the plain and deliberate language of the law and the recognized intent of the Congress to penalize people who do not purchase insurance.

Additionally, the implied logic of the "alternative reading" of the mandate is that *if* it is interpreted "only" as a tax on those who do not purchase insurance, *then* the mandate is not a command to individuals to purchase insurance and the required payment is not a penalty for not doing so. This logic is fallacious because it is begging the question, employing a *petition principia* fallacy. It is circular reasoning, the premise of its argument consisting of the claim that the conclusion is true. That is to say, the conclusion is that the tax is not a penalty for failure to obey a command, but at the same time the whole *premise* of the argument *assumes* that very thing. The logic of the government's argument is invalid and thus the "alternative reading" is by definition *not reasonable*. If we employ sound reasoning, we see that it follows that *since* Congress does not have the authority to command individuals to purchase insurance, *therefore it has no authority to penalize individuals for not doing so, whether through taxation or any other means*.

The Court continued:

> **Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes.** See §5000A(b). That, according to the Government, means the mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS. **Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income.** And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax.
>
> **The question is not whether that is the most natural interpretation of the mandate, but only whether it is a "fairly possible" one.** *Crowell v. Benson*, 285 U. S. 22, 62 (1932). As we have explained, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U. S. 648, 657 (1895). The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution. Granting the Act the full measure of deference owed to federal statutes, **it can be so read, for the reasons set forth below.**[25]

[25] Ibid., p. 32.

Notice that the Court argues that "the only consequence" of failure to "maintain health insurance" is that the individual "must make an additional payment to the IRS". But the fact that this is the "only" consequence *is completely irrelevant*. It nevertheless admittedly remains *a consequence of failing to comply with the command to maintain health insurance*. This is, according to the Court's own logic, unconstitutional. This obviously wouldn't do, so the Court effectively tried to argue that section 5000A(a) of the Act can be interpreted not as a command, but as merely a *suggestion*, and that the required payment is merely a "consequence" of a voluntary choice not to heed that non-compulsory "suggestion". This is plainly ludicrous. How is it "fairly possible" to interpret section 5000A(a) as merely a suggestion, or anything other than a command?

The Court proceeded in its attempt to answer that question:

> The exaction the Affordable Care Act imposes on those without health insurance **looks like a tax in many respects**…. Indeed, the payment is expected to raise about $4 billion per year by 2017.[26]

We may stipulate that payment is a tax, and therefore it is unnecessary to reproduce here the further arguments of the Court in that regard. Skipping further ahead, the Court stated:

> **It is of course true that the Act describes the payment as a "penalty," not a "tax." But** while that label is fatal to the application of the Anti-Injunction Act, supra, at 12–13, **it does not determine whether the payment may be viewed as an exercise of Congress's taxing power.**

The Court thus began to shift attention away from 5000A(a) to 5000A(b). The purpose for doing so is apparent: the Court had already admitted that the Congress has no authority to command individuals to purchase health insurance. It follows that it therefore had a duty to strike down 5000A(a). But this would have posed a problem for the predetermined conclusion, since this would have made the question of whether the payment required in 5000A(b) is a tax or not effectively moot; if the command to purchase insurance contained in 5000A(a) is unconstitutional, then the "penalty" required in 5000A(b) for not doing so is also *ipso facto* unconstitutional. Therefore it became necessary for the Court to preposterously assert that 5000A(a) may be interpreted as *not* a command, thus effectively rewriting the law. From this premise, it set out to also rewrite 5000A(b) by asserting that the "penalty" is not a penalty, even though it is described as such; Congress intended it as such; and it remains such for all practical intents and purposes, whatever other label one may wish to apply to it.

To this end, the Court argued that

> **the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty**: First, for most Americans **the amount due will be far less than the price of insurance**, and, by statute, it can never be more. It **may often be a reasonable financial decision to make the payment rather than purchase insurance**….

[26] *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services, et al.*, p. 33.

> Second, **the individual mandate contains no scienter requirement**. Third, the payment is collected solely by the IRS through the normal means of taxation—except that **the Service is not allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution**. See §5000A(g)(2).[27]

If one breaks down the logic the Court has employed here into its syllogism, we find the following: *since* the payment may be "considered a tax"*, therefore* it is "not a penalty". This is a flagrant *non sequitur*. As has already been pointed out, it does not follow that since it may be "considered a tax" that therefore it is "not a penalty", for the simple and obvious reason that it may be a "penalty" in the form of a "tax". Indeed, it is clearly both. The Court is here engaging in mere casuistry.

This is not to deny Congress's authority under the Constitution to lay and collect taxes. True, one may just as well argue that laying *any* tax on the purchase of some good or service constitutes a "penalty" for buying that good or service, even though many such taxes, unlike this one, are not *intended* to penalize individuals for consumption, but merely to raise revenue. On the other hand, some taxes *are* intended at least in part to effectively penalize individuals for making certain purchases in order to deter them from doing so (e.g., cigarettes), just as Congress may use tax *breaks* to incentivize individuals to make other purchases (e.g., housing). The wisdom of imposing such taxes aside, we may stipulate that the Congress does have this authority. However, it does not require any great mental exercise to recognize that there is no slight difference between taxing *consumption* and taxing *non-consumption*.

As to the Court's further arguments here, first, the fact that the payment is likely to be "less than the price of insurance" for most Americans, and thus may be "a reasonable financial decision to make", is *completely irrelevant* to the question of whether or not it constitutes a penalty. This logic is equivalent to arguing that spending a night in the local jail is "not a penalty" because it is a less than spending five years in a federal penitentiary; it's a *non sequitur*. It does not follow from this observation that the payment is any less compulsory, any less of penalty for not acting as Congress so desires, for the simple and obvious reason that it may also be in the individual's best interests *to do neither*. The act of legislating away someone's liberty, their freedom to choose for themselves, is *ipso facto* to penalize them. This was precisely the intent of Congress, of course, a fact which the Court attempted to speciously relegate to irrelevancy.

