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DEATH AND TAXES IN *NFIB v. SEBELIUS*

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Politics is the art of controlling your environment.
—Hunter S. Thompson

Introduction

In approving the Affordable Care Act's (ACA) individual mandate under the tax power and rejecting it under the commerce power, Chief Justice Roberts, writing for the court, ruled that the commerce clause does not authorize Congress to compel citizens to participate in interstate commerce, but that the tax clause does allow Congress to tax citizens' decisions not to so participate. To get to this conclusion, Roberts drew a distinction between a command, which "restricts" a citizen's "lawful choice" to do or not do some act, and a tax, which allegedly does not work such a restriction:

> 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.[1]

Answering this objection, Roberts argues:

> 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.[2]

In a footnote, Roberts elaborates:

> 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 lower taxes. The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax.[3]

The Chief Justice's analysis reveals some potential slippage between the concepts of a command and a tax, and between the categories of lawful behavior for which a fee or tax is charged and unlawful behavior leading to a financial punishment. For an intuitive illustration, suppose I'm driving down the road, and I see a patch of red-painted curb in front of my destination. Aware that, should I park adjacent to that curb, I'll receive a notice attached to my windshield from the local municipality requiring me to pay it some money, I might reason in several ways. First, I may suppose that it's illegal for me to park there, and that, should I ignore the law and do so anyway, the city will fine me. Alternatively, I may suppose that it's perfectly legal for me to park there, just so long as I pay the fee (or "tax") for doing so, for which the city will helpfully bill me in the form of a notice attached to my windshield. Phrased in the language of choice rather than of legality, I may suppose either that my choice to park in the spot in question has been restricted, or, alternatively, that I am still just as free to park in that spot as I would be were it not painted red, and am merely not free to both park in that spot and decline to give the city some of my money.

In this paper, I consider whether a selection among those interpretations makes a difference and which (if any) is defensible. The goal is to aggressively apply the principle of charity to understand what the opinion actually means by making sense of it.[4] By examining Roberts's claim through an analytic lens, we can come to a better understanding of what precisely the court held, and the law that will be applied to future cases as to what makes a tax a tax and not a regulation.

This essay focuses on Roberts's notion of a "lawful choice." Section 1 supposes that the word "choice" does the work, and that Roberts is claiming that the individual mandate does not interfere with citizens' choices to refrain from purchasing health insurance. I show that Roberts's argument is not sustainable in those terms. In section 2, I suppose that the work is done by Justice Roberts's claim that Congress does not have the power to "compel" citizens under the taxing clause, and consider whether the argument can be charitably interpreted as the claim that, while the individual mandate is an interference with citizens' choice not to purchase health insurance, it is not a coercive interference within the meaning of a plausible conception of coercion. I conclude that this argument fails too. In section 3, I suppose that the word "lawful" does the work. There, I show that the quoted language can be charitably understood as an interpretation of what it means for an act to be unlawful. For the state to say that an act is unlawful and impose a penalty on it is to express disapproval of that act; no such disapproval is expressed merely by taxing an act. *NFIB v. Sebelius* raises this expressive aspect of outlawing to constitutional significance. In doing so it may signal that significant leeway will be given to congressional

regulations, so long as they do not carry with them the opprobrium of outlawry; however, I will suggest in closing that this expressive constraint is a meaningful and important restriction on Congress's powers.

1. Choice: Political not Metaphysical

1a. Two Kinds of Choice

Let us begin by considering the language of choice. In what sense does the individual mandate leave an individual a choice about whether to buy health insurance?

In *NFIB v. Sebelius*, we might call Chief Justice Roberts's conception of choice the "alternatives conception." On the alternatives conception, the law does not deprive an individual of the choice to do or not do X so long as it offers her an alternative to carrying out the officially preferred option. Thus, the law doesn't foreclose the individual choice to purchase or not purchase health insurance, because it leaves an alternative to buying health insurance—paying a tax.

There's a sense in which we might think that someone has a choice to do X when she has any alternative available. Much of the philosophical debate about the existence of free will has hinged on whether or not an agent's behavior *could have been otherwise*. We might say that an agent had free will in the metaphysical sense with respect to some act if she could have done anything other than that act, even if the alternatives to that act are few, only slightly different from the act actually taken, or exceedingly unpleasant.

But it would be a serious mistake to confuse the metaphysical idea of choice with the legal, social, political, or normative idea of choice. Should a gunman point a pistol at my head and say "your money or your life," I take it as uncontroversial that I don't have a real choice, in the relevant sense, except to turn over my wallet—and this is so even if, in the metaphysical sense, it's possible for me to say "go ahead, pull the trigger . . . you don't have the guts."

We can distinguish these two domains of choice-talk by their associated conceptions of freedom. As noted, the metaphysical sense of choice is associated with the freedom of will. By contrast, the political or normative sense of choice is associated with freedom from interference by others, or political freedom (in Berlin's negative sense). These two kinds of freedom can come apart. I might be politically free without having free will, if my cognitions and behaviors are fully determined by my biology, but neither the state nor anyone else is interfering with my choices. On the other hand, I might have free will without political freedom: when the state does interfere with my choices, it ordinarily does not undermine such metaphysical freedom as I may have.

To be sure, there are ways in which the state does, or could conceivably, undermine individuals' metaphysical freedom (if it exists in the first place). Incarcerating someone does this: by locking someone in a cage such that it is

physically impossible for him to leave, the state brings it about that he cannot do otherwise than be in that cage. Moving from the inside to the outside, so do fences and walls: the state takes away individuals' metaphysical freedom to enter top-secret military installations by putting them behind high walls that cannot be scaled. Mental restraints as well as physical restraints could serve the same function.[5] On the benign, everyday level, the state takes away my metaphysical freedom to sell military secrets to the enemy by preventing me from learning them. It takes away gangsters' metaphysical freedom to kill snitches by spiriting them off in the witness protection plan and keeping their locations secret. Entering the realm of fantasy, the state might take away my metaphysical freedom by brainwashing me or by employing that perennial bugbear of philosophy of mind, the evil neuroscientist with the capacity to directly manipulate brains.

