

## Sec. 8—Powers of Congress

## Cl. 1—Power To Tax and Spend

Discerning whether Congress, in passing a regulation that purports to be under the taxing authority, intends to exercise a separate constitutional authority, requires evaluation of a number of factors.<sup>599</sup> Under the *Child Labor Tax Case*,<sup>600</sup> decided in 1922, the Court, which had previously rejected a federal prohibition of child labor laws as being outside of the Commerce Clause,<sup>601</sup> also rejected a tax on companies using such labor. First, the Court noted that the law in question set forth a specific and detailed regulatory scheme—including the ages, industry, and number of hours allowed—establishing when employment of underage youth would incur taxation. Second, the taxation in question functioned as a penalty, in that it was set at one-tenth of net income per year, regardless of the nature or degree of the infraction. Third, the tax had a scienter requirement, so that the employer had to know that the child was below a specified age in order to incur taxation. Fourth, the statute made the businesses subject to inspection by officers of the Secretary of Labor, positions not traditionally charged with the enforcement and collection of taxes.

More recently, however, in *National Federation of Independent Business (NFIB) v. Sebelius*,<sup>602</sup> the Court upheld as an exercise of the taxing authority a requirement under the Patient Protection and Affordable Care Act (ACA)<sup>603</sup> that certain individuals maintain a minimum level of health insurance. Failure to purchase health insurance may subject a person to a monetary penalty, administered through the tax code. Chief Justice Roberts, in a majority holding,<sup>604</sup> found that the use of the term “penalty” in the ACA<sup>605</sup> to describe the enforcement mechanism for the individual mandate was not determinative, and used a functional approach in evaluating the authority for the requirement. The Court found that the latter three factors identified in the *Child Labor Tax Case* (penal intent, scienter, enforcement by regulatory agency) were not present with respect to the individual mandate. Unlike the child labor taxation scheme, the tax level under the ACA is established based on traditional tax variables such as taxable income, number of dependents and joint filing status; there is no requirement of a knowing violation; and the tax is collected by the Internal Revenue Service.

<sup>599</sup> *Hill v. Wallace*, 259 U.S. 44 (1922); *Helwig v. United States*, 188 U.S. 605 (1903).

<sup>600</sup> *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20 (1922).

<sup>601</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>602</sup> 567 U.S. \_\_\_, No. 11–393, slip op. (2012).

<sup>603</sup> Pub. L. 111–148, as amended.

<sup>604</sup> For this portion of the opinion, Justice Roberts was joined by Justices Ginsburg, Breyer, Sotomayor and Kagan.

<sup>605</sup> 26 U.S.C. §§ 5000A(c), (g)(1).