Second, the Court argues that the payment is "not a penalty" because "the individual mandate contains no scienter requirement". That is to say, individuals need not have knowledge that their failure to purchase insurance is unlawful in order for the "penalty" to be incurred, as may be required for prosecutions under criminal law.[28] In other words, the Court argued that Congress did not explicitly define a failure to purchase insurance as constituting a *criminal* act, and *since* it didn't do so, *therefore* the payment required for not doing so is "not a penalty"—yet another glaring *non sequitur*. Knowledge that *not* buying insurance is an *un*lawful *in*activity is not required for the "shared responsibility payment" to constitute a penalty for that inactivity. Consider: if *not* buying insurance is *not* unlawful, logically, then, there can be no penalty—or *any* legal consequence contrary to the will of the individual, whether described as a "penalty" or not—for not doing so. Conversely, if there *is* a

[27] Ibid., pp. 35-37.
[28] Definition of "scienter", Hill.

penalty for not doing so—whether described as such or not—then this inactivity must be considered under the Act to be *unlawful*. The further corollary, according to the Court's own argument, is that the mandate must be unconstitutional. Reason demands that we arrive at the opposite conclusion from the one drawn by the Court.

The third argument here is also a *non sequitur*. The fact that the IRS "is not allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution" does not lead to the conclusion that therefore the required payment is "not a penalty". While an individual may not be criminally prosecuted, it does not follow that there may not be *lesser* punitive legal consequences. Indeed, the requirement of the payment itself is *ipso facto* a lesser punitive legal consequence than criminal prosecution for the act of not purchasing insurance![29] The only way the payment could reasonably be considered, for all intents and purposes, to *not* be a penalty would be if compliance was completely *voluntary*. Unless the Court is telling the American people that they are simply free to ignore the mandate altogether (which would mean it *wasn't* a mandate) and neither purchase insurance nor make the "shared responsibility payment" to the IRS, that there will be *no* legal consequences for doing so and no enforcement of the "requirement" to pay the tax (which would mean it *wasn't* a requirement), and that any such choice will not be considered unlawful, then the logic employed here is patently fallacious.

Again, this is not to say that every tax mandated by Congress must therefore be considered a "penalty" for making a purchase. We return to the distinction between taxing consumption and taxing *non*-consumption. Consider that if a "penalty" tax is laid on cigarettes, individuals remain free to purchase cigarettes or not, and *neither choice is considered by the government to be an unlawful act invoking punitive legal consequences*. Yet in this case, the Court, as we shall see, has in fact determined that failure to make the "shared responsibility payment" would indeed be considered by the government to be *unlawful*. Note that the Congress could use its power to offer tax *breaks* to individuals who do purchase insurance, if it wished to incentivize such activity in the market without infringing on personal liberty (setting aside the question of the wisdom of interfering in the market by such means, as the government did in housing, thus contributing to the housing bubble[30]).

This is actually a point the Court makes implicitly in its next argument:

> None of this is to say that the payment is not intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But **taxes that seek to influence conduct are nothing new**…. Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking. And we have upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns…. **That §5000A seeks to shape**

[29] In turn, the punitive legal consequence for not paying the penalty tax is that the IRS may collect it by withholding money from a person's tax refund. Janemarie Mulvey and Hinda Chaikind, "Individual Mandate and Related Information Requirements under ACA," Congressional Research Service, July 2, 2012, http://www.fas.org/sgp/crs/misc/R41331.pdf.

[30] Jeremy R. Hammond, *Ron Paul vs. Paul Krugman: Austrian vs. Keynesian economics in the financial crisis* (Charleston: CreateSpace 2012).

> **decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.**[31]

The observation that "taxes that seek to influence conduct are nothing new" is an irrelevant strawman argument. It remains true that Congress attempting to lay a tax on individuals precisely for *not* making a purchase *is indeed* something new. It is, in fact, an unprecedented claim to power by the Congress. This is evident in the fact that it was necessary for this case to be heard by the Supreme Court to address that question in the first place, and in the fact that the Court cited no precedent for such a tax in its entire judgment. As the *New York Times* observed following the Court's decision, this is a "tax" that "does break new ground. 'Nobody here can think of an example where you pay a tax if you do not buy something,' said Howard Gleckman, a resident fellow at the Tax Policy Center in Washington."[32]

Likewise, it is true that the fact that section 5000A "seeks to shape decisions about whether to buy health insurance" does not *by itself* mean "that it cannot be a valid exercise of the taxing power". But this is a similarly irrelevant observation, since the whole question before the Court is regarding *the means* by which Congress intends to "shape decisions"; it may, after all seek to "shape decisions" by either constitutional or unconstitutional means. The Court effectively continued to evade this central question with such irrelevant observations, which do nothing to further its argument; to wit, it does not follow that *since* the Congress has authority to use its tax power to influence conduct, and has historically done so, *therefore* it may tax people for not making purchases it would have them make.

The Court next tried to draw the conclusion that the "shared responsibility payment" is "not a penalty" because it is not punishment for an unlawful act by the following means:

> **In distinguishing penalties from taxes, this Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission."** *United States v. Reorganized CF&I Fabricators of Utah, Inc.,* 518 U. S. 213, 224 (1996); see also *United States v. La Franca*, 282 U. S. 568, 572 (1931) ("[A] penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act"). **While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Government agrees with that reading, confirming that if someone chooses to pay rather than obtain health insurance, they have fully complied with the law.** Brief for United States 60–61; Tr. of Oral Arg. 49–50 (Mar. 26, 2012).
>
> Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. See Congressional Budget Office, *supra*, at 71. We would expect Congress to be troubled by that prospect if such conduct were unlawful. That

[31] *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services, et al.*, pp. 36-37.
[32] Floyd Norris, "Justice Allow the Term 'Tax' to Embrace 'Penalty'," *New York Times*, June 28, 2012, http://www.nytimes.com/2012/06/29/business/supreme-court-calls-insurance-penalty-a-tax.html.

> Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance.[33]

We must again pause to examine the Court's ridiculous logic, as the fallacies here are numerous. First, there is a glaring self-contradiction fatal to the Court's conclusion. Observe that the Court states that the Act does not attach "any negative legal consequences to not buying health insurance, *beyond requiring a payment to the IRS*" (emphasis added). The Court thus implicitly acknowledges that the required payment to the IRS *is itself a negative legal consequence to not buying health insurance*. And *since* there is this negative legal consequence for not buying insurance, *therefore*, according to the Court's own logic, it must constitute a penalty for engaging in what the government considers to be unlawful inactivity, and therefore is unconstitutional.