But the state doesn't usually work like that. The paradigm cases of state-caused unfreedom aren't carried out by directly manipulating individuals' bodies or their minds; they're carried out by manipulating their alternatives in just the way that the individual mandate in the Affordable Care Act does. The case of ordinary taxes is instructive.[6] For legal and social (if not metaphysical) purposes, the state *makes* us pay our taxes by credibly threatening to put us in prison if we don't do so. We don't ordinarily experience ourselves as having a choice about the matter. Consider the cliché that gave this paper its title: the two unavoidable things in life are death and taxes. That's not strictly true from a metaphysical standpoint: assuming your income comes from some source that it's not convenient for the state to garnish, you can avoid taxes all you want by the simple expedient of not paying them. *But just you try.*

1b. Interference with Choices

The most developed account of the political concept of choice arose as a side effect of the debates surrounding the neorepublican conception of freedom. Philip Pettit's work has been the prime driver of this debate. On Pettit's account, the conventional liberal conception of freedom in the political sense, associated with a line of thought beginning with Hobbes and culminating in Berlin's "Two Concepts of Liberty," conceives of an individual's freedom as the absence of anyone else's interference with the individual's choices. This conception has long been dominant, although Pettit and others propose to replace it.

In the course of defending his alternative, Pettit has developed an account of the notion of what it means to interfere with a choice that has met with general assent as a fair account of the concept. On Pettit's account, to interfere with an individual's choices is to (a) intentionally attempt to (b) "worsen an agent's situation of choice," by "changing the range of options available, by altering the expected payoffs assigned to those options, or by assuming control over which outcomes will result from which options and what actual payoffs, therefore, will

materialize."[7] Quintessential interferences with choices include thus both direct restraints on the agent's choices, which change the available options by taking some away (if I break your knees, I take away the option to take a walk), and imposing costs on the agent's choices (if I tell you that I'll beat you up if you take a walk, I alter the expected payoff from that option).[8]

I will not defend Pettit's account of what it means to interfere with a choice here; as noted above, it's generally accepted. It will be helpful, however, to note a useful elaboration on the concept developed, again, in the course of the neorepublican debate, by Matthew Kramer and Ian Carter.[9] Kramer and Carter point out that an agent can suffer interference with her "conjunctively exercisable choice set(s)," when, for example, she is in the power of another person such that she is obliged to, for example, behave obsequiously toward that person so that the other is not motivated to interfere with her choices. In the absence of the dominator's power, she would have the conjunctively exercisable choice to P *and* to behave non-obsequiously to the dominator. Because the dominator has power, however, she now only has the choice *either* to P *or* to behave non-obsequiously. And this is sensibly understood as an interference with her choices: she has a narrower range of choice than she might otherwise have in the absence of the dominator's power, even if the dominator never actually carries out his omnipresent threats or makes any demands of her.

On either the Pettit or the Carter/Kramer conception of what it means to have a choice interfered with, the individual mandate manifestly does it. By imposing a financial cost on the previously costless choice to not purchase health insurance, the state has intentionally worsened the choice situation of each member of the political community. And by outright eliminating the option to both not purchase health insurance and not send a penalty/tax payment to the IRS, the state has narrowed each citizen's conjunctively exercisable choice set. It's hard to see how the Chief Justice's opinion for the Court can make sense if understood as the claim that a tax, rather than a command under the commerce clause, does not interfere with citizens' choices.[10]

2. Not Choice but Coercion?

2a. Hayek Delendus Est

The Chief Justice seems to be particularly concerned with the way in which a mandate may compel or coerce citizens. Thus, in the text quoted above, he emphasizes: "If a tax is properly paid, the Government has no power to compel or punish individuals subject to it." The immediately prior section of the opinion, rejecting the notion that the individual mandate constitutes a regulation under the commerce authority, is also pervaded with the language of compulsion. For example: "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."[11]

The "choice" interpretation failing, I propose to turn to an interpretation of the opinion in which Roberts isn't talking about choice; he's talking about coercion—in which the relevant distinction between a tax and a regulation is that the tax doesn't "compel" (which I will read as equivalent to "coerce") the citizen to do anything.[12]

Choicelessness can exist without coercion, if, for example, one simply lacks the means to do X. (Nobody is *coercing* me to not fly to the moon, but I hardly have a choice in the matter.) Likewise, coercion—or, at least, *attempted* coercion—might exist, depending on which conception of coercion one accepts, without posing a real interference with a choice. For example, if someone threatens me with something I don't care about, they might carry out behavior that would ordinarily be coercive but fails to pose the kind of cost that genuinely restricts my choice set. "Give me twenty dollars or I'll beat up your worst enemy." Hence, it's worth considering the possibility that, for Roberts, the individual mandate interferes with citizens' choices without coercing them.

The quoted language from the Chief Justice's opinion bears a striking resemblance to some of Friedrich Hayek's remarks about the way that laws enacted pursuant to the demands of the rule of law allegedly are not coercive.[13] On Hayek's account, the regulative ideal of the rule of law requires that the effect of laws on individual choices be knowable in advance. Because they are knowable, Hayek argues, they are not coercive: an individual may always avoid being coerced by the state merely by not doing those things to which the state will respond with coercive force. On this account, state coercion does not proceed by threats, but only by the direct application of force.

On Hayek's account of coercion, Roberts would be right to say that the individual mandate is not coercive. After all, the individual mandate does not force anyone to buy health insurance. Citizens are merely put on notice that, should they not buy health insurance, they will then meet with a coercive response from the government, and they can avoid all coercion by buying health insurance.

Unfortunately, Hayek's account of coercion should not be accepted. Its problems should be self-evident. If Don Corleone announces that anyone who opens a competing bookmaking business in the neighborhood will be beaten up, on Hayek's conception, it would seem that Don Corleone doesn't coerce anyone. After all, everyone can avoid being beaten up just by not going into the bookie business. But surely this offends our basic notion of what it means to be coerced. And indeed, Hayek himself backs off from the piece of his broader argument that relies on that conception fairly quickly, later arguing that the rule of law is consistent with individual freedom largely because the law arises from the norms immanent in the underlying political culture.[14]

More worryingly in the immediate context, any such conception of coercion could not do the work the Chief Justice wants it to do, namely, illuminating a way that tax incentives are different from regulations enacted under the commerce clause. As noted, on this Hayekian conception of coercion, no ordinary regulation is coercive. The law "no murdering people" doesn't coerce people not to murder; it just tells them how to avoid getting put in prison (or, in Roberts's terms, simply tells them that they may either murder people or stay out of prison, but not both).

