

The Health Insurance Mandate—a Tax or a Taking?

by KARL MANHEIM*

Introduction

President Barack Obama’s 2008 campaign pledge to provide “universal health care” to all Americans culminated in the passage of the Patient Protection and Affordable Care Act of 2010 (the “Act” or the “ACA”).¹ The Act has been controversial since its inception. Over half of the states have sued to block its implementation on Tenth Amendment grounds. In *National Federation of Independent Business v. Sebelius* (“*NFIB*”),² the United States Supreme Court held the requirement that uninsured individuals purchase health insurance (the so-called “individual mandate”) was invalid under the Commerce Clause but valid under Congress’s taxing powers.³

The political and legal controversy did not end with *NFIB*. Today, thirty-six states have refused to expand Medicaid coverage or establish state exchanges through which insurance companies sell individual policies.⁴ The United States House of Representatives has

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (modeled largely on Mass. Gen. Laws ch. 111M, § 2 (2007) and Mass. Gen. Laws ch. 176Q, § 3 (2006), which also required uninsured individuals to obtain health insurance). Pub. 111-152, 124 Stat. 1029.

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

3. *Id.* at 2593, 2600. The Court also invalidated the Medicaid expansion provisions as “coercive” of state authority. *Id.* at 2605 (Roberts, J., concurring).

4. See *State Decisions on Health Insurance Marketplaces and the Medicaid Expansion*, The Henry J. Kaiser Family Foundation <http://kff.org/health-reform/state-indicator/state-decisions-for-creating-health-insurance-exchanges-and-expanding-medicaid/>.

voted over 50 times to repeal the law.⁵ The House and other groups have filed dozens of additional constitutional and statutory claims, ranging from separation of powers⁶ to religious liberty.⁷ In fact, President Obama's implementation of "Obamacare" has even spurred calls for his impeachment.⁸ This article examines a different constitutional issue that has mostly escaped the headlines—whether the ACA's individual mandate violates the Fifth Amendment's Takings Clause.⁹

There is a risk in applying the Takings Clause to broad-based regulatory obligations of the sort found in the ACA. The risk is simply that aggressive use of takings law could easily supplant economic substantive due process, as practiced during the *Lochner* era,¹⁰ as a tool for hobbling economic regulation. Where the two clauses are combined, as often occurs in rate regulation cases, courts find it easier to subject business and property regulation to heightened judicial scrutiny.¹¹ Yet, the analysis must be done, if for no other reason than to explore recent doctrinal inconsistencies in takings law. In particular, the sharply different views of the Takings Clause articulated by the Supreme Court in *Eastern Enterprises v. Apfel*,¹² and *Koontz v. St. Johns River Water Management District*,¹³ and their application to monetary burdens, suggest that the Clause is at a crossroads. Indeed, the Court's "seemingly inconsistent

5. Ed. O'Keefe, *The House Has Voted 54 Times in Four Years on Obamacare. Here's the Full List*, WASH. POST, Mar. 21, 2014, available at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/21/the-house-has-voted-54-times-in-four-years-on-obamacare-heres-the-full-list/>.

6. H.R. Res. 676, 113th Cong., 2d Sess. (2014) (enacted).

7. See, e.g., *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014) (invalidating employer mandate for corporations whose owners have religious objections to particular health benefits); *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2014) (holding that secular for-profit corporations had standing to bring claims alleging that contraception coverage mandate in ACA violated the Religious Freedom Restoration Act because the mandate forced corporations to provide contraception coverage in their employee health-care plans or face penalties and enforcement actions by federal regulators). See also HEALTH CARE LAWSUITS, <http://healthcarelawsuits.org> (last visited Oct. 15, 2014).

8. *Impeachment Over Obamacare?*, PATRIOTUPDATE.COM, <http://patriotupdate.com/2013/12/impeachment-obamacare> (last visited Aug. 15, 2014).

9. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation.").

10. See *Lochner v. New York*, 198 U.S. 45 (1905).

11. See, e.g., Ronald J. Krotoszynski, Jr., *Expropriatory Intent: Defining The Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 717 (2002).

12. *E. Enters. v. Apfel*, 524 U.S. 498 (1998).

13. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

pronouncements” on this point has “produce[d] bewilderment among lower courts.”¹⁴ The ACA’s insurance mandate gives us a unique context in which to explore this fundamental unease.

Four dissenters in *Eastern Enterprises* took the approach that, in the context of business regulation, financial burdens are incident to a broader regulatory scheme affecting economic interests. According to the four, takings law is thus a poor substitute for economic substantive due process, and ordinary economic regulation should be subject to minimal judicial scrutiny. The imposition of monetary liability is a common feature of regulated industries, and to characterize every such liability as a conceptually separate interference (i.e., a taking of money) perverts the Fifth Amendment.

However, the plurality in *Eastern Enterprises* reasoned that where a monetary obligation is imposed *in gross*, detached from regulation of an underlying economic activity, a takings analysis may be appropriate.¹⁵ The liability is not simply incident to regulation; it is a distinct interference with property. *Koontz* confirms that monetary obligations can be takings.¹⁶ The only thing that sets expropriations of money apart from other seizures is that the former occurs all the time, in the form of taxes. However, there are important structural and process safeguards that apply to exercises of the taxing power that are missing in the insurance mandate.

Congress’ power to tax enters the analysis at two points. The first is whether a requirement that uninsured individuals pay money to private insurance companies is simply a novel form of tax. If so, it is mostly exempt from takings scrutiny, as are taxes generally.¹⁷ However, all attributes of this tax—the amount, collection and use—are determined by private insurance companies. Congress cannot simply delegate its taxing power to private for-profit entities that are exempt from political accountability and constitutional constraint. The non-delegation doctrine precludes characterizing mandated insurance premiums as taxes.¹⁸

The second tax issue is whether individuals can avoid the mandate altogether by paying a tax to the federal treasury instead. If so, the overall scheme is constitutional even if the mandate alone would work a taking. As Chief Justice Roberts stated in *NFIB*, “[t]he

14. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 889–90 (2000).

15. 524 U.S. at 522–23.

16. 133 S. Ct. at 2599.

17. See *Koontz*, 133 S. Ct. at 2601.

18. See *infra* at Part III.B.

Federal Government does not have the power to order people to buy health insurance. [The ACA] would therefore be unconstitutional if read as a command.”¹⁹ But, he continued, “[t]he Federal Government does have the power to impose a tax on those without health insurance.”²⁰ *NFIB* thus settled the question of whether the ACA was within Congress’ enumerated powers. The case did not, however, consider the separate question of whether this particular use of Congress’ tax power violated other constitutional constraints or individual rights.

Subsequent to *NFIB*, two lower courts have held that the ACA does not impose a tax in the traditional sense because it is not principally a revenue-raising device.²¹ This suggests that the payment required for non-compliance with the ACA may be a “tax” for Tenth Amendment purposes, yet a “penalty” for other constitutional provisions. Thus, cases exempting taxes from takings scrutiny may be inapposite. Moreover, if one can avoid paying money (mandated purchase) only by paying money (tax), then the ACA is an exercise in circular logic.

Congress can and does levy insurance taxes (e.g., Social Security and Medicare²²), and perhaps can levy an additional special tax on uninsured individuals. However, a tax imposed on the *lack* of consumption has never been seen before. Although Congress provides tax deductions for particular purchases, such as electric cars, the distinction between a tax *credit* for socially desired actions and a tax *surcharge* on those who decline to comply with an “induced” purchase may be material.