Second, the observation that "if someone chooses to pay rather than obtain health insurance, they have fully complied with the law" is irrelevant to the question of whether the mandate is constitutional. It surely goes without saying that if an individual pays the "penalty" rather than purchase insurance, then they have complied with the law! But the fact that individuals may choose to act in compliance with a law that is passed by Congress *does not make that law constitutional*. The question before the Court is *not* whether individuals who *comply* with the mandate are acting lawfully or not, but whether individuals who do *not* comply with the mandate and who *neither* buy insurance *nor* make the payment are considered to have acted unlawfully. The Court's argument effectively amounts to the perfectly meaningless observation that those who comply with the law are in compliance with the law. It simply does not follow that *since* individuals who comply with the mandate are not acting unlawfully, *therefore* the mandate is constitutional. This is plain nonsense, and it should be shocking to Americans that their Supreme Court could engage in such shameless arguments.

We are now deep down the rabbit hole, but the Court's next argument is even more disturbing:

> Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient windows must pay $50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer's income tax return. Those whose income is below the filing threshold need not pay. The required payment is not called a "tax," a "penalty," or anything else. **No one would doubt that this law imposed a tax, and was within Congress's power to tax.** That conclusion should not change simply because Congress used the word "penalty" to describe the payment.[34]

Welcome to Wonderland. The Court has really delved into the absurd here, its arguments having lost even a *pretense* of reason. Consider the fact that the whole premise of this argument is that nobody would argue that it would be unconstitutional for the Congress to impose a tax on homeowners for not having energy efficient windows. For every individual who bought a home

[33] Ibid., pp. 37-38.
[34] Ibid., p. 39.

without energy efficient windows already installed, this would amount to taxing them for *not* purchasing such windows. The bizarre logic employed by the Court here is that *since* nobody would argue otherwise, *therefore* such a tax on failing to purchase windows would be constitutional; *ergo* the tax on failing to purchase insurance, which is really the same thing, must also be constitutional. There are two main fallacies with this syllogism. First, it depends entirely upon the assumption that nobody would argue that such a window tax would be unconstitutional. But what is the basis for this assumption? The premise is true only in a hypothetical fantasy world, and there is every reason to believe it would be false in the real one. It is, after all, self-evident that many Americans believe taxing the non-purchase of insurance is unconstitutional (if this were not so, the Court would obviously not be hearing this case), so it would rather seem to follow that there would certainly likely be many who would similarly protest such a window tax on precisely the same grounds. So the Court begins with a false premise, which it then uses to employ the circular argument that *since* the hypothetical tax would be constitutional, *therefore* so is the real one. This is nonsense because the premise of this argument presumes the very proposition to be proven. It is not good enough for the Court to invent some hypothetical reality and apply this fiction to the real world in order to be able to arrive at the conclusion desired by the government, and the fact that the Court found it necessary to do so is highly instructive as to the actual merits of its arguments—or, rather, the lack thereof.

Let us recall the Court's argument that "Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other". And yet changing whether the exaction is a penalty or not for constitutional purposes by describing it as one or the other is *exactly* what the Court itself has done in this case. It has merely declared that the tax *isn't* what by its very nature we must recognize it to be, and what by its own admission Congress *intended* it to be. It has failed to present even a single valid argument to support its contention that the tax is "not a penalty" imposed on Americans for what the government, under the Act, considers to be unlawful inactivity in the market.

VI. A Direct or Indirect Tax?

> *"[A]lthough there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words' duties, imposts and excises,' such a tax, for more than one hundred years of national existence, has as yet remained undiscovered…. [A]ll taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes"* — United States Supreme Court, *Pollock v. Farmers' Loan and Trust Company*

We may stipulate the Court's conclusion that the "shared responsibility payment" may be considered a "tax". The Court's conclusion, however, that this "tax" is "not a penalty", as has been shown, relies entirely upon specious arguments. Yet even if we were to stipulate that it is "not a penalty", the Court would still have to show that the Congress has the authority under the Constitution to tax individuals for inactivity. The Court was apparently cognizant of this fact, and next turned its attention to the question of whether it constitutes a direct tax or not:

> Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution. Plaintiffs argue that the shared responsibility payment does not do so, citing Article I, §9, clause 4. That clause provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." This requirement means that any "direct Tax" must be apportioned so that each State pays in proportion to its population. **According to the plaintiffs, if the individual mandate imposes a tax, it is a direct tax, and it is unconstitutional because Congress made no effort to apportion it among the States.**
>
> Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a "head tax" or a "poll tax"), might be a direct tax. See *Springer v. United States*, 102 U. S. 586, 596–598 (1881). Soon after the framing, Congress passed a tax on owner-ship of carriages, over James Madison's objection that it was an unapportioned direct tax. *Id.*, at 597. This Court upheld the tax, in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State. See *Hylton v. United States*, 3 Dall. 171, 174 (1796) (opinion of Chase, J.). The Court was unanimous, and those Justices who wrote opinions either directly asserted or strongly suggested that only two forms of taxation were direct: capitations and land taxes. See id., at 175; *id.*, at 177 (opinion of Paterson, J.); *id.*, at 183 (opinion of Iredell, J.).
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> That narrow view of what a direct tax might be persisted for a century. In 1880, for example, we explained that "*direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate." *Springer, supra*, at 602. In 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 618 (1895). That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes. See *Eisner v. Macomber*, 252 U. S. 189, 218–219 (1920).
>
> **A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, "without regard to property, profession, or *any other circumstance*." *Hylton, supra*, at 175 (opinion of Chase, J.)** (emphasis altered). The whole point of the shared responsibility payment is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance. The payment is also plainly not a tax on the ownership of land or personal property. **The shared responsibility payment is thus not a direct tax that must be apportioned among the several States.**[35]

According to Bouvier's law dictionary, in the sense of the Constitution, "taxes are usually divided into two great classes, those which are direct, and those which are indirect. Under the former denomination are included taxes on land or real property, and under the latter taxes on