What might be said for Hayek's conception? Not much, I suspect, but we should consider one possible line of defense. Hayek suggested that the essential feature of coercion is that it substitutes the lawmaker's will for the individual's.[15] One might defend that conception on the ground that this substitution of will idea captures what's really morally significant about coercion (from, perhaps, a Kantian standpoint), and hence that there's something morally superior about a state that gets its way by threats rather than by directly intervening on citizens' behavior. Indeed, something like this seems to be behind Waldron's claim that the law respects citizens' dignity by being, in his words, "self-applying"—by demanding that citizens carry out its commands volitionally.[16] It also makes an appearance in several other philosophical accounts of coercion.[17]

Maybe that's Roberts's point. The individual mandate may not undermine the will of a citizen in the same way as does a command, for example, in the criminal law. This could be particularly compelling to those with religious objections to participating in the insurance market (e.g., because it would subsidize contraception): perhaps the mandate refrains from subverting their wills, to support a system of insurance that they conscientiously reject, in the way a standard regulatory command might.

The purpose of this essay is not to make a full-fledged intervention into the literature on coercion; however, it seems clear that behavior control by threats and manipulating alternatives is, *pace* Hayek, coercive under the will-substitution theory—it does substitute the will of the one exercising control for the will of the one over whom control is exercised. Consider the mugger who points a gun and says "your money or your life." In what sense is my will less undermined in that scenario than if the mugger simply wrestles me to the ground and yanks the wallet from my hands? At least arguably, I would experience my will as *more* rather than less undermined where the mugger threatens me with a gun, since at least in the wrestling match version of the mugging, I'm offered the opportunity to fight back. The gunman doesn't just override my will, he *co-opts* it by forcing me to reach into my own pocket and hand over the wallet with a sycophantic smile.

At any rate, the will-substitution argument still retains the fundamental problem with the Hayek conception of coercion as applied here. To the extent a tax incentive of the form "do X or pay a tax" doesn't substitute the lawmaker's will

for the citizen's, neither does the command "do X or pay a fine"; commands and taxes are indistinguishable with respect to this feature.

2b. Escaping the Austrian Strawman

Unsurprisingly, the contemporary literature has been dominated by conceptions of coercion that recognize that making a threat—"do X or I will do something nasty to you" is a quintessential form of coercing someone. I don't propose to enter into this literature in any depth here—in general, the debates have focused on the extent to which an offer, as well as a threat, might constitute an act of coercion, and the difficulties in determining a "baseline" against which we might say a threat has been made.[18] Regardless of the position one takes in the literature, it is obvious that "buy health insurance or we make you pay this penalty [tax]" is a threat in just the same way as is the parking regulation noted in the introduction, and as are all ordinary criminal laws. Either threats are coercive or they aren't—if they aren't, we're condemned to stand with Hayek and deny that any laws are coercive; if they are, the individual mandate is one.

However, the contemporary literature does contain two ideas that might be relevant to understanding the Roberts opinion. Both appear in Nozick's seminal paper introducing the threat conception, and persist through the subsequent literature.[19] First is the idea that in order to coerce someone, one must *intend* to alter her behavior. Second is the idea that in order to coerce someone, one must *succeed* at getting her behavior to change.

We can dispatch the second point fairly easily, along the same lines that we used to dispose of the Hayekian conception. Either a threat must succeed at inducing behavior change to be coercive, or it needn't. If it needn't, then that can't count against the individual mandate being coercive. If it must, then perhaps the mandate isn't coercive, since (as Roberts points out) many citizens might be expected to decline to purchase health insurance and choose to pay the "tax" instead. But neither are ordinary laws—many citizens choose, for example, to possess and distribute illegal drugs and risk being caught and punished; as to those citizens, the theory under which a threat must succeed in order to be coercive seems to entail that the drug laws aren't coercive.[20] Whatever one thinks of that view, it cannot be used to distinguish the individual mandate from the ordinary commands of law.

The same point can be offered with respect to an argument raised by Campos and Boleslavsky.[21] They suggest that the individual mandate may not be coercive as to any given citizen in virtue of the fact that (by obliging other citizens to buy insurance) it induces insurers to lower the price enough that each individual would be willing to buy insurance without being ordered to do so by the government. This argument is very intriguing, and may be right.[22] However, right or wrong, it applies to the mandate conceived of as a regulatory statute under the commerce

clause and as a tax. Put differently, if that's why Roberts thought the mandate could be upheld as a tax, he was inconsistent to say that it was impermissible under the commerce power in virtue of Congress's not having the power to coerce citizens into commerce.

The intent claim has some more grip to it. It's an intuitively plausible claim about coercion—a threat not made in order to change the behavior of those threatened only dubiously counts as a threat at all, let alone coercive. Ordinarily we issue threats in order to get the person threatened to do what he's told.

The Chief Justice isn't terribly clear about whether he thinks the individual mandate was enacted with the intention of bringing it about that people purchase health insurance. From the opinion:

> 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.
>
> Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. We would expect Congress to be troubled by that prospect if such conduct were unlawful. That 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.[23]

It's not obvious what to make of this. Congress "aims to induce the purchase of health insurance," but "regards such extensive failure to comply with the mandate as tolerable" and is not "troubled by [the] prospect" that there will be four million citizens as to whom Congress's aims will predictably fail? This is a strangely ambivalent kind of policy that the Chief Justice describes: Congress just *sort of* wants you to buy health insurance, so it imposes a weak penalty on not doing so, but really, it'll be perfectly fine if you don't buy it. The closest real-world metaphor for this kind of regulation is the softhearted parent, reluctantly cracking down on his or her kids at the behest of a hardhearted spouse (President Obama?): "I guess you have to eat your broccoli, because your mom/dad says so. If you don't, you only get *half* of a dessert."[24]

Maybe that's a fair characterization of the individual mandate. It's distinctly plausible in light of the institutional constraints on Congress in general and the political circumstances surrounding health care reform in particular: the Affordable Care Act does have the feel of a halfhearted compromise between those on the left who wanted single payer or at least a public option (the stern parent), and those on the right who would keep the state out of the picture entirely (the

softhearted parent). But it probably can't do the work the Chief Justice might want to put it to.