Although the Court in *NFIB* held that Congress may tax *inactivity*, the Chief Justice provided no case law supporting this conclusion. Every reference to “Congress’s use of the Taxing Clause to encourage buying something” was to a deduction or credit, not a special tax.²³ The difference merits analysis. For instance, Congress may want everyone to have a retirement savings account, and in fact the tax code provides benefits to those who do.²⁴ However, Congress

19. 132 S. Ct. at 2601.

20. *Id.*

21. *Sissel v. U.S. Dep’t of Health & Human Servs.*, 760 F.3d 1 (D.C. Cir. 2014); *Hotze v. Sebelius*, 991 F. Supp. 2d 864 (S.D. Tex. 2014).

22. Medicare and Social Security are funded by payroll taxes. *See* Federal Insurance Contributions Act (FICA), 26 U.S.C. § 3101 (2010).

23. 132 S. Ct. at 2599.

24. *See* 26 U.S.C. § 401(k) (2012).

does not impose an explicit surcharge on those who choose not to buy an IRA.²⁵

The fact that Congress uses one approach rather than the other—a carrot instead of a stick—may simply be a political choice.²⁶ Tax offsets do not have the same obloquy attached to them as tax increases; indeed often just the opposite. Does the difference matter for constitutional purposes? *NFIB* holds that the difference between action and inaction *does* matter when it comes to the scope of Congress' power.²⁷ Perhaps it also matters when the taxpayer claims a constitutional right not to buy.

Surely, if Congress had taxed the exercise of other constitutional rights—e.g., First Amendment rights—the tax would place an undue burden on the right itself.²⁸ Taxing a constitutional right may be less draconian than jailing someone for exercising it, but it would still trigger strict scrutiny. Thus, *if* forced consumption violates the Takings Clause, is it saved by giving individuals the “option” of paying a special tax instead of suffering the taking?

The consumption mandate in the ACA heralds a new era in government regulation and privatization of public welfare. A strong push is underway to shrink government and transfer its regulatory and protective functions to private enterprise. This reduces both accountability and rights; the former because private firms are not subject to popular control; the latter because they are exempt from constitutional constraint under the “state action doctrine.” We ordinarily accept these limitations because, in liberal economic theory, markets are self-regulating and participation is voluntary (which is what effectuates their self-regulation). Where market participation is effectively mandatory, the loss of accountability and constitutional rights is problematic. Thus, consumption mandates represent a paradigm shift, not just in the marketplace (e.g., by restructuring the demand curve), but in democratic self-governance as well.

25. See *NFIB*, 132 S. Ct. at 2597–98 (describing a hypothetical tax on homeowners whose homes lacked energy efficient windows but citing to no actual tax of this kind).

26. *Id.* at 2600 (“Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”).

27. *Id.* at 2599 (distinguishing taxing inactivity, which Congress may do under its taxing power, from regulating inactivity, which Congress cannot do under its Commerce Clause authority).

28. See, e.g., *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 586 n.9 (1983) (tax on newspapers); *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (same); *Leary v. United States*, 395 U.S. 6 (1970) (self-incrimination); *Marchetti v. United States*, 390 U.S. 39 (1968) (same).

Others have addressed the takings issue in their discussions of the insurance mandate, but most have done so in conventional or cursory ways.²⁹ The unique nature of mandated consumption suggests that we need to return to the theoretical underpinnings of the Takings Clause in order to fully appreciate its application to the ACA.

A statutory requirement that individuals purchase a particular commodity effectively takes money from them and transfers it to a third-party who then delivers a good or service in exchange. Via this mandated consumption, the federal government has asserted dominion over a portion of the involuntary purchaser's assets. If the asset were anything other than money, the Takings Clause's applicability would be obvious. But money may be different, partly because it is so fungible and because nearly every form of regulatory compliance involves monetary burdens. Still, the ACA's insurance mandate is fundamentally different from typical financial obligations (and typical takings cases) because of its unique feature—forced market participation.

Never before in American history has the federal government forced its citizens to buy something, not as a condition for engaging in a regulated activity (e.g., businesses must buy workers' compensation insurance for their employees), but merely for living here. Just because insurance mandates are unprecedented does not mean they are also unconstitutional, but their rarity should give us pause.³⁰ Has no politician ever seen this way out of an economic problem before? If Americans can simply be forced to buy *X*, for whatever social welfare reason seems compelling, then we have a new tool, not just of health policy but fiscal policy too. Insurance mandates today, food mandates tomorrow.³¹

This article aims not so much to answer the constitutional questions, but to provide a framework for analysis. Part I describes the operation of the individual mandate. Part II surveys current takings doctrine and its application to the ACA. Part III considers

29. See, e.g., *Ass'n of Am. Physicians & Surgeons v. Sebelius*, 746 F.3d 468, 470 (D.C. Cir. 2014); *Hotze*, 991 F. Supp. 2d at 885–86. See also Daniel Gottlieb, *You Can Take This Health Insurance And . . . Mandate It?*, 33 SETON HALL LEGIS. J. 535, 536–37 (2009); Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, 37 J.L. MED. & ETHICS 38, 44–45 (2009).

30. *NFIB*, 132 S. Ct. at 2586 (“Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes ‘the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent’ for Congress’s action.”).

31. *Id.* at 2588 (“the Government’s logic would justify a mandatory purchase to solve almost any problem . . . Congress could address [America’s] diet problem by ordering everyone to buy vegetables.”).

consumption mandates as taxes, comparing them to the familiar payroll taxes we all pay. Part IV examines whether the mandatory insurance acquired constitutes just compensation. If insurance mandates are a taking of property, rather than a general monetary obligation in the nature of a tax or user fee, then we need to address the second half of the Takings Clause, the Just Compensation Clause. The Takings Clause doesn't prohibit the taking of private property for public use; rather it conditions the taking on the payment of "just compensation." Since a forced exchange presupposes that something is given in return for the payment, the services acquired could theoretically satisfy the compensation requirement. Part V addresses whether *NFIB's* "optional" tax for those who choose not to purchase insurance is constitutional under the Takings Clause.

I. The Health Insurance Mandate Deconstructed

Healthcare is one of the largest sectors of the American economy.³² Medical and other health-related costs totaled an estimated \$2.8 trillion in 2012,³³ or 17% of the gross domestic product.³⁴ Still, nearly one-sixth of the population remains uninsured; even more are underinsured or lack adequate access to healthcare.³⁵ Despite having the highest absolute and per capita medical expenditures in the world,³⁶ the United States has relatively poor health outcomes and one of the lowest life expectancies in the industrialized world.³⁷ "In no uncertain terms, the U.S. health care system is in crisis and has been for some time."³⁸ Most Americans

32. See U.S. CENSUS BUREAU, 2012 ECONOMIC CENSUS OF THE UNITED STATES (2012), available at http://www.census.gov/newsroom/releases/pdf/2012_econ_advance_report.pdf (total health care accounted for \$4.23 trillion in goods and services).

33. See *National Health Expenditures 2012*, CENTERS FOR MEDICARE & MEDICAID SERVICES, <http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/highlights.pdf>.

34. *Id.*

35. Frank Newport & Elizabeth Mendes, *About One in Six U.S. Adults Are Without Health Insurance*, GALLUP (July 22, 2009), <http://www.gallup.com/poll/121820/one-six-adults-without-health-insurance.aspx>.

36. See *Health Expenditure Per Capita (PPP; International \$)*, THE HENRY J. KAISER FAMILY FOUND., <http://kff.org/global-indicator/health-expenditure-per-capita/#table> (last visited Oct. 15, 2014) (United States ranked number 1 in per capita expenditure); see also Christopher J.L. Murray & Julio Frenk, *Ranking 37th—Measuring the Performance of the U.S. Health Care System*, 362 *NEW ENG. J. MED.* 98 (2010).