[35] Ibid., pp.40-41.

articles of consumption."[36] As the Court noted, a capitation—defined as a "poll tax; an imposition which is yearly laid on each person according to his estate and ability"[37]—is a tax directly imposed on individuals. The Constitution prescribes two rules regarding taxation, "the rule of uniformity and the rule of apportionment. Three kinds of taxes, namely, duties, imposts and excises are to be laid by the first rule; and capitation and other direct taxes, by the second rule."[38]

The corollary of the Court's determination that the "shared responsibility payment" is not a direct tax is that it is an *indirect* tax. It is important to emphasize that the conclusion that the tax is not unconstitutional because it is not an unapportioned *direct* tax does *not* imply that it is therefore not unconstitutional as an *indirect* tax. The Court, clearly cognizant of this fact, sought to allay any objection to the payment as an *indirect* tax with the following arguments:

> **There may, however, be a more fundamental objection to a tax on those who lack health insurance.** Even if only a tax, the payment under §5000A(b) remains a burden that the Federal Government imposes for an omission, not an act. **If it is troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce, perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something.**
>
> **Three considerations allay this concern. First, and most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity. A capitation, after all, is a tax that every-one must pay simply for existing, and capitations are expressly contemplated by the Constitution.** The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity. But **from its creation, the Constitution has made no such promise with respect to taxes. See Letter from Benjamin Franklin to M. Le Roy (Nov. 13, 1789) ("Our new Constitution is now established . . . but in this world nothing can be said to be certain, except death and taxes")**.[39]

We must again pause here to point out the numerous fallacies already contained with the first of the three "considerations". The Court's observation that it may "perhaps" be "troubling" to suggest that the Congress has the constitutional authority to tax individuals for non-consumption is certainly an apt one. Its attempt to "allay this concern", however, offers no immediate reassurances. Recognize in the first place that the Court's whole argument rests on the presumption that it is not the *ends* but only the *means* that are "troubling".

Let's begin with the latter point made here. Notice the source the Court cited for its assertion that "the Constitution made no such promise with respect to taxes." To support this, the Court cites a private letter from Benjamin Franklin to Frenchman Jean-Baptiste Leroy, which included his famous quip that nothing is certain "except death and taxes". We must dare to ask: is the Court

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[36] Definition of "Taxes", John Bouvier, *A Law Dictionary: Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union*, Revised Sixth Edition, 1856, from http://www.constitution.org/bouv/bouvier.htm.
[37] Definition of "Capitation", Ibid.
[38] Definition of "Taxes", Ibid.
[39] *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services, et al.*, pp. 41-42.

being *serious*? It would be one thing to cite previous case law or the writings of the Founders directly pertaining to the intended purpose and meaning of the Constitution, as it had done in citing Alexander Hamilton in *The Federalist*. But citing Franklin's quip to support the argument that the Constitution *doesn't* protect Americans from being taxed for not buying something Congress wishes them to buy is entirely frivolous. As if that wasn't egregious enough, notice the ellipsis; the court shamelessly omitted the middle portion of the sentence, which provides the context for the quip. The quote in full reads, "Our new Constitution is now established, *and has an appearance that promises permanency;* but in this world nothing can be said to be certain, except death and taxes" (emphasis added).[40] Thus, Franklin's point was that the Constitution might not be permanent as established, but was subject to change (just as the Articles of Confederation that preceded it and which it replaced had proved to be temporary, having been replaced altogether). Franklin was emphatically *not* stating that there was no guarantee in the Constitution that the Congress cannot tax people for abstaining from the marketplace. He wasn't telling Leroy that under the Constitution, the Founders understood that the Congress may tax anything and everything it pleases in order to compel Americans to act in whatever way it so determines. He wasn't saying that the government's power to tax is unlimited. Franklin simply wasn't commenting on Congress's power to tax under the Constitution *at all*. Franklin's quip *is totally irrelevant* to the argument the Court is attempting to make, and doesn't in the least bit support it.

More importantly, the argument that "the Constitution does not guarantee that individuals may avoid taxation through inactivity" is a strawman. Observe carefully the reasoning employed to knock down this strawman: a capitation, after all, is a tax that individuals must pay "simply for existing". This, while perhaps an overly-simplistic way of putting it, is true. But it is not a valid argument. The employed syllogism is that *since* the Congress may tax individuals "simply for existing", *therefore* it may also tax individuals simply for doing nothing (as opposed to doing some action the Congress wishes the individual to do). But there is a simple and obvious problem with this logic. The capitation tax, as the Court had itself already made abundantly clear, is a *direct* tax that must be apportioned among the states. We may assume that there is a reason that the Founders established in the Constitution that any such tax imposed directly on individuals "simply for existing"—or simply for doing nothing, for that matter—must be *apportioned* among the states. Since the Court had already argued that the "shared responsibility payment" is not a direct tax, it must therefore contend that it is an *indirect* tax. The question therefore remains of whether Congress has the authority to lay an *indirect* tax on individuals for not doing something. The Court's strawman argument serves the purpose of obfuscating the distinction between the two different kinds of taxes.

Additionally, the Court upheld that Congress may not mandate that individuals purchase insurance under the Commerce Clause, the Constitution "made no such promise" that the Congress could not lay a *tax* on individuals for not doing so. But this argument runs directly contrary to many of the Court's own arguments for why such authority is *not* granted under the Commerce Clause. This is a good point at which to reconsider some of those very reasonable arguments that apply equally to the tax power. Recall that the Court had argued that

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[40] Letter from Benjamin Franklin to Jean-Baptiste Leroy, November 13, 1789; reported in *Bartlett's Familiar Quotations*, 10th ed. (1919), from http://en.wikiquote.org/wiki/Benjamin_Franklin.

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

And yet the Court would have Americans believe that taxation power *does* permit Congress to regulate individuals by taxing them "precisely *because* they are doing nothing"? This statement of the Court implicitly recognizes that Congress's use of such a power would be unprecedented, and clearly it is the *ends* that are objectionable here, and not only the *means*. That is to say, permitting Congress to so regulate individuals "would open a new and potentially vast domain to congressional authority" *regardless* of whether it was deemed to be authorized under the Commerce Clause *or by any other clause* of the Constitution.