Even if Congress didn't *really* intend, in the serious and stern-minded sense to which we might want to attach the word "coercion," to make citizens buy health insurance, the distinction between intending to control behavior and not intending to control behavior, or really meaning it and not really meaning it, does not track the distinction between a regulatory tax and a flat-out command. Governments choose their regulatory instruments based on a whole host of policy and practical considerations. They might sometimes choose to tax behavior with the serious aim of getting rid of it, and might other times choose to forbid behavior without being fully committed to its elimination.

For an example of the former, consider *McCulloch v. Maryland*. As Justice Marshall pointed out, if Maryland was allowed to tax the national bank, it could tax it to death. (And one might suspect that at least some in Maryland wanted to do just that.) A tax need not be a halfhearted attempt to cut down on something, but can be a full-fledged effort to kill it off.

On the other side, consider almost any anti-corruption legislation imposed on the government by an annoyed populace. When Congress passes a campaign finance law, probably some of those legislators who voted for the bill really meant it. But many others probably voted for it only because they don't dare try to explain to their constituents why they voted against it, and doubtless had no intention of changing the behavior of themselves and their political allies (of course, they'll be happy to change the behavior of their opponents). Many may have planned to evade it at the first opportunity, or expected the Supreme Court to complaisantly strike it down.

Or consider the story about the inclusion of sex discrimination in the 1964 Civil Rights Act, which, on some accounts, was a ploy by conservative opponents of the bill to kill it off. If this story is true, we cannot attribute to that Congress a serious intent to forbid sex discrimination.[25] But we don't say that the Civil Rights Act merely "taxed" sex discrimination.[26]

Moreover, even if the relevant institution intends that some rule be followed at the time of enactment, that intention may change, or some other relevant part of the government may not so intend. For example, consider the President's refusal to defend the Defense of Marriage Act in court.[27]

All of this is just an implication of the general fact that lawmaking is a creature of politics. Congress, or any subset thereof, will often be ambivalent about some policy, whether that policy is framed as a command or a tax or whatever, and that ambivalence will often show up in various uncomfortable compromises, like a bill that doesn't really get enforced, or that is meant to be chipped away by the courts—or by a milquetoast "individual mandate" backed up with too-weak penalties that will predictably lead to disobedience. If all of this politics leads us to say that sometimes a law isn't genuinely coercive, so be it, but that non-

coercive character has little to do with the difference (if any) between a tax and a command.

3. So What Makes a Choice Lawful, Anyway?

3a. Lawfulness and Purpose

In this section, I attempt to make sense out of Roberts's claims by making the word "lawful" do the work.

Sometimes the legislature fines us for doing something illegal; other times, it charges a fee for some perfectly legal act. The distinction is typified by that between a parking ticket and a toll road.

Should you park on the side of the road that the city has scheduled to sweep, you will be fined. We typically say that you may not lawfully park there. This conventional judgment of lawfulness does not depend on whether or not you pay the fine: if you routinely park on the street sweeping day, and immediately pay the fine the moment you receive the ticket, having paid the fine does not sanitize the act of parking of its unlawful character. The lawbreaking happened when you parked, not if you park and don't pay the fine.

By contrast, consider a toll road. Much as Roberts says about the individual health insurance mandate, there's an obvious sense in which one may lawfully drive on the toll road, or one may lawfully decline to pay the toll, but one may not lawfully both drive on the toll road and pay the toll. If you pay the toll to drive on the road, you've never broken the law.

Perhaps, to an economist, there's no difference between these two transactions (a point Roberts makes with respect to the mandate): in each case, there's something I want to do (park, drive), and the state puts a price on it. But to a lawyer, there is a kind of difference between them, and thinking like a philosopher can help us sort it out.[28]

These examples suggest an initial pass at the distinction between lawful behavior for which one must pay a fee, and unlawful behavior for which one must pay a fine: one acts unlawfully when one *thwarts the state's purposes*.

In imposing the street sweeping regulation, the state's purpose, presumably, is to clear the road of cars so that the street sweeper may pass unimpeded. Consequently, it makes putting a car along the street sweeper's path illegal, and imposes a fine to deter people from doing so.

By contrast, in creating the toll road, the state's purpose is not to keep people from driving on it. Its purpose either is to raise revenue and/or ration use of that road (reduce congestion) by limiting it to those willing to pay. Consequently, it's not unlawful to use the toll road. Doing so doesn't thwart the state's purpose. What does thwart the state's purpose is driving without paying, and so that's what we count as unlawful.

On this analysis, Chief Justice Roberts's argument doesn't seem to fare much better in terms of lawfulness than it did in terms of choice or coercion. After all, the state's purpose wasn't to raise revenue by taxing non-purchasing of health insurance, or ration non-purchasing of health insurance by limiting it to those who were willing to pay. The state's purpose was to make people get health insurance, and hence solve the adverse selection problem, and the "tax" payment was imposed in order to deter non-buying of health insurance. Or, at least, that's the most plausible interpretation of the overall intent of the statute, *modulo* the discussion in the previous section about the extent to which Congress *really meant it*. On the analysis thus far, we ought to say that not purchasing health insurance is unlawful.

Perhaps the purpose argument can be rehabilitated by reinterpreting Congress's purpose. Rather than suppose that the mandate was enacted only, or primarily, to induce the purchase of health insurance, we might actually suppose that the mandate was intended to raise revenue, say, in order to fund the other provisions of the ACA. Or, on a slightly more nuanced account of the congressional purpose, the purpose of the mandate may be to fund policy interventions that correct for the externalities that nonpurchasers inflict on the market, or to directly force nonpurchasers to internalize some of the costs of their failure to purchase insurance (such as the cost of their free-riding on things like the mandatory provision of emergency care).[29] On such an account, we might be able to say that someone who does not purchase health insurance nonetheless doesn't thwart Congress's purposes (so long as they pay the penalty), and hence rescue the purpose-based argument for the proposition that nonpurchasers don't do anything unlawful. Of course, Congress could mean to raise revenue, and also mean to induce the purchase of health insurance, but we might fairly say that not purchasing health insurance does not violate Congress's purposes if inducing health insurance purchase wasn't Congress's primary or most significant purpose.