37. Murray & Frenk, *supra* note 36, at 98. See also *Male Life Expectancy in Years*, THE HENRY J. KAISER FAMILY FOUND., <http://kff.org/global-indicator/life-expectancy-male/> (last visited Oct. 15, 2014).

38. H.R. REP. NO. 111-299, pt. 3, at 56 (2009).

concur that our healthcare system is broken.³⁹ Thus, it is no surprise that health care and its financing remains a dominant political issue, one that has eluded solution for over a century.⁴⁰

The Affordable Care Act was the first successful expansion of health insurance coverage since Congress enacted Medicare in 1965. Among the ACA's salient features are: 1) an expansion of Medicaid, 2) expanded regulation of the health insurance industry, 3) premium subsidies for small businesses, 4) requirements that large employers provide health insurance to their employees ("employer mandate"), and 5) a requirement that most uninsured individuals buy private health insurance ("individual mandate").⁴¹ To facilitate the latter, the Act provides subsidies to low-income persons and creates "Health Benefit Exchanges" to augment private insurance markets.⁴² By many accounts, the ACA has already had some success, both in calming volatility in insurance costs⁴³ and in reducing the number of uninsured.⁴⁴ It may prove to be one of President Obama's most notable achievements.

Under the ACA, "universal health insurance" is achieved, for the most part, simply by requiring people to buy private insurance that provides "minimum essential coverage."⁴⁵ The system established by the ACA differs from what one may normally think of as a "universal" public good, since it treats health care and its financing as private commodities. It would be as if government achieved its goal of universal education by requiring everyone to attend a private school. The ACA does not establish a public alternative to privately provided services, as the government did with

39. Theodore Marmor, *Wanting It All: The Challenge of U.S. Health System Reform*, 55 U. KAN. L. REV. 1137, 1139 (2007).

40. See Joseph Antos, *Health care reform after the ACA*, NEW ENG. J. MED., 2259 (2014).

41. See *Summary of Affordable Care Act*, THE HENRY J. KAISER FAMILY FOUND., <http://kff.org/health-reform/fact-sheet/summary-of-the-affordable-care-act/> (last visited Oct. 15, 2014).

42. See ACA § 1311, 42 U.S.C. § 18031.

43. See generally *A Look at 2015 Individual Market Health Insurance Rate Filings*, PWC, www.pwc.com/us/en/health-industried/health-research-institute/aca-state-exchanges.jhtml (last visited Aug. 6, 2014).

44. See *Medicaid Enrollment Shows Continued Growth in May*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/healthcare/facts/blog/2014/07/medicaid-chip-enrollment-may.html> (last visited Aug. 16, 2014).

45. See ACA H.R. 3590, 111th Cong. §1501(f) (2010) (enacted) ("Minimum Essential Coverage" is defined in 26 U.S.C. §5000A(f) to include: (A) government-sponsored programs, (B) employer-sponsored plans, (C) plans in the individual market, (D) grandfathered plans, and (E) coverage approved by the Secretaries of the Treasury and Health and Human Services).

education. Rather, Congress has declared universal health care (and the insurance to fund it) to be a public good, but it then privatized the good and mandated that the public consume it from private companies.

The federal health insurance law actually includes two acts—the ACA, signed on March 23, 2010, and the Health Care Education Reconciliation Act of 2010 (“HCERA”), enacted two weeks later.⁴⁶ This sequence became necessary when Republican Scott Brown won the January 19, 2010, special election in Massachusetts for United States Senate to fill the seat left vacant by the death of Edward Kennedy. Brown’s surprise victory reduced the Democratic majority in the Senate to 59, one shy of the three-fifths needed to overcome Republican filibusters. In late 2009, the United States House had passed the America’s Affordable Health Choices Act of 2009,⁴⁷ while the Senate had passed the ACA.⁴⁸ Observers expected a conference committee to reconcile the provisions, but when it became clear that Democrats lacked the 60 votes needed for cloture on any compromise bill, the House simply adopted the Senate version verbatim on March 21, 2010. The Senate used the separate HCERA “reconciliation” bill, not subject to filibuster, to enact some of the provisions in the earlier House version. It worked several substantive changes, including increasing subsidies to low-income families and reducing the penalty for failing to buy insurance. However, the HCERA omitted one of the key provisions of the original House version—a “public option.”

The ACA encompasses ten sweeping titles.⁴⁹ Title I includes the individual insurance mandate. The law requires individuals to maintain “minimum essential coverage” for themselves and their dependents.⁵⁰ A variety of insurance mechanisms satisfy this requirement. For example, individuals enrolled in a government-sponsored program such as Medicare or Medicaid automatically meet

46. P.L. 111-152, 124 Stat. 1029, Mar. 30, 2010.

47. H.R. 3962, 111th Cong. (2009) (enacted)

48. H.R. 3590, 111th Cong. (2009) (enacted). The Senate used an unrelated bill providing for homeowners credits to members of the armed forces as a vehicle for its health reform legislation. H.R. 3590 was amended in the Senate by “[s]trik[ing] all after the enacting clause and insert[ing] the [text of the ACA].” Apparently, this is a common tactic to get around the Origination Clause.

49. Changes made to the original ACA by the Reconciliation Act were added to the end of the ACA as Title X rather than integrated into the bill. The Office of Legislative Counsel has consolidated the two Acts into an unofficial “compilation,” available at <http://docs.house.gov/energycommerce/ppacacon.pdf>. While it is inaccurate to reference the ACA without mentioning the Reconciliation Act, for simplicity this article uses the shorthand “ACA” to refer to the amended Act.

50. ACA § 5000A(a), 26 U.S.C. § 5000A(a) (2010).

their obligations.⁵¹ Similarly, those covered through their employers generally satisfy the ACA's mandate.⁵² Consumers may also purchase insurance through the individual private market⁵³ or through the newly created Health Benefit Exchanges.⁵⁴ In all cases, qualifying insurance must provide "essential health benefits" as defined by the Secretary of the Department of Health and Human Services⁵⁵ and cover at least 60% of the "actuarial value" of benefits provided under the plan.⁵⁶ Because the operation of the Exchanges is relevant to a takings analysis of the Act, the process is described here in detail.

A. Health Benefit Exchanges Under the ACA

The ACA encourages states to create Health Benefit Exchanges. If a state declines to do so, as most have, its residents can use the online federal exchange.⁵⁷ The latter, HealthCare.gov, had a rocky start, but it recovered by the ACA's implementation date in 2014.⁵⁸ The Exchanges were designed to create a new marketplace for facilitating the purchase of qualified health plans by: 1) creating a more competitive market; 2) pooling coverage, thus reducing transaction and risk-related costs; and 3) making coverage more transparent.⁵⁹ Exchanges also determine whether an individual or family is eligible for premium assistance and serve as the only place where such credits may be used to purchase health insurance.⁶⁰

While these Exchanges are subject to oversight from the Secretary of the Department of Health & Human Services ("HHS") in five areas—marketing, network adequacy, accreditation for performance measures, quality improvement and reporting, and uniform enrollment procedures⁶¹—the core functions of state

51. 26 U.S.C. § 5000A(f)(1)(A).

52. *Id.* at § 5000A(f)(1)(B), (E)(2).

53. *Id.* at § 5000A(f)(1)(C).

54. ACA § 1311(b), 42 U.S.C. § 18031(b).

55. ACA § 1302(b), 42 U.S.C. § 18022(b).

56. ACA § 1302(d). This means that an insurance plan can exclude non-essential medical services and require a co-payment up to 40% for covered services.

57. ACA § 1311(b), 42 U.S.C. § 18031(b).

58. Sandhya Somashekhar and Lena Sun, *HealthCare.gov meets deadline for fixes, Obama administration says*, WASHINGTON POST, Dec. 1, 2013.