The Court had argued that

> Indeed, the Government's logic [that it has authority under the Commerce Clause to compel individuals to make a purchase] would justify a mandatory purchase to solve almost any problem.

It is just as true that the government's logic that it has authority under the Taxation Clause to tax individuals for not buying something would justify similar attempts to "solve" whatever "problem" Congress deemed to exist (or itself created in the first place). Recognizing again that it is the *ends* which are objectionable here and not only the *means*, it follows that the latter is no less oppressive and incompatible with the principle of individual liberty than the former.

We may also remember the Court's argument that:

> Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables.

The Court rejected that the Congress could so address the diet problem. And yet it accepted the argument, if we follow its determination through to its logical corollary, that the Congress could, if it so desired, "address the diet problem" by *taxing* people for *not* buying vegetables. Once again, the latter is no less repulsive to liberty than the former, and it cannot be that it is only the *means* and not also the *ends* that is objectionable.

The Court had similarly argued that

> Accepting the Government's theory [with regard to the Commerce Clause] would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.

It is equally true that the government's theory with regard to the Taxing Clause would give Congress the same license to regulate what we do not do, which would just as fundamentally change the relation between the citizen and the Federal Government.

If the Congress may tax individuals simply for not doing whatever legislators wish them to do, there is no limit to its power to coerce. According to the Court's determination, for example, the Congress may tax a parent for homeschooling their child. It may tax someone who does not buy a more fuel-efficient automobile to replace the one they already own. To borrow the Court's own examples, it may tax people for not buying enough vegetables according to a prescribed quota. It may tax homeowners for not installing energy-efficient windows. There is simply no limit to the Congress's power to *coerce* individuals by laying a penalty tax on them for not doing whatever it may be that government bureaucrats would have them do. Moreover, it is no secret that the pharmaceutical industry, through its lobbies, were heavily involved in shaping the Affordable Care Act to make sure it was in their interests, regardless of whether or not their demands were in the interests of the general public.[41] Imagine the dangers of corporate lobbies and moneyed interests buying influence in government to get legislation passed using this new taxing power to coerce Americans to purchase their goods or services. The oppressive nature of this power and the threat it represents to liberty is limited only by the ability of corporate interests and corrupt government bureaucrats to imagine.

As John Dalberg-Acton famously wrote, with regard to the presumption that the public should trust the government to have their best interests in mind:

> If there is any presumption it is the other way against holders of power, increasing as the power increases. Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: still more when you superadd the tendency or the certainty of corruption by authority. There is no worse heresy than that the office sanctifies the holder of it.[42]

Finally, recall the Court's admission that

> Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.
>
> That is not the country the Framers of our Constitution envisioned….

And yet according the government's logic, the Constitution authorizes Congress to use its *tax* power to compel citizens to act as the Government would have them act. And the Court would have us

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[41] "ObamaCare's Secret History: How a Pfizer CEO and Big Pharma colluded with the White House at the public's expense," *Wall Street Journal*, June 11, 2012, http://online.wsj.com/article/SB10001424052702303830204577446470015843822.html.

[42] Letter from John Dalberg-Acton to Mandell Creighton, April 5, 1887; published in *Historical Essays and Studies, by John Emerich Edward Dalberg-Acton* (1907), ed. John Neville Figgis and Reginald Vere Laurance, Appendix, p. 504; from http://en.wikiquote.org/wiki/John_Dalberg-Acton,_1st_Baron_Acton.

believe that this *is* the country the Framers of our Constitution envisioned? Certainly not! The Court made no attempt to reconcile any of the above self-contradictory conclusions.

Let us consider the words of Chief Justice Roberts, who, in delivering the opinion of the Court, correctly observed that

> **The enumeration of powers is also a limitation of powers**, because "[t]he enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824). **The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it."** *McCulloch, supra*, at 405….
>
> **And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: "The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people."** U. S. Const., Amdt. 10.

The assertion that "the Constitution does not guarantee that individuals may avoid taxation through inactivity" is therefore meaningless, an observation from which we may draw no conclusions, for the following reason: the question is not whether or not the Constitution guarantees this or that protection against government usurpation of power, but whether or not a claimed power is expressly granted to the government under the Constitution. It is not enough for the Court to declare that the Constitution does not expressly forbid a power; it must show that the Constitution expressly *grants* a power in order to be able to determine that it is constitutional. If it cannot do so, it must perform its duty to overturn the law in which the Congress claimed the power not expressly enumerated. The Court with the above argument was recklessly and in dereliction of its duty attempting to shift that burden of proof.

With this in mind, let us now continue with the Court's first of three arguments intended to "allay" the concern that the Congress is usurping power not authorized to it by the Constitution:

> Whether the mandate can be upheld under the Commerce Clause is a question about the scope of federal authority. Its answer depends on whether Congress can exercise what all acknowledge to be the novel course of directing individuals to purchase insurance. **Congress's use of the Taxing Clause to encourage buying something is, by contrast, not new. Tax incentives already promote, for example, purchasing homes and professional educations.** See 26 U. S. C. §§163(h), 25A. **Sustaining the mandate as a tax depends only on whether Congress has properly exercised its taxing power to encourage purchasing health insurance, not whether it can. Upholding the individual mandate under the Taxing Clause thus does not recognize any new federal power. It determines that Congress has used an existing one.**[43]

The Court's observation that it is nothing new for the Congress to use its tax power "to encourage buying something" is certainly accurate, but it is also irrelevant, since, as the Court itself points out, the question is not whether Congress can use taxes to encourage participation in the

[43] Ibid., p. 42.

market (and the plaintiffs in this case did not contend otherwise), but whether the *means* by which it does so is proper. It does not follow that *since* Congress's use of the Taxing Clause to encourage buying something is not new, *therefore* taxing individuals for not purchasing insurance is constitutional. Ironically, the examples provided perfectly illustrate the fallacy. Tax incentives to "encourage buying" things like homes or education exist in the form of *tax breaks*. But there is quite obviously a fundamental difference between *not* taxing individuals for *making* a purchase and *taxing* individuals for *not* making a purchase. The Court surely could not have been incognizant of the self-evident distinction. We remain without any reassurance that this power is just as troubling under the Taxing Clause as it is under the Commerce Clause.