This argument seems facially implausible because, if the mandate did not induce at least a substantial number of citizens to purchase insurance, it couldn't resolve the adverse selection problem, which is generally understood to be a chief flaw in the health insurance market. However, even assuming that point away *arguendo*, the argument founders on the details of the penalty payment. First, the penalty payment is fairly small, at least to start—probably far too small to fund real policy interventions, and certainly too small to plausibly be motivated primarily by revenue generation.[30] It begins at $95 per individual in 2014 (although it increases in subsequent years, up to $695 in 2016).[31] Second, the penalty increases with the household income of the one penalized, even though there's no obvious reason to believe that the higher-income households impose more externalities on the health care system. On the other hand, an income-graduated penalty is good at improving behavior-change incentives by making the pain of a penalty track the ability to pay of the one penalized.[32] Third, and most importantly, the amount of the penalty is

capped based on the market price of health insurance. If Congress's primary purpose was to raise revenue, there would be no reason to impose such a cap. If Congress's primary purpose was to correct for externalities, a more natural cap would track some estimate of the costs imposed on the public by uninsured patients. But if Congress's primary purpose was to induce citizens to purchase health insurance, this cap makes perfect sense, since it limits the amount of the pain that a noncompliant citizen must suffer to the cost of the behavior Congress wishes to induce.

Finally, the individual mandate provision is entitled "[r]equirement to maintain minimum essential coverage," and the first clause in it is phrased in the unequivocal language of command: "[a]n 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" (emphasis added). Any account of Congress's primary purpose that concludes that not purchasing health insurance doesn't thwart it has an uphill battle in explaining away such language.[33]

3b. The Expressive Character of Unlawfulness

All is not lost. We can learn more about the distinction between unlawful and lawful by exploring why it seems to have some pre-theoretic grip on us.

Consider the frequent critique offered in the editorial pages of automated red-light and speed cameras: many complain that the point of those cameras is not to enforce the law (that is, to stop speeding and red-light running), or to promote the purpose of the law (traffic safety), but to raise revenue for the municipalities that enforce them.[34] This is seen as illegitimate *despite* the fact that it would be perfectly legitimate for the state to openly use the roads to raise revenue, for example, by installing tolls on those roads instead of red-light cameras.

The perceived illegitimacy seems to have something to do with the mismatch between the character of the regulation—flat out making running a red light illegal, for the purpose of stopping red-light running and promoting traffic safety—and the purpose of the enforcement measure, namely, to raise revenue. Similar critiques have been raised of the practice of civil asset forfeiture, in which police departments seize the property of those who commit crimes, sometimes in scales grossly disproportionate to the crime in question, and keep the proceeds for themselves.[35]

We can bear down a little closer on the source of this perceived illegitimacy. What's so wrong with the state bringing together a statute that is meant to make some act illegal with an enforcement measure that seems to take advantage of that illegality and use it to raise revenue?

Three possibilities suggest themselves. All seem to be at play in various instances of this perceived illegitimacy.

The first is hypocrisy: there may be an objection to the state simultaneously forbidding some behavior and profiting from it. Consider those states that ban gambling . . . except for their own lotteries.[36]

The second is incentive misalignment: the state or some of its officials may have an incentive to promote the behavior in question rather than deter it. Consider "speed traps," typically municipalities that combine a location right along a freeway, invitingly wide and empty roads, low speed limits, and aggressive traffic enforcement in a naked attempt to raise revenue by tricking drivers into speeding. The "trap" in a speed trap is that the municipality structures the environment in order to encourage the activity that it's supposed to be forbidding.

The third is the expressive objection: the state is taking a condemnatory stance toward citizens who don't deserve it. The person who falls into a speed trap is given a citation, and labeled *a lawbreaker*, even though, *really*, she's just a citizen who engaged in ordinary and socially acceptable behavior, but who stumbled into a situation that was set up to trick her into running afoul of a legal rule. She combines innocent character (and a total absence of *mens rea*) with legal guilt. The speed trap is a kind of frame-up: the state falsely accuses drivers of consciously disregarding the law, of choosing to break it.

It's this last feature of unlawful conduct that can illuminate Roberts's analysis. In support of the characterization of the penalty as a tax, Roberts points out that "punitive statutes" typically contain a "scienter requirement," punishing only those who knowingly break the law.[37] He also points out that, as noted above, "it is estimated that four million people per year will choose to pay the IRS rather than buy insurance," claims that "Congress apparently regards such extensive failure to comply with the mandate as tolerable," and concludes that "Congress did not think it was creating four million outlaws."[38]

This talk about the creation of "outlaws" sounds like Roberts is saying that Congress did not mean to attach the *label* "lawbreaker" to those who don't buy health insurance. I think this is the key to charitably understanding what the Chief Justice meant when he said that the mandate does not "restrict the lawful choice" to purchase or not purchase health insurance. Congress made that choice more costly, and hence interfered with it in the sense given by the best part of the philosophical literature. But it did not label those who fail to purchase insurance as lawbreakers. In Raz's terms, Congress did not—on Roberts's account—invoke the law's claim to authority, and hence claim that citizens were under an obligation to obey and were subject to criticism in terms of disobedience to the law for not doing so.[39]

Roberts uses more expressive language in his characterization of the tax-like nature of the mandate:

> 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. . . . 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.[40]

Roberts may be wrong about Congress's intent—perhaps Congress *did* intend to create a nation of outlaws. But whether he was factually right or wrong is beside the point. Conceptually, on the expressive reading of the part of the opinion upholding the mandate as a tax, we could distinguish a criminal regulation from a tax regulation with respect to the message it sends about the character of those who carry out the regulated act. And Congress might consciously make this choice, to encourage or deter an act, but to do so gently, without imposing the label "lawbreaker" on someone who does not go along with the congressional design.