59. ACA at § 1311(b), (d). *See also Initial Guidance to States on Exchanges*, CTRS. FOR MEDICARE & MEDICAID SERVS., http://www.cms.gov/CCIIO/Resources/Files/guidance_to_states_on_exchanges.html (last visited Oct. 15, 2014).

60. ACA § 1311(d)(4)(G), 42 U.S.C. § 18031(d)(4)(G).

61. ACA § 1311(c).

Exchanges fall to the states themselves.⁶² Despite the statutory guidelines, neither the federal government nor the states have the power to regulate premiums under the ACA.⁶³ Rather, the insurance companies participating in the Exchanges are responsible for setting their own premiums, subject to a cost containment mechanism.⁶⁴ This creates an interesting delegation problem.⁶⁵

The ACA includes several cost containment measures. The most important is the “requirement to provide value for premium payments,” which was part of the later-added HCERA.⁶⁶ Under this requirement, health insurers must rebate premiums that exceed medical loss ratios⁶⁷ of 80% in the case of individual policies or 85% in the case of large group policies.⁶⁸ The cost containment feature of the ACA serves a salutary regulatory purpose even while premiums remain mostly unregulated.⁶⁹

B. The Individual Mandate

Under the ACA, nearly every American citizen and resident alien has a statutory obligation to obtain insurance.⁷⁰ The Act grants exemptions from the mandate for religious objection, American Indians, those without coverage for less than three months,

62. *Id.* at § 1311(d)(4).

63. States can, independent of the ACA, oversee insurance rates. Many do, often pursuant to a “file and use” system. See generally *State Approval of Health Insurance Rate Increases*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/health/health-insurance-rate-approval-disapproval.aspx> (last visited Oct. 15, 2014). Other states prohibit rate regulation. See, e.g., S.B. 1842, 115th Reg. Sess. (Fla. 2013). But in no case is health insurance subject to rate regulation akin to public utilities.

64. ACA § 1323(d)(1)(A).

65. See *infra*, Part II.C.

66. ACA § 1001 (adding § 2718 to the Public Health Services Act, 42 U.S.C. 300gg–18).

67. 42 U.S.C. § 300gg–18(b). The term “medical loss ratio” describes the various components of allowable insurer expense compared to earned premiums collected over an applicable period, including the “loading factor” (retained premiums). CBO estimates the loading factor “constitutes a large proportion—about 29%, on average—of the total premium” in nongroup markets.

68. *Id.* Insurance accounting is complex and creative, so Congress required the National Association of Insurance Commissioners to establish uniform definitions of the operative terms. *Id.* § 300gg-18(c).

69. While there is room for manipulation, the “value for premiums” requirement is already reducing the cost of insurance premiums. The Secretary has authority to adjust the ratios as she “determines appropriate on account of the volatility of the individual market due to the establishment of State Exchanges.” *Id.* at § 300gg-18(d).

70. ACA § 1312(f)(1).

undocumented immigrants, and incarcerated persons.⁷¹ The ACA also provides “hardship” waivers for individuals for whom the lowest cost plan option exceeds 8% of annual income and those with incomes below the tax filing threshold (in 2013 the threshold for taxpayers under the age of 65 was \$10,000 for singles and \$20,000 for couples).⁷² Everyone else must buy insurance.

Given its breadth, the individual mandate has the potential to change the dynamics of the health insurance industry and the attendant crisis in coverage. The Congressional Budget Office estimates that the ACA will reduce the number of uninsured nonelderly people by approximately 32 million.⁷³ The teeth of the insurance mandate are what achieve such a dramatic reduction in the number of uninsured Americans: one’s failure to maintain minimum essential coverage results in a penalty,⁷⁴ exacted through annual tax returns.⁷⁵

Those without coverage pay either \$695 per year per person, up to a maximum of three times that amount (\$2,085) per family, or 2.5% of household income above the income tax filing threshold, whichever is greater.⁷⁶ Beginning in 2017, the penalty will be increased annually by the cost-of-living adjustment.⁷⁷ The “Individual Responsibility” section of the ACA is codified in the Internal Revenue Code and enforced by the IRS.⁷⁸ Penalties for non-compliance “shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes.”⁷⁹

Thus, instead of purchasing insurance an individual can elect to pay a penalty. Or is it a tax? The Act declares the former, but in *NFIB*, the majority upheld the law as a tax.⁸⁰ Since Congress’ power to tax is broader than its power to regulate, the mandate fell within its

71. ACA § 1311(d)(4), 42 U.S.C. § 18031(d)(4).

72. *Id.* at § 1501(b), 26 U.S.C. § 5000A(d)–(e), available at <http://www.irs.gov/pub/irs-pdf/p501.pdf>.

73. Cost Estimate for Pending Health Care Legislation, CONG. BUDGET OFFICE, <http://www.cbo.gov/publication/25049>.

74. ACA § 1501(b), 26 U.S.C. § 5000A(c).

75. *Id.* at § 5000A(b)(3).

76. *Id.* at § 5000A(c)(3). The penalty will be phased-in according to the following schedule: \$95 in 2014, \$325 in 2015, and \$695 in 2016 for the flat fee or 1.0% of taxable income in 2014, 2.0% of taxable income in 2015, and 2.5% of taxable income in 2016.

77. *Id.* at § 5000A(c)(3).

78. ACA § 1501(b) (adding Chapter 48—Maintenance of Minimum Essential Coverage—to Title 26 U.S.C.).

79. 26 U.S.C. § 5000A(g)(1), § 6671(a).

80. *NFIB*, 132 S. Ct. at 2594.

enumerated powers. This solved the Tenth Amendment issue in *NFIB*, but the ruling left open the question whether the “tax” imposed for non-compliance violates any individual rights. Especially when it comes to the Takings Clause, “the character of government action” often controls.⁸¹

This article next discusses whether the insurance mandate, divorced from the consequence of non-compliance constitutes a taking. If it does, it will then be necessary to see whether the option of paying a special tax instead is a constitutional alternative to the taking.

II. Do Insurance Mandates “Take” Private “Property”?

At their most basic level, government-forced commodity purchases take money from A and give it to B,⁸² albeit with something given in exchange. If the mandatory exchange involved physical property it would be easy to see the applicability of the Takings Clause. For instance, a required land swap⁸³ or the taking of an easement that enhanced the value of remaining property⁸⁴ are both analyzed as takings. In *United States v. Sioux Nation of Indians*,⁸⁵ the government took part of the Great Sioux Reservation, including the Black Hills of South Dakota, in exchange for subsistence rations which were thought at the time (1877) as vital to the tribe’s welfare. The Court had no difficulty in seeing the mandated exchange as a taking, despite the federal government’s guardianship role in protecting Indian interests.

But the property involved here is money, which is fungible and intangible, rather than unique and discrete.⁸⁶ In many respects, money is simply conceptual (a promise by the issuer), whereas takings jurisprudence deals mostly with “things,” like land and buildings.

81. See *United States v. La Franca*, 282 U.S. 568, 572 (1931) (“[N]o mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such”). See also *Dep’t of Revenue v. Kurth Ranch*, 511 U.S. 767, 779 (1994).

82. See *Calder v. Bull*, 3 U.S. 386 (3 Dall.) (1798) (Chase, J.) (“It is against all reason and justice” to presume that the legislature has been entrusted with power to enact “a law that takes property from A and gives it to B”).

83. See, e.g., *Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1556 (Fed. Cir. 1985).

84. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Arguably, the value of Loretto’s apartment building was enhanced by the cable equipment she resisted by supplying a coveted utility to tenants.

85. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

86. See *Sabri v. United States*, 541 U.S. 600 (2004).

Money is also instrumental rather than an object of use. It is “enjoyed” only upon exchange for other property. Does this distinction between tangible and intangible objects affect the analysis, or do all economic constructs qualify as “property” for purposes of the Takings Clause?⁸⁷

Moreover, the money *qua* property is not “taken” in the traditional sense, either through eminent domain or inverse condemnation. Rather, the ACA imposes an obligation to pay money to a third party. While seizures for the benefit of third parties are subject to the Takings Clause,⁸⁸ such seizures typically relate to discrete property rather than to a transfer of money. Indeed, some form of transfer is money’s only use (except for cash stored in the mattress), either through consumption, investment (including savings), or gift. In this sense, insurance mandates regulate the use of money rather than simply title ownership. Individuals are required to use their property in a particular way: by investing it in insurance.

The third threshold question is whether broad-based exactions, such as universal mandates, should be treated as the functional equivalent of eminent domain—the conceptual framework for modern takings cases. The Court has stated that the Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,”⁸⁹ rather than being “disproportionately concentrated on a few persons.”⁹⁰ According to Frank Michelman, this equality principle is one of the ethical foundations of the Takings Clause.⁹¹ Since insurance mandates affect millions of Americans, they are hardly targeted to “a few persons.” In fact, the burden of paying for mandated insurance may be an equalizing one, offsetting the free rider benefits that many uninsured would otherwise enjoy. In this sense, insurance mandates resemble taxes in their widespread

87. Non-contractual government benefits are one species of economic interest that lay outside of the takings clause. *See Bowen v. Gilliard*, 483 U.S. 587, 605 (1987); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174 (1980). For an argument that such benefits should be protected, see Charles Reich, *The New Property*, 73 *YALE L.J.* 733, 785 (1964).

88. *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 78 (1982) (“takings analysis is not necessarily limited to outright acquisitions by the government for itself”). *See also Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

89. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

90. *Id.*

91. *See Frank Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 *HARV. L. REV.* 1165, 1171 (1967).

application. Since taxes are generally immune from takings challenge,⁹² should not universal insurance mandates also get a pass?

This raises an interesting process issue. As will be discussed in Part III, insurance mandates probably cannot be justified as taxes, if for no other reason than the statutory obligation violates the non-delegation doctrine. If the ubiquity of insurance mandates makes them like taxes, but they cannot be treated as such for constitutional purposes, should they nonetheless be exempt from the Takings Clause?

The “fairness and justice” element is an important factor, but only one of many factors in the takings equation.⁹³ Equality, after all, is about access to and responsiveness of political processes.⁹⁴ If those affected by insurance mandates are underrepresented in the political arena, then judicial scrutiny should not be foreclosed simply because the burdened class is large.⁹⁵ No matter its scope, the mandate of private insurance creates a private burden where a public one existed before.

These threshold questions—whether money is Fifth Amendment property, whether a purchase obligation can be a form of “taking,” and whether broadly-shared burdens should be subject to rights-based judicial scrutiny—are next addressed. Only if the answers to all three questions are “yes,” would we then proceed with our formal takings analysis. As discussed below, our understanding of property and its Fifth Amendment protection would need some refinement in order to exempt insurance mandates from the Takings Clause. However, the breadth of the mandate, with widely shared burdens (as in the case of taxation), may turn out to be dispositive in ultimately finding that no taking has occurred.

92. For Professor Joseph Sax, the ubiquity of taxes is what distinguishes them from other government interferences with property. See Joseph Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36, 75–76 (1964) (“most taxes are not takings because they incorporate precisely the goal which the compensation rule is designed to achieve: they spread the cost of operating the governmental apparatus throughout the society rather than imposing it upon some small segment of it”).

93. In *Penn Cent. Transp. Co. v. New York City*, the Court discussed at length whether Penn Central had been singled out for unique burdens, but did so as part of its multi-factored ad hoc analysis. 438 U.S. 104, 131–32 (1978).

94. Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

95. Michelman’s fairness principle “differentiate[s] between intrinsically acceptable redistributive effects and those which seem, prima facie, to call for either compensation or special justification.” Michelman, *supra* note 91, at 1182. These include those programs whose “evident purpose is to redistribute from the better off to the worse off. Michelman, *supra* note 91, at 1182. Progressive income taxes and social welfare programs are, of course, excellent examples of such measures.” *Id.*

A. Money as Fifth Amendment Property

Whether money is property should not be an open question, yet some suggest that it is not the type of property protected by the Takings Clause.⁹⁶ While it is true that some economic interests simply are not “Fifth Amendment property,”⁹⁷ the limitation is most often applied to speculative investments,⁹⁸ inchoate and unrecognized property interests⁹⁹ and property acquired after a use limitation is imposed.¹⁰⁰ None of the usual exceptions apply in the case of money.¹⁰¹

It is hard to imagine that money was not considered a property interest at the founding. Adam Smith had just devoted almost the entirety of Book 1 of *Wealth of Nations* to money, its origin, uses and value.¹⁰² Also, shortly after the Bill of Rights was adopted, James Madison wrote his essay, *Property*, which gave an expansive definition of protected economic rights.¹⁰³

[Property] means “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual . . . [A] man’s land, or merchandize [sic], or *money* is called his

96. See, e.g., Merrill, *supra* note 14, at 903.

97. *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945) (“Only those economic advantages are ‘rights’ which have the law back of them . . . whether it is a property right is really the question to be answered”).

98. *E. Enters.*, 524 U.S. at 532 (“[only] reasonable investment-backed expectations [are protected by the Takings Clause]”).

99. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (no takings claim where “inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with”).

100. See *Concrete Pipe & Prods. of Cal. v. Construct. Laborers Pension Trust*, 508 U.S. 602 (1993) (one who buys with knowledge of a restraint assumes the risk of economic loss); *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984); *Sec. Indus. Bank*, 459 U.S. at 82. *But see Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (after acquired property entitled to Takings Clause protection).

101. See generally *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003).

102. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannon ed., Univ. of Chi. Press 1976); see also Thomas Jefferson & John Dickinson, *The Declaration of Causes and Necessity*, July 6, 1775, available at <http://founders.archives.gov/?q=Ancestor%3ATSJN-01-01-02-0113&s=1511311111&r=5>, which complained of Parliament’s interference with “our money without our consent, though we have ever exercised an exclusive right to dispose of our own property.” *Id.*

103. James Madison, *Property*, Papers 14:266–68 (Mar. 29, 1792), reprinted in THE FOUNDERS’ CONSTITUTION, ch. 16, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html>.

property . . . [A]nd none shall be taken directly even for public use without indemnification to the owner.¹⁰⁴

But the point remains abstract. Money may be property, but not necessarily the type of property that the Fifth Amendment protects. The issue is posed not in the everyday street sense but in the technical legal sense intended by the Takings Clause.¹⁰⁵ This turns out to be a harder question than might first appear.¹⁰⁶

“Unlike real or personal property, money is fungible.”¹⁰⁷ But, aside from real property whose uniqueness is well recognized in property law,¹⁰⁸ many personal assets have a liquidity to them that makes them easily exchangeable (e.g., stocks and bonds), yet are still protected by the Takings Clause. It is not clear why the ubiquity of money should render government demands on it immune.

More broadly, we can dismiss the notion that only discrete and tangible *things* are protected. For instance, flowing water has been treated as Fifth Amendment property;¹⁰⁹ it may be tangible, but it is not discrete. Nor are air rights,¹¹⁰ riparian rights,¹¹¹ “undivided fractional interests” in land,¹¹² or many of the “sticks in the bundle of rights that are commonly characterized as property,”¹¹³ such as rights of alienation¹¹⁴ or survivorship.¹¹⁵

104. *Id.* (emphasis added).