The second argument offered to "allay" the concern that the government is usurping power was as follows:

> Second, Congress's ability to use its taxing power to influence conduct is not without limits…. We have nonetheless maintained that "'there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.'" *Kurth Ranch*, 511 U. S., at 779 (quoting *Drexel Furniture, supra*, at 38).
>
> We have already explained that the shared responsibility payment's practical characteristics pass muster as a tax under our narrowest interpretations of the taxing power. Supra,at 35–36. **Because the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it.**[44]

This argument is completely nonsensical. When you deconstruct it, the Court is essentially asserting that *since* the "shared responsibility payment" may be considered a "tax" rather than a "penalty", *therefore* it is unnecessary "to decide the precise point at which" the "tax" becomes a "penalty". The Court is again begging the question, its premise consisting of the assumption that the proposition to be proved is true. Drawing upon the Court's previous conclusions and breaking this down even further, the syllogism is: *since* the payment may be considered a "tax", *therefore* it is not a "penalty"; and *since* it is not a "penalty", *therefore* the Court need not consider whether it is "so punitive" that it may be considered a "penalty". (Notice again the Court's admission that as a penalty, the tax is unconstitutional.) Obviously, if the Court refuses to even consider to what extent the tax is punitive, then it cannot reasonably conclude that it does not constitute a penalty. Only in a fantasy world like the one visited by Alice could such reasoning be considered anything less than preposterous.

We come to the Court's third attempt to "allay" the concern that the power to tax individuals for non-consumption might be just as "troubling" as the power to command them to consume:

> Third, although the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. **Once we recognize that Congress may regulate**

[44] Ibid., pp. 42-43.

> **a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions.** Those sanctions can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes.
>
> **By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it.** We do not make light of the severe burden that taxation—especially taxation motivated by a regulatory purpose—can impose. But **imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.**[45]

This argument is highly instructive. Notice that the Court is stating that the government may not "bring its full weight to bear" to compel people to purchase insurance by taxing them for not doing so. Congress may *not* "simply command individuals to do as it directs", the Court admits, and an individual who neither buys insurance nor complies with the requirement to make a "shared responsibility payment" may *not* be "subjected to criminal sanctions". These are meaningless observations, since a legal consequence need not rise to the level of government "bring[ing] its full weight to bear" to constitute a penalty (obviously a ludicrous measure); it need not rise even to the level of "criminal sanctions" (also quite a high bar) to constitute penalization for engaging in unlawful *in*activity.

So what does this all add up to? What is the Court really trying to say here? That the mandate is completely *voluntary*, that one is *not* acting unlawfully by ignoring it, and that there are *no* legal consequences for choosing *not* to comply with it? Indeed not. The statement, "*If* a tax is properly paid, the Government has no power to compel or punish individuals subject to it" (emphasis added) logically implies that if the tax is *not* paid, then the government *may* compel or punish individuals subject to it. And, again, it goes without saying that anyone who complies with the mandate is acting lawfully; the question is whether those who do not comply are acting unlawfully. This question the Court answered in the affirmative, though it relegated the following to a *footnote* attached to the above paragraph:

> **Of course, individuals do not have a lawful choice not to pay a tax due**, and may sometimes face prosecution for failing to do so (although not for declining to make the shared responsibility payment, see 26 U. S. C. §5000A(g)(2)). But that does not show that the tax restricts the lawful choice whether to undertake or forgo the activity on which the tax is predicated. Those subject to the individual mandate may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay

[45] Ibid., pp. 43-44.

> lower taxes. **The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax.**[46]

Thus it is clear that individuals who do *not* comply with the mandate, by their failure to either purchase insurance or to pay the penalty, *will*, under the Act, be considered to have engaged in *unlawful inactivity*. And if it is unlawful to not comply with the mandate, then the mandate cannot be considered voluntary (or it naturally wouldn't *be* a "mandate"). Rather, the mandate is, as the Court acknowledges in its footnote, *compulsory*. According to the Court's own logic, even if the law was not enforced and there were *no* legal consequence for ignoring the mandate, there would still be the "social stigma" attached of having acted *unlawfully* in doing so, which *would by the Court's own logic render it unconstitutional*. To sum up, once again, it does not follow from the meaningless observation that individuals who comply with the law will not be acting unlawfully that therefore the law is constitutional.

The Court nevertheless concludes that

> The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because **the Constitution permits such a tax**, it is not our role to forbid it, or to pass upon its wisdom or fairness.[47]

By stating that "the Constitution permits *such* a tax" (emphasis added), recognize that the Court is declaring that the Constitution authorizes the Congress to lay an *indirect* tax on individuals for declining to participate in the marketplace. *And yet the fact remains that this supposed power is nowhere to be found within the Constitution*.

As the Supreme Court noted in *Pollock v. Farmers' Loan and Trust Company*, "in the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely: the rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts and excises."[48] Bouvier's law dictionary defines "duties" as follows: "In its most enlarged sense, this word is nearly equivalent to taxes, embracing all impositions or charges levied on persons or things; in its more restrained sense, it is often used as equivalent to customs … or imposts."[49] The word "imposts" "is sometimes used to signify taxes, or duties, or impositions; and, sometimes, in the more restrained sense of a duty on imported goods and merchandise."[50] The word "excises" "is used to signify an inland imposition, paid sometimes upon the consumption of the commodity, and frequently upon the retail sale."[51] Recall that the whole class of indirect taxes is defined as "taxes on articles of consumption". It is clear that the "shared responsibility payment" does not fall under the category of any one of these

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[46] Ibid. p. 44.
[47] Ibid., p. 44.
[48] *Pollock v. Farmers' Loan and Trust Company*, 157 U.S. 429 (1895), http://www.law.cornell.edu/supct/html/historics/USSC_CR_0157_0429_ZO.html.
[49] Definition of "Duties", Bouvier.
[50] Definition of "Imposts", Ibid.
[51] Definition of "Excises", Ibid.

indirect forms of taxation. Clearly, it was never envisioned by the Founders that indirect taxes could include a tax on *non*-consumption or *absence* of a retail sale.