Moveover, this is a fair characterization of the method of regulation by taxation. When the legislature enacts a Pigouvian tax (or a sin tax), its intention is to deter the activity thus taxed, and it does interfere with the choice to engage in it, and does so coercively. However, unlike when it imposes a fine, the legislature does not label the activity unlawful. A cigarette tax doesn't make those who smoke cigarettes into lawbreakers. Roberts actually compares the individual mandate to a cigarette tax, and this comparison is, I conclude, apt.[41]

This point matters not only from the legislator's standpoint but also from the citizen's. From the perspective of a Holmesian bad man, a Pigouvian tax and a regulation backed up by a fine might look like the same thing. But those citizens who take the internal point of view on the law may experience themselves as having at least a *pro tanto* obligation to obey it (independent of the arguments of philosophers about whether any such obligation exists). The individual mandate may leave them a "lawful choice" in the sense that they do not experience themselves as so obliged here.[42] We may say that a tax regulation is "expressively tolerant," in that it does not condemn the activity taxed, while an ordinarily command is "expressively intolerant."

In that light, the Chief Justice's invocation of the language of freedom in the form of talk about whether the mandate "restricts the lawful choice" to not purchase health insurance begins to make more sense. From an external standpoint, perhaps those who are subject to the mandate are less free than they were before, because Congress has interfered with their choices to not purchase health insurance. But from an internal standpoint, because of the expressively tolerant character of a tax incentive, they may experience themselves as just as free to not purchase health insurance as before, in the sense of "freedom" that is the opposite of "obligation."[43]

This point may have particular importance for those with religious commitments that preclude participation in the insurance market: they need not experience themselves as under a legal obligation that contradicts their religious obligations. For that reason, the mandate understood as a Pigouvian tax may better protect their liberty of conscience than the mandate understood as an ordinary regulation.

Conclusion: Can Congress Tax Non-Eating of Broccoli?

I will close by addressing an objection to the expressive argument, given in a recent paper by Cooter and Siegel.[44] They agree that there is an expressive difference between taxes and regulations, and, although they don't describe it in depth, their version of the expressive difference appears to run along roughly the same lines as the difference I draw out here. However, they argue that hinging the constitutional tax/commerce distinction on the expressive difference would inappropriately allow Congress to "avoid any constitutional limitation on its powers by the way it refers to them."[45] Instead, they argue that the constitutional distinction should focus on the "material" difference they see between taxes and penalties: taxes have the effect of "dampening" behavior, while penalties have the effect of "preventing" it.

Cooter and Seigel's argument doesn't directly generate an objection to mine: it could be true both that the Chief Justice ruled that taxes are distinct from regulations or penalties because of the different expressive character of the two enactments, and that such a ruling leads to bad consequences because of the almost unbounded discretion it confers on Congress. But this, if true, would at least undermine the interpretive analysis given in this paper, since I have proposed to proceed by following the principle of charity—by interpreting the Chief Justice's opinion in a way that makes it plausible and reasonable.

There are two problems with the Cooter/Siegel approach. First, the effects-based distinction would lead to absurd results. They distinguish speeding tickets from parking tickets, claiming the one is a "preventing" penalty and the other is a "dampening" tax because only the former is characterized by increasing penalties that ultimately lead to license revocation.[46] But anyone who drives can see that the speeding fine barely "dampens" most people's behavior because the state is unwilling to put enough resources into catching people to achieve serious deterrence. Their argument seems to entail that the government may turn a tax into a penalty merely by hiring more police.

Moreover, whether a tax or penalty eliminates or merely "dampens" a behavior depends on much more than its magnitude and on the legislature's intent. Particularly, it also depends on the available alternatives to the behavior. For example, suppose Congress imposed a very small tax on web hosting servers located in the United States. That might well eliminate US servers entirely, just because it's essentially free to move servers offshore—a rational business would change behavior in response to any nonzero tax. On the Cooter/Siegel account, that independent fact about technology and markets would change the law from a tax to a penalty. This seems bizarre.

Second, they fail to recognize that an expressive distinction is more than just a congressional choice of label. It can make a real-world difference in how people

who take the internal point of view on the law feel obliged to behave. Moreover, while Cooter and Siegel dismiss the social effect of the law's expressive content,[47] the reality is that one's neighbors, in addition to one's conscience, will often be more likely to scold one for smoking marijuana than for smoking tobacco, just because the former is illegal and the latter is merely taxed. It is less freedom-impairing to make something more costly than it is to make it more costly *and* tell someone they are morally obliged to refrain from it, *and* tell the rest of the community that they ought to condemn those who disobey. This can, and should, matter for constitutional purposes.

I think this last point does quite a bit to answer the worries about unbounded congressional authority embedded in the critique of the mandate. By regulating through a tax, even a tax labeled a "penalty," Congress must give up a number of its regulatory tools. It cannot invoke citizens' moral commitments to obeying the law. It cannot condemn those who disobey as outlaws. It cannot so easily wield social disapproval against those who disagree. And, of course, it cannot put those who disobey in jail, or disenfranchise them, or forfeit their assets, or bring it about that they fail criminal background checks the next time they apply for a job.[48] Congress's power can be limited by magnitude as well as scope, and the power to regulate through taxation, while in principle of unlimited or nearly unlimited scope, has a radically circumscribed magnitude compared to that of Congress's power over the domain that it can directly regulate with the full force of the sovereign's power to command.

That being said, it appears that Congress now has a very broad scope of power to regulate by taxation. And advocates of limited government may think they have some cause for concern in this.

Consider the notorious "broccoli horrible": Roberts suggested that if the individual mandate were upheld under the commerce power, it would allow Congress to paternalistically force people to purchase broccoli on the notion that, by doing so, they would be participating in interstate commerce. As a commerce clause regulation, this would have been objectionable. But, based on the logic of the tax argument, so long as Congress does so without labeling non-broccoli-eaters as lawbreakers, it can impose a non-broccoli-eating tax on citizens who do not meet a broccoli consumption quota. And it can do so even if it doesn't bother to label the bill a tax first.

But there may not be anything new in this. Such regulative taxes have long been a feature of US law.[49] And they exist in many other domains, from cigarette taxes to gasoline taxes. Ultimately, the difference between a cigarette tax and a broccoli tax (well, a non-broccoli tax) is mostly political: many are more offended by the paternalistic notion of taxing broccoli nonconsumption than the equally paternalistic notion of taxing cigarette consumption, perhaps because the ill effects of not consuming broccoli are more controversial or more severe than those of consuming cigarettes, or just perhaps because broccoli regulation

would affect a much greater proportion of the population. But this suggests that the democratic process, rather than constitutional law, will be quite sufficient to prevent the broccoli horrible from ever taking place.