105. We all would probably agree that, as a practical matter, money is a most desirable asset to own since it can be exchanged for a limitless array of goods, services, and affections.

106. As the Court is fond of saying, “[t]he question of what constitutes a ‘taking’ for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty.” *See, e.g., Penn Cent.*, 438 U.S. at 123.

107. *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989).

108. *See generally* Nancy Perkins Spyke, *What’s Land Got to Do With It?: Rhetoric and Indeterminacy in Land’s Favored Legal Status*, 52 *BUFF. L. REV.* 387, 394 (2004) (“Widgets and Blackacre are not the same, and (at least arguably) ought not be treated identically in the law.”).

109. *See United States v. Cress*, 243 U.S. 316 (1917); *Hage v. United States*, 35 Fed. Cl. 147, 172 (1996) (“water rights are not ‘lesser’ or ‘diminished’ property rights unprotected by the Fifth Amendment.”).

110. *Cf. Griggs v. Allegheny Cnty.*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946).

111. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

112. *Hodel v. Irving*, 481 U.S. 704 (1987).

113. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

114. *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

115. *United States v. Craft*, 535 U.S. 274, 281 (2002).

Similarly, many notable takings cases have involved intangible assets, such as trade secrets,¹¹⁶ patents,¹¹⁷ trademarks,¹¹⁸ and future interests.¹¹⁹ Financial instruments such as liens,¹²⁰ stocks and bonds,¹²¹ contracts,¹²² insurance policies,¹²³ debt instruments (e.g., mortgages,¹²⁴ debentures,¹²⁵ creditor security interests¹²⁶), retirement benefits,¹²⁷ rental income¹²⁸ and other financial products evidencing monetary rights have all been treated as Fifth Amendment property. Even bank accounts,¹²⁹ interest on deposits¹³⁰ and other bank assets are protected.¹³¹ Why not money itself?

One concern is that, if money were property, any government obligation (e.g., to pay tax) or any regulation that affects the value of

116. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

117. *Campbell v. James*, 4 F. Cas. 1168 (C.C.S.D. N.Y. 1879) (No. 2,361), *rev'd on other grounds*, 104 U.S. 356 (1881). *See generally* Christopher S. Storm, *Federal Patent Takings*, 2 J. BUS. ENTREPRENEURSHIP & L. 1 (2008).

118. *Singer Mgmt. Consultants v. Milgram*, 608 F. Supp. 2d 607 (2009); *Commonwealth Brands, Inc. v. United States*, 678 F. Supp. 2d 512, 539–541 (2010); *Mobil Oil Corp. v. Attorney Gen. of Va.*, 747 F. Supp. 1173 (1990); *cf.* DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 233 (2002) (stating that “the application of the Takings Clause to intellectual property—trademarks, copyrights and patents—has not yet been seriously tested in the courts.”).

119. *See N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976).

120. *Sec. Indus. Bank*, 459 U.S. 70.

121. *Armstrong*, 364 U.S. 40; *Perry v. United States*, 294 U.S. 330, 373 (1935).

122. *Lynch v. United States*, 292 U.S. 571, 579 (1934); *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (“Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.”).

123. *Lynch*, 292 U.S. at 580.

124. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Shelden v. United States*, 7 F.3d 1022, 1026 (Fed. Cir. 1993).

125. *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952).

126. *Sec. Indus. Bank*, 459 U.S. at 82.

127. *Fern v. United States*, 908 F.2d 955 (Fed. Cir. 1990).

128. *Koontz*, 133 S. Ct. at 2600 (citing *Palm Beach Cty. v. Cove Club Investors Ltd.*, 734 So.2d 379 (Fla. 1999)).

129. *Kitt v. United States*, 277 F.3d 1330, 1336 (Fed. Cir. 2001); *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1381 (Fed. Cir. 2001); *United States v. Minor*, 228 F.3d 352, 356 (4th Cir. 2000). *But see* *MBank New Braunfels v. Fed. Deposit Ins. Corp.*, 772 F. Supp. 313 (N.D. Tex. 1991) (money held in bank accounts was not “private property entitled to just compensation under the Fifth Amendment”).

130. *Brown*, 538 U.S. 216; *Phillips v. Wash. Legal Found.*, 524 US 156 (1998); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). *See generally* Rebecca Rogers, *Interest, Principal and Conceptual Severance*, 46 B.C. L. REV. 863 (2005).

131. *Golden Pac. Bankcorp v. United States*, 1 F.3d 1066 (Fed. Cir. 1994); *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449 (2d Cir. 1995). *See also* *N. V. Handelsbureau La Mola v. Kennedy*, 370 U.S. 940 (1962) (Black, J., dissenting from denial of certiorari).

regulated property (as most do) would trigger the Takings Clause,¹³² thus hobbling ordinary government functions. By excluding money, or at least monetary obligations, from the Takings Clause, we instantly resolve the problem of why taxes and fees are ordinarily exempt from the clause's strictures.¹³³ But this expedient puts form over substance.

It might make sense, for instance, to treat unique and fungible property differently in the application of certain takings rules. Margaret Jane Radin argues that *per se* rules of takings jurisprudence ought not to be applied to fungible property.¹³⁴ Categorical takings (involving the complete destruction of a property right) necessarily focus on a specific interest.¹³⁵ Similarly, possessory takings doctrine may be inapposite to the taking of money if for no other reason than there is no "permanent physical occupation." It is hard to "occupy" a cipher in an electronic database, which is how most money exists these days. But whether *per se* or multi-factored *ad hoc* tests ought to apply, an issue taken up below, it is hard to treat money differently than other Fifth Amendment property.

B. Monetary Obligations and the Takings Clause

There is another expedient way to avoid the Takings Clause when the asset claimed by government is money. That is to treat money and monetary obligations differently. Under this theory, seizure of an identifiable corpus of money is no different than expropriation of any asset. But a monetary obligation is not a seizure so long as the obligation can be satisfied in any manner chosen by the obligor (if what is paid is money). No property is identified by the government, just an undifferentiated (although quantifiable) burden on total assets.¹³⁶

The money/monetary obligation dichotomy does resolve some of the tension between takings and taxes, but, as *Koontz* makes clear,¹³⁷ it is not supported by any principled distinction underlying either the

132. See, e.g., Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, in O'NEILL INST. PAPERS, Paper 21, at 12 (2009).

133. This is the route advocated by a number of scholars. See, e.g., Merrill, *supra* note 14, at 903.

134. Margret Jane Radin, *The Liberal Conception of Property: Cross-Current in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1687 (1988).

135. See *Sperry Corp.*, 493 U.S. at 62 n.9; *Unity Real Estate Co. v. Hudson*, 178 F.3d 649 (3d Cir. 1999).

136. These can be negative assets—a debt—as occurs where the obligor must borrow to satisfy the obligation.

137. *NFIB*, 132 S. Ct. at 2600.

Takings or Due Process Clauses (collectively, “property clauses”). The case law has advanced far beyond the point where physical seizures of property were the only kind of interferences protected by the Fifth Amendment. Burdens on property, real and personal, tangible and inchoate, are now also covered by the property clauses. As a result, the distinction between turning over to the government “this” pot of money or “some” pot of money seems metaphysical at best.

1. *Extending the Takings Clause to Monetary Obligations*

Early cases treated monetary obligations as Fifth Amendment property. In a 1796 decision, *Ware v. Hylton*,¹³⁸ the Court considered a debt owed to a British subject that was confiscated by Virginia during the War of Independence. The Court noted that the confiscation was lawful under international law, but that the debt had been restored by the Treaty of Paris.¹³⁹ Unfortunately for the debtor, he had already paid the debt into a confiscation account set up by Virginia during the war, and was now obligated to pay it a second time, to the original creditor. Justice Chase stated:

It was said that the defendant ought to be fully indemnified, if the treaty compels him to pay his debt over again; as his rights have been sacrificed for the benefit of the public.