The Court, remember, had argued that "A tax on going without health insurance does not fall within any recognized category of direct tax." By this argument, the Court concluded that the tax was therefore an indirect tax, therefore need not be apportioned, and therefore is not unconstitutional. We will further examine this argument momentarily, but it must be emphasized that this logic applies equally both ways; to wit, one could just as well argue that *the tax does not fall within any recognized category of an indirect tax, therefore must be a direct tax, and therefore is unconstitutional.*

As the Supreme Court had also noted in *Pollock v. Farmers' Loan and Trust Company*, "although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax, for more than one hundred years of national existence, has as yet remained undiscovered".[52] The Court pointed out in that case that "all taxes paid primarily by persons who can shift the burden upon someone else, *or who are under no legal compulsion to pay them*, are considered indirect taxes" (emphasis added).[53] After all, a person who pays an excise tax makes the choice to do so by voluntarily and out of their own perceived self-interest purchasing some good, but is just as free *not* to make that purchase. The individual may avoid the tax by buying nothing, and is none the worse off for it, for they have simply determined that is in their better interest to defer consumption; they are no worse off for their inactivity in the market, since they keep the money in their pocket that represents the fruits of their labor. It really goes without saying that taxes imposed directly upon individuals who are under legal compulsion to pay them are by definition *direct* taxes. This is perfectly self-evident. It is clear that the Founders never contemplated directly taxing individuals simply for not making a purchase of whatever thing the Congress wishes them to purchase, and it was precisely to guard against such tyrannical abuses of the tax power that they required all direct taxes to be apportioned.

Now recall the Court's argument that

> A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, "without regard to property, profession, or *any other circumstance*." *Hylton, supra*, at 175 (opinion of Chase, J.)

The Court offers this quote as a definition of direct taxes. But turning to *Hylton v. U.S.*, we find that it has been deliberately removed from its context. Justice Chase had said that "the direct taxes *contemplated by the Constitution*, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on LAND" (emphasis added).[54] Thus Chase was *not* stating that a direct tax is defined as either a tax laid "without regard to … any… circumstance" or a tax on land. He was *not* stating that there were no other possible kinds of direct taxes. He was rather stating that there are no other kinds of direct taxes "*contemplated by the Constitution*"! All that means is that if there *were* some other kind of direct tax imposed on

[52] *Pollock v. Farmers' Loan and Trust Company*, op. cit.
[53] Ibid., p. 558.
[54] *Hylton v. United States*, 3 U.S. 171 (1796), http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=3&invol=171.

individuals—such as directly taxing them for nonparticipation in the marketplace—*then it would be unconstitutional*. The Court here has engaged in outright deception and fraud by quoting only the second half of Chase's statement and deliberately omitting the context in which it was made. This is an even more egregious offense than the frivolous citation of Ben Franklin's quip on death and taxes to arrive at the predetermined conclusion.

The Supreme Court in *Hylton v. U.S.* also stated the following with regard to *indirect* taxes, which must comply with the rule of uniformity: "Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to states, and is at once easy, and efficacious. All taxes on expenses or consumption are indirect taxes."[55] The Court made no mention that taxes on non-expenditures or non-consumption are likewise. Consider further that the "shared responsibility payment" doesn't meet the requirement of being "easy", "efficacious", and "without the intervention of assessments". It rather requires government bureaucracy related to internal revenue. It requires inconvenience to individuals and assessment of their situation, such as whether their income is over a certain minimum to be liable for the tax, how many dependents are in their household, etc. Such a required payment to the government, whether considered a direct or indirect tax, simply was never contemplated as being included under the powers granted to Congress under the Constitution, and this fact is well reflected in the Supreme Court's prior case history, as well as the writings of the Founders.

Alexander Hamilton, for example, in *The Federalist* wrote of "the power of imposing taxes on all articles other than exports and imports"—meaning taxes on the consumption or sale of articles—but never contemplated the power of imposing taxes on the non-consumption or non-sale of such articles.[56] Referring to power to tax individuals indirectly, he wrote of "The maxim that the consumer is the payer", never of the maxim that the non-consumer is the payer.[57] He spoke of how "citizens pay their proportion of them [duties] in the character of consumers", never of how they pay their proportion of indirect taxes in the character of non-consumers.[58] He opined that "it is necessary that recourse be had to excises, the proper objects of which are particular kinds of manufactures", but nowhere suggested individuals who do not make a purchase might likewise be the proper objects of taxation.[59] He observed that "The taxes intended to be comprised under the general denomination of internal taxes may be subdivided into those of the *direct* and those of the *indirect* kind", "the latter" of which "must be understood [to consist of] duties and excises on articles of consumption", but never did opine that indirect taxes must also be understood to include taxes on articles of non-consumption. Etc.[60] The entire premise of the government's argument and the Court's determination is patently absurd.

Indeed, indirect taxes, as taxes on *expenses* or *consumption*, are *by definition* taxes that individuals are under no legal compulsion to make. Benjamin Franklin in 1776, for example, explained that duties

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[55] *Hylton v. United States*, op. cit.
[56] Alexander Hamilton, James Madison, John Jay, *The Federalist Papers*, edited by Clinton Rossiter (New York: Penguin 2003), No. 32, p.195. *The Federalist* may be read online at http://www.constitution.org/fed/federa00.htm.
[57] Ibid., No. 35, p. 208.
[58] Ibid., No. 35, p. 208.
[59] Ibid., No. 35, p. 209.
[60] Ibid., No. 36, p. 215.

were included in the price of goods and that "If the people do not like it at that price, they refuse it; they are not obliged to pay it."[61] Neither choice, either to consume or not, is considered an unlawful activity (or inactivity). Indirect taxes are *by definition* those taxes that individuals pay voluntarily, of their own free will, by making a choice to purchase something. There is no penalization for choosing not to consume and to thus avoid the tax payment. The "shared responsibility payment", on the other hand, is a *compulsory* tax, and it *is* considered unlawful not to pay it. That, as we've already observed, makes it a direct tax, the Court's sophistry notwithstanding. As the Court itself pointed out, the only way one may avoid paying the tax and yet not be considered to have acted unlawfully would be to purchase insurance. Thus, individuals, under this law, are denied their free will. Neither choice, either to purchase insurance or to pay the tax, is any longer a *voluntary* one, but each is effectively a penalty for not doing the other to any person who would consider it to be in their self-interest to do *neither* (and it is reasonable to presume that, given freedom of choice, while some people may consider it in their interests to buy insurance, *nobody* would consider it in their own best interest to pay the tax).