It may be true that when Congress enacts a law that doesn't look like it labels those who break it as lawbreakers, that law is likely to look like a tax (at least to Roberts), and may be upheld as such. And other courts, treating *NFIB v. Sebelius* as controlling precedent and working to find a theory of the case that best rationalizes and explains what the Court held, may do the same. And so, it may be true that from a constitutional standpoint, rather than constricting Congress's power, *NFIB v. Sebelius* may have expanded it. By bifurcating the commerce power from the tax power, the Court may have permitted Congress to impose regulatory taxes on a host of nonbehavior wholly unrelated to interstate commerce. But this power is nonetheless tightly constrained by the requirement that any such regulation have both the expressive and non-expressive features of a tax, and there's little reason to believe that the voters need the help of the courts to keep it under control.

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NOTES

Thanks to Sascha Somek, Govind Persad, Jovana Davidovic, and the participants in a workshop at the Western Michigan Medical Humanities Conference for helpful comments on this paper.

1. Slip op. at 41.

2. Slip op. at 43–44.

3. Ibid.

4. The spirit is that of Davidson's "radical interpretation"—which perhaps has the most appeal in the legal context, since we ordinarily make sense of a legal text by rationalizing it. Davidson (2001a), chaps. 9 and 10; Davidson (2001b).

5. I don't mean here to take on any commitments in philosophy of mind, particularly not the controversial position that physical restraints can undermine one's freedom of will, a view criticized, *inter alia*, by Rogers Albritton (1985). (I don't mean to commit against the position either, which seems rather stronger than Albritton wittily takes it to be.) Rather, I mean to draw on a more folk-psychological distinction and suggest that both physical and mental restraints are in a distinct category from mere incentive manipulation with respect to the way that, intuitively, both kinds of restraints make it impossible for the one restrained to have done otherwise, while incentives do not. If it will comfort the reader, we can divide the category of "metaphysical freedom" into "physical freedom" and "psychological freedom" without losing any of the argument.

6. Although, note that sin taxes—the closest conventional tax analogy to the individual mandate—can flat out remove items from individuals' choice sets by pricing them out of the market for the good taxed.

7. Pettit (1996), p. 579.

8. I pause here to answer an objection. I have just considered, and rejected, the possibility that the Chief Justice's opinion is best understood to suggest that the individual mandate doesn't interfere with citizens' choices to refrain from purchasing health insurance. But the Chief Justice doesn't talk about "interfering" with choices; he talks about "restricting" them. Perhaps the two ideas mean something different. (I thank an anonymous reviewer for raising this point.)

However, "interfering" with a choice, in the sense developed in the philosophical literature, exhausts the logical space for ways in which an agent, such as a state, can intentionally restrict the choice set of another agent. As Pettit points out (forthcoming), pp. 48–49, the philosophical literature has used the concept of "interfering" with a choice to refer to the generic act of intervening on another agent's choice in order to restrict it. Unless one thinks that Congress might have unintentionally, or accidentally, intervened on citizens' health insurance purchasing choices (a wildly implausible proposition), if the act restricted those choices, it interfered with them in the sense given by the literature on which I draw, and if it did not restrict them, it did not interfere with them. For that reason, I take the Chief Justice's use of the word "restricts" to be a semantic difference only.

9. See Kramer (2008); and Carter (2008).

10. It may be that the ACA taken as a whole improves citizens' choice sets by, for example, giving all citizens the option to purchase health insurance, even if they have pre-existing conditions; it may further be that the individual mandate is necessary in order to achieve this overall improvement (by solving the adverse selection problem). Nonetheless, we still interfere with a choice when we eliminate an option from an agent's choice set in order to expand their options later on. Consider Ulysses: by tying him to the mast, the crew unequivocally interfered with his choice to steer toward the rocks; this interference is not vitiated simply because they did so in order to give him the choice to listen to the Sirens. (And, at any rate, the state could use an ordinary regulation or a criminal statute to do this just as well as a tax.) I thank Govind Persad for raising this objection (personal communication).

11. Slip op. at 24.

12. The assumption that "compel" and "coerce" mean the same thing may be too hasty. It might be, for example, that "compel" means something weaker than "coerce." (Jovana Davidovic, in a personal communication, has suggested to me that "compel" might mean "give strong reasons," while "coerce" might mean "give overriding reasons.") However, the argument in this section applies identically under either interpretation. (Also, if a tax gives overriding reasons, those reasons must also be strong.)

13. Hayek (1960), p. 142.

14. Hayek (1982), chap. 5.

15. Hayek (1960), p. 133.

16. Waldron (2009). Incidentally, Waldron be mistaken about how law works. Larry Lessig has drawn an insightful distinction between "East Coast Code"—conventional commands embedded in law—and "West Coast Code"—"architectural" restrictions on individuals' behavior, including both physical architecture (walls, locks) and virtual architecture (encryption, copy-protection). Lessig (2006), chap. 5. An architectural

restriction, like the philosopher's fantastical evil neuroscientist with the power to hale folks about by their brains, can intervene on people's choices without recruiting their wills. Against Waldron's argument, it should be noted that law often operates by West Coast Code. For example, the Digital Millennium Copyright Act uses the law to buttress architectural restraints, imposing penalties on citizens who crack encryption used to protect copyrighted content.

17. For example, Raz has said that "[c]oercion and manipulation subject the will of one person to that of another." Raz (1986), p. 378. Frankfurt has elevated this to a very strong claim, at one point suggesting that the core cases of coercion are where someone is "stampeded" by some threat, such that it "upset him so profoundly, moreover, that he completely forgot his own earlier decision and did what was demanded of him entirely because he was terrified of the penalty with which he was threatened." Frankfurt (1988), pp. 3–5. Arnold makes a similar claim, distinguishing between "rational compulsion," which is not coercive, and "psychological compulsion," which is where the distinction roughly tracks that between Frankfurt's "stampeding" and a strong incentive. Arnold (2001). The health care mandate won't be stampeding anyone. But neither do most laws.

18. Generally, see Anderson (2011).

19. Nozick (1969). As it doesn't really make a difference for understanding Roberts, I won't delve into the extensive post-Nozick literature.