That Congress had the power to sacrifice the rights and interests of private citizens to secure the safety or prosperity of the public, I have no doubt; but the immutable principles of justice; the public faith of the States, that confiscated and received British debts, pledged to the debtors; and the rights of the debtors violated by the treaty; all combine to prove, that ample compensation ought to be made to all the debtors who have been injured by the treaty for the benefit of the public. This principle is recognized by the Constitution, which declares, “that private property shall not be taken for public use without just compensation.”¹⁴⁰

138. *Ware v. Hylton*, 3 U.S. 199 (3 Dall.) (1796).

139. The Treaty of Paris, September 3, 1783, ended the Revolutionary War and transferred sovereignty from the Crown to the United States. *E. Band of Cherokee Indians v. Lynch*, 632 F.2d 373, 375 (1980).

140. *Ware*, 3 U.S. at 245.

The rule of *Ware*, that a monetary obligation in the form of a debt receives Fifth Amendment protection, was reaffirmed in *Cities Service Co. v. McGrath*,¹⁴¹ which also held that a legislatively mandated double payment entitles the debtor to just compensation.¹⁴² According to these cases, debts are property,¹⁴³ and money used to pay debts is property even if the source of funds is not specified.

Another line of cases addresses monetary obligations imposed on regulated industries.¹⁴⁴ In *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*,¹⁴⁵ the Court held that liabilities imposed on employers who withdraw from a multiemployer pension plan did not violate due process.¹⁴⁶ A renewed attack was mounted in *Connolly v. Pension Benefit Guaranty Corp.*,¹⁴⁷ this time under the Takings Clause, because the law “require[d] employers to transfer their assets for the private use of pension trusts and, in any event, . . . requir[ed] an uncompensated transfer.”¹⁴⁸

The Court agreed that withdrawing employers were “permanently deprived of those assets necessary to satisfy its statutory obligation.”¹⁴⁹ “[I]t constitutes a real debt that the employer must satisfy, and it is not an obligation which can be considered insubstantial.”¹⁵⁰ Nonetheless, the Court disagreed “that such a statutory liability to a private party always constitutes an uncompensated taking.”¹⁵¹ It thus rejected a facial takings challenge. The Court also rejected an as-applied challenge, but only after applying the standard *ad hoc* factual inquiry of regulatory takings cases.¹⁵² Although “the Act completely deprives an employer of

141. *Cities Serv. Co. v. McGrath*, 342 U.S. 330 (1952).

142. *Id.* at 335.

143. *See also* *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55 (1986) (“Congress does not have the power to repudiate its own debts, which constitute ‘property’ to the lender, simply in order to save money.”); *Perry*, 294 U.S. 330 (government’s repudiation of its debt is a taking).

144. *See Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211 (1986); *Sperry Corp.*, 493 U.S. at 62 n.9; *Concrete Pipe*, 508 U.S. at 644–45.

145. *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984).

146. *See* Employee Retirement Income Security Act of 1974 (“ERISA”), 88 Stat. 829, 29 U.S.C. § 1001, and the Multiemployer Pension Plan Amendments Act of 1980 (“MPPAA”), 94 Stat. 1208, 29 U.S.C. §§ 1381–1461.

147. *Connolly*, 475 U.S. 211.

148. *Id.* at 221.

149. *Id.* at 222.

150. *Id.*

151. *Id.*

152. *Id.* at 224.

whatever amount of money it is obligated to pay to fulfill its statutory liability,”¹⁵³ the liability “is not made in a vacuum, however, but directly depends on” its pre-existing regulated activities.¹⁵⁴ “[T]he mere fact that the employer must pay money to comply with the Act is but a necessary consequence of the MPPAA’s regulatory scheme.”¹⁵⁵

Thus, the law seemed settled for years that both money and monetary obligations were subject to the Takings Clause, but that not all interferences, even appropriations, were takings. Rather, like other property interferences, government demands on money were subject to traditional takings scrutiny.

2. *Eastern Enterprises v. Apfel*

A different view of monetary obligations emerged in the several opinions in *Eastern Enterprises*.¹⁵⁶ There, Justice O’Connor, writing for a plurality of four Justices, held that a retroactive and unanticipated monetary obligation imposed by the Coal Act¹⁵⁷ on an employer constituted a taking, even though the particular law under attack did not regulate or directly affect other property.

The fact that the Federal Government has not specified the assets that Eastern must use to satisfy its obligation does not negate [the substantial economic] impact. It is clear that the Act requires Eastern to turn over a dollar amount established by the Commissioner under a timetable set by the Act, with the threat of severe penalty if Eastern fails to comply.¹⁵⁸

In dissent, Justice Breyer, also writing for four Justices, said:

The “private property” upon which the Clause traditionally has focused is a specific interest in physical or intellectual property This case involves, not an interest in physical or intellectual

153. *Id.* at 225.

154. *Id.*

155. *Id.* at 226.

156. *E. Enters.*, 524 U.S. at 542 (Kennedy, J., concurring in part and dissenting in part).

157. *Id.*; Coal Indus. Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701–9722.

158. *E. Enters.*, 524 U.S. at 529.

property, but an ordinary liability to pay money, and not to the Government, but to third parties.¹⁵⁹

He distinguished the earlier cases in which interest on money was treated as Fifth Amendment property because “the monetary interest at issue there arose out of the operation of a specific, separately identifiable fund of money. And the government took that interest for itself.”¹⁶⁰ In contrast, the pension obligation on Eastern “is only a general liability.”¹⁶¹

Justice Kennedy provided the fifth vote invalidating the statutory obligation. He also thought the Takings Clause inapposite (but that the obligation violated substantive due process) because the obligation did not “operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest.”¹⁶² To him, the Takings Clause did not apply because the statute “regulates the former mine owner without regard to property,” and did not first “identify[] the property allegedly taken.”¹⁶³ Of course the statute did specify the quantum of money that was necessary for compliance, just not the source from which that money needed to be paid. To Justice Kennedy, whether the “take” is for the government’s benefit or that of a third party is ordinarily immaterial to takings law.¹⁶⁴

The Breyer/Kennedy position in *Eastern Enterprises* is the first time that a majority clearly confined the Takings Clause to interferences with specific and discrete items of property and declined to treat generic money (or monetary obligations) as property.¹⁶⁵ The distinction between specific and non-specific property may describe

159. *Id.* at 554.

160. *Id.* at 555.

161. *Id.* This also describes how the insurance mandate of ACA works. No identifiable corpus of funds is invaded or even regulated, and the government does not enrich its own coffers by requiring individuals to buy insurance (although it may ameliorate public funding obligations).

162. *Id.* at 540.

163. *Id.* at 543.

164. *Cf.* *FCC v. Fla. Power Corp.*, 480 U.S. 245 (1987) (government cannot avoid the Takings Clause simply by transferring private property to “an interloper with a government license”).

165. See Eric Kades, *Drawing The Line Between Taxes And Takings: The Continuous Burdens Principle, And Its Broader Application*, 97 NW. U. L. REV. 189, 194 (2002) (“neither Kennedy nor Breyer offered any precedent or argument for this distinction”) (citing Merrill, *supra* note 14, at 903).

the several cases finding a taking of interest on deposits,¹⁶⁶ but it does not adequately deal with all the other cases that have applied the Takings Clause to money and monetary obligations dating back to *Ware* in 1796. It is also somewhat of an artifice to create a constitutional distinction between money and interest on money, or to constrain the government if it seizes “a fund into which a private individual has paid money,”¹⁶⁷ but not if it demands a like sum of money without first specifying the fund from which the individual must pay.