Albert Gallatin in *Sketch of the Finances of the United States*, published in 1796, wrote, "The most generally received opinion … is that, by direct taxes in the Constitution, those are meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expenses." Gallatin explained that the framers of the Constitution "by *direct* taxes, meant those paid *directly* from, and falling *immediately* on, the revenue, and, by *indirect*, those which are paid *indirectly* out of the revenue by falling immediately upon the expense."[62] These observations by Franklin and Gallatin were both cited by the Supreme Court in *Pollock v. Farmers' Loan and Trust Company*, in which case the Court also stated that "it is apparent" that "the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it" and that "under the state systems of taxation, all taxes on real estate or personal property or the rents or income thereof were regarded as direct taxes."[63]

The "shared responsibility payment" is neither a tax on income nor on expense. It is well to say it is a tax on non-expense, but what does that actually mean, practically speaking, if not that it is a tax on *personal property*? How, after all, is the individual supposed to make the payment required for not purchasing insurance except out of the property that represents the fruits of their labor, their hard-earned savings, that which remains of their income minus their expenses? The Affordable Care Act dictates that the "penalty imposed … shall be included with a taxpayer's return under chapter 1".[64] That is, the individual is to include it with their income tax return. Chapter 1 of the U.S. Tax Code falls under "Subtitle A—Income Taxes" of U.S.C. Title 26.[65] Income taxes are, of course, a direct form of taxation. Does the "shared responsibility payment" fall on the revenue or the expense? Does it more resemble a direct or indirect tax? The "shared responsibility payment" is effectively a tax on personal *savings*. It is by any meaningful measure an unapportioned direct tax, and therefore unconstitutional. Consider the implications: with this decision of the Supreme Court, the

[61] *Pollock v. Farmers' Loan and Trust Company*, op. cit.
[62] Ibid.
[63] Ibid.
[64] Public Law 111-148, Section 5000A(b)(2).
[65] http://www.law.cornell.edu/uscode/text/26.

government may now tax individual income, individual expenditures, *and* individual *savings*! There is no point at which the government may not tax the fruits of an individual's labor. Such a system of government, in which Congress may claim such power, is not conducive to liberty but to indentured servitude.

VII. Conclusion

The Supreme Court's decision to uphold the Affordable Care Act's individual mandate is dependent upon arguments that are entirely fallacious. The Act states that individuals "shall" purchase insurance and that the consequence for failing to obey this "requirement" is that a "penalty" will be imposed. The question of whether the penalty may be considered a "tax" is entirely irrelevant to the question of whether it constitutes a penalty. We may stipulate that the required payment is a tax; nevertheless, it also remains a penalty. The Obama administration sold it to the public as "not a tax". The Act describes it as a "penalty", and the Court recognizes that this use of language was deliberate; the Congress *intended* it to *penalize* individuals for not obeying the mandate to purchase insurance. Even if they had applied "tax" or some other label to it in lieu of the word "penalty", its effect for all intents and purposes would remain to punish those who don't do as Congress wishes.

The Court correctly noted that Congress has authority under the Commerce Clause to *regulate* commerce, but this does not include the power to *compel* it; therefore, the mandate as it relates to the Commerce Clause is unconstitutional. It argued that such a power would be contrary to both the letter and the spirit of the Constitution, granting the Congress an abusive power contrary to the intent of the Founders. And yet, at the same time, it argued that *this same end* is permissible by *another means*. The means do not justify the ends any more than vice versa. Even if this could be found consistent with the letter, such an argument *cannot* be sustained according to the spirit of the Constitution.

Even according to the argument that the same ends could be achieved through the tax power, the Court explicitly recognized that any attempt by the Congress to *penalize* individuals for noncompliance with a command to purchase insurance is unconstitutional, which in turn necessitated the argument that it be defined as "not a penalty". This the Court accomplished through contentions ranging from nonsensical to fraudulent, failing to present even a single logically valid argument to support its conclusion.

Recognizing that it is not enough to simply declare the penalty a "tax", the Court admitted that as an unapportioned direct tax, the mandate is unconstitutional. Just as it solved the problem of the "penalty" being unconstitutional by declaring it to be "not a penalty", it solved the problem of it being a direct tax by declaring it not to be a direct tax, through no less specious reasoning. It is clear that the Founders never even contemplated the use of the Congress's power to lay and collect taxes on *non-consumption*. The requirement that any tax laid directly upon individuals must be apportioned was specifically intended to guard against any such usurpation of the tax power, and indirect taxes were conceived to be only those that individuals might lawfully avoid by choosing *not* to make a purchase; indeed, indirect taxes are *defined* as those which are paid through the voluntary purchase of

some good. Under the Constitution, the power granted to Congress to lay indirect taxes was intended as a means to collect revenue from *expenses*, but never was conceived by the Founders to include taxing individuals for doing nothing, for simply choosing *not* to buy something government bureaucrats would have them buy in order to "solve" a perceived problem—particularly not a problem they, with their own legislation, created or exacerbated in the first place.

As the Supreme Court itself observed in its judgment in this case,

> our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not "consist[ent] with the letter and spirit of the constitution," … are not "*proper* [means] for carrying into Execution" Congress's enumerated powers. Rather, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.'"

Such an authority to tax inactivity in the market is not included in the enumeration of Congressional powers. The Constitution was intended to establish a republican form of government that would guarantee and *protect* personal liberty, not legislate it away. The government's claim to such an authority is incontrovertibly a usurpation of power anathema to both individual liberty and the very concept of limited, constitutional government. Notwithstanding the Supreme Court's spurious claim to the contrary, reason dictates that we must recognize that the individual mandate imposed on Americans under the Patient Protection and Affordable Care Act is compatible neither with the letter nor certainly the spirit of the Constitution of the United States.