20. We might say that an aggregate threat, like a law, has to succeed in general, even if there are isolated exceptions, to be coercive. But the health insurance mandate will, I suspect, succeed at least as generally as the laws against marijuana possession and speeding.

21. Campos and Boleslavsky (2013).

22. It may, however, rest on an unduly narrow conception of coercion that excludes cases of mixed motive, as when A buys health insurance *both* because it is now affordable and because she is under threat.

23. Slip op. at 37–38 (internal citations omitted).

24. It may also be that Congress *foresaw* that people would be induced to purchase health insurance without *intending* it. I thank Govind Persad for suggesting this to me (personal communication).

25. On the debate about its veracity, see Bird (1997).

26. Or consider the practice of attaching special-interest provisions or controversial codicils to omnibus legislation in order to force opponents to accept them or risk losing entire legislative programs. Some of those who voted for those bills doubtless intend to bring it about that those provisions be complied with; others could care less, or may even intend to actively impede them.

27. Also, see Selmi (2008), arguing that the ADA had been pushed through Congress with broad language by committed disability advocates, but most in Congress simply didn't care that the Court applied it in a much narrower fashion.

28. Note that the lawful or unlawful character of the respective acts does not track the coercive character of the rules, or the extent to which the state leaves anyone a choice. The state interferes with one's choice to drive on a toll road by charging a fee for it, just in the same sense that the shopkeeper interferes with my choice to use his wares by enforcing his

property rights in them and demanding money for the privilege. Cohen has shown that property rights are interferences with choices. Cohen (2011), chaps. 7, 8. And in both cases, a mere shift in degree can foreclose the choice completely: if the state charges a 10 million dollar toll, or the shopkeeper in question sells Ferraris, I and almost all readers will find ourselves completely unable to drive the car, on or off the road. Mutatis mutandis for coercion.

29. I thank Alexander Guerrero and Govind Persad for raising two versions of this worry, and an anonymous reviewer for pressing me to answer it more fully (personal communication). The parenthetical remark about mandatory provision of emergency care refers to the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. 1395dd, which requires hospitals to provide certain emergency care without regard to a patient's ability to pay; one major argument in favor of an insurance mandate is that, in its absence, the rest of the community must bear the costs of emergency treatment for the uninsured.

30. An anonymous reviewer objected that this point commits me to the counterintuitive conclusion that if Congress had made the penalty higher, the mandate would be less coercive, in virtue of the fact that a higher penalty would signal that its purpose is not to induce the purchase of health insurance. However, while a lower penalty makes it less likely that Congress enacted the mandate for revenue-generating purposes, nothing in my argument requires that the question of whether the mandate is coercive turns on whether it was enacted for the primary purpose of generating revenue. Congress could merely have a secondary purpose of inducing insurance purchasing, and still seek to serve that secondary purpose by coercion.

31. The text of the individual mandate is codified at 26 U.S.C. 5000a.

32. Income-graduated taxes are also, of course, consistent with the primary purpose of raising revenue in a fair and progressive fashion, so this fact only weakly counts against the purpose argument.

33. This does not contradict the previous section, where I allowed that Congress might have had an ambivalent intent with respect to inducing the purchase of health insurance. The claim here is only that the purpose or intent of inducing the purchase of health insurance is more significant than these other candidate possibilities, such as raising revenue. An agent's most significant purpose might still be fairly ambivalent.

34. See, for example, Cooke (2011): "Last year, the city of New York took in $52 million from its 150 existing red-light cameras. If his purpose is to increase revenues, Mayor Bloomberg is sensible to advocate an expansion of the program, but he could at least be honest with his constituents as to why he thinks the proposition so necessary." Langland-Orban, Large, and Pracht (2011), p. 2, recounted a newspaper account of "some of the concerns about RLCs, which included using them to generate revenue, failing to save lives, failing to significantly reduce crashes, and increasing rear-end crashes."

35. See, for example, Blumenson and Nilsen (1998).

36. This hypocrisy has even led to jurors refusing to convict bookies on the grounds that there was "no moral difference" between their activity and the state lottery. Curriden (2001).

37. Slip op. at 35.

38. Slip op. at 37–38. Note that we can accept the estimate of noncompliance without thinking that Congress regarded it as "tolerable." Congress could have concluded that it would be too expensive or disruptive or politically impractical to more aggressively

enforce the mandate (by imposing a higher fine), without thereby finding such disobedience "tolerable." Or what Congress regards as "tolerable" is just an incoherent muddle of compromises. Or Congress didn't even have a coherent intent for the reasons given by social choice theory—see Riker (1988).

39. Raz has argued that the state claims authority for its laws—the state claims that citizens have an obligation to obey them. Raz (1983). I take this to be a *moral* claim, and submit that with this claim of obligation comes naturally an attitude of disapproval that the state takes toward the lawbreaker. In accordance with this understanding of Roberts's opinion, the dissenters, too, attended to the expressive content of the individual mandate, but disagreed with Roberts about what it was, urging it not be upheld as a tax in part because, borrowing language from the *Child Labor Tax Case*, 259 U.S. 20 (1922), it "adopts the criteria of wrongdoing." Dissent of Scalia, Kennedy, Thomas, and Alito at 19.

40. Slip op. at 37.

41. Slip op. at 36.

42. I thank Alexander Guerrero for raising this point.

43. For similar reasons, this may resurrect the notion, noted above, that the mandate is less worrisome in virtue of the fact that it does not subvert citizens' wills: at least it leaves their wills intact to the extent that it does not demand that they experience themselves as obligated to buy health insurance.

44. Cooter and Siegel (2012).

45. Ibid., p. 1227.

46. Ibid., p. 1226.

47. Ibid., pp. 1226–1227, n. 155, and accompanying text.

48. Moreover, on Roberts's logic, for Congress to regulate by a tax, it would have to be a small tax, imposed without a scienter requirement, and collected by the IRS (cf. slip op. at 35).

49. Consider that the court in *Sozinsky v. United States*, 300 U.S. 506 (1937), p. 513, upheld a tax on the sale of some firearms Congress wanted to deter. In the process, the Court distinguished *United States v. Constantine* on the grounds that under the tax at issue in Constantine, unlike the tax at issue in Sozinsky, "the subject of the tax [was] described or treated as criminal by the taxing statute." Again we see a labeling criterion with an expressive flavor to it.

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