Moreover, limiting the Takings Clause to “specific interest[s] in physical or intellectual property”¹⁶⁸ fails to appreciate that individuals do have a specific interest in their financial assets, whether it be a bank account or other liquid asset. Should the distinction between an obligation to pay a specific *sum* of money and an obligation to pay a specific *pot* of money really matter?

The formalism might be justified by returning to the original purpose of the Takings Clause, with its focus on the condemnation of real property.¹⁶⁹ But ever since judicial expansion of the Clause to reach regulatory interferences with property, most notably in *Pennsylvania Coal Co. v. Mahon*,¹⁷⁰ a wide range of property interests (both real and personal) and regulatory impacts have come under the Clause’s purview. If government were free to impose regulatory obligations so long as they did not specify the particular asset affected, then we would have to reconsider the expansion of the Takings Clause more generally to non-specific or fungible property.¹⁷¹

Of course, it is always possible to redefine Fifth Amendment property as to include some intangibles, such as trade secrets¹⁷² and debts, but to exclude others, such as generic money. Conceptual lines can be drawn anywhere. But we would have to revisit not just the

166. See *Webb’s Fabulous Pharmacies*, 449 U.S. 155; *Brown*, 538 U.S. 216; *Phillips*, 524 U.S. 156.

167. *E. Enters.*, 525 U.S. at 555 (Breyer, J., dissenting).

168. *Id.* at 554.

169. See generally William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

170. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

171. The best examples of this proposition are the numerous rate regulation cases decided under the Takings and Due Process Clauses. See *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), and cases cited therein.

172. See *Monsanto v. Ruckelshaus*, 467 U.S. 986, 1002 (1984) (“Trade secrets have many of the characteristics of more tangible forms of property in that a trade secret is assignable, can form the res of a trust, and passes to a trustee in bankruptcy.”) (citations omitted). All of those characteristics apply to money as well.

money as property cases described above, but also the framework the Court has given us for defining property. It has “consistently held that ‘the existence of a property interest is determined by reference to ‘existing rules or understandings that stem from an independent source such as state law.’”¹⁷³ We are not aware of any “independent sources,” in state law or elsewhere, that fail to protect money as a property right, nor did Justices Breyer and Kennedy cite to any.¹⁷⁴ Such a development would be especially curious since, according to the Court, property is merely a bundle of rights,¹⁷⁵ which includes the rights to possess, use, dispose of,¹⁷⁶ devise¹⁷⁷ and exclude others,¹⁷⁸ all of which well describe our relation to money.¹⁷⁹

3. *Koontz v. St. Johns River Water Management District*

Some of the uncertainty created by *Eastern Enterprises* for monetary obligations was cleared up in a 2013 case, *Koontz*.¹⁸⁰ There, the Supreme Court held an impact fee imposed on a property developer triggered the “unconstitutional conditions” doctrine.¹⁸¹ That doctrine applies to actions that condition the grant of government benefits on the grantee’s surrender of a constitutional right.¹⁸² *Koontz* had been denied a development permit because he declined to pay for offsite mitigation of environmental impact.¹⁸³ The Court held that the District’s demand for money, just as a demand for

173. *Phillips*, 524 U.S. at 164 (quoting *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972)). *Roth* included “money” in its list of protected property interests. *Id.* at 572.

174. As Professor Merrill has noted, “*Eastern Enterprises* is a decision of many ironies, not the least of which is that . . . five Justices saw fit to adopt a legal theory that had never been considered by the lower courts, briefed by the parties, mentioned at oral argument, or previously endorsed by the Court.” Merrill, *supra* note 14, at 904.

175. *Andrus*, 444 U.S. at 65–66.

176. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

177. *Hodel*, 481 U.S. at 716 (“[I]n one form or another, the right to pass on property—to one’s family in particular—has been part of the Anglo-American legal system since feudal times.”).

178. *Dolan*, 512 U.S. at 384 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

179. In *Gen. Motors Corp.*, Justice Roberts defined property as the “group of rights inhering in the citizen’s relation to the physical thing.” 323 U.S. at 377–78. But, this was likely intended to resolve the long-standing debate over whether the Fifth Amendment protected the asset itself or rights in it (*see, e.g.*, *Munn v. Illinois*, 94 U.S. 113 (1877)), not that protection was limited to physical (as opposed to intangible) things.

180. *Koontz*, 133 S. Ct. 2586.

181. *Id.* at 2594, 2597.

182. *Id.* at 2595.

183. *Id.* at 2591.

any other property, was subject to the Takings Clause.¹⁸⁴ “Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.”¹⁸⁵

Justice Alito’s majority opinion noted the dispute in *Eastern Enterprises* between monetary obligations that were tied to distinct property interests and those that were not.¹⁸⁶ But since the fee imposed on Koontz was the result of his proposed development, Justice Alito felt the Clause applicable in any event.¹⁸⁷ He declined to take on the broader issues of “whether monetary exactions must be tied to a particular parcel of land in order to constitute a taking” or whether “the government can commit a *regulatory* taking by directing someone to spend money.”¹⁸⁸

Justice Kagan, writing for four dissenters, saw the majority opinion as “run[ning] roughshod over *Eastern Enterprises*” on whether “ordinary financial obligations [can trigger] the Takings Clause.”¹⁸⁹ She read the majority’s approach as delinking monetary obligations from discrete property interests. The unconstitutional conditions doctrine does not apply unless an exaction, divorced from a conditional grant, is independently unconstitutional.¹⁹⁰ Thus, according to Justice Kagan, since the majority held the exaction violated the unconstitutional conditions doctrine, they also effectively ruled that “requiring a person to pay money to the government, or spend money on its behalf, constitute[s] a taking requiring just compensation.”¹⁹¹

While *Koontz* does not answer the specific question raised by consumption mandates, it does reopen the door some thought closed by *Eastern Enterprises*. Prior to *Koontz*, lower courts were split on the applicability of the Takings Clause to monetary obligations.¹⁹² The Federal Circuit was fairly emphatic: “the Takings Clause does not apply to legislation requiring the payment of money.”¹⁹³ Other

184. *Id.* at 2603.

185. *Id.* at 2595.

186. *Id.* at 2599.

187. *Id.* at 2595.

188. *Koontz*, 133 S. Ct. at 2600.

189. *Id.* at 2603–04.

190. *Id.* at 2611.

191. *Id.* at 2605.

192. *Id.* at 2602.

193. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1329 (Fed. Cir. 2001); *id.* at 1339 n.11. However, the cases upon which the court relied for its rule, apart

circuits reached the opposite conclusion.¹⁹⁴ After *Koontz*, the latter position seems vindicated.¹⁹⁵ Despite the fracture, there may be a way to reconcile the opinions in *Eastern Enterprises* with each other, with *Koontz*, and with the rather long history of cases applying the Takings Clause to money and monetary obligations.

4. *Resolving the Eastern Enterprises Dilemma*

The monetary obligation imposed on coal companies in *Eastern Enterprises* was part of a broader regulatory scheme to protect employees.¹⁹⁶ It was at least the fourth in a series of efforts to provide health benefits to miners.¹⁹⁷ Had the mandated obligations been imposed on current employers, no serious constitutional objection would have arisen. Even financial impositions on employers withdrawing from the benefits funds would easily have been (and were) upheld as part of their continuing obligations arising from regulated activities.¹⁹⁸ What set Eastern's monetary obligations apart from those upheld earlier was that the company had left the coal business decades before the obligation was imposed.¹⁹⁹ Although liability was premised on Eastern's historic coal operations, by the time of the Coal Act, Eastern had long ended any involvement with the industry,²⁰⁰ and there was no direct connection between those earlier operations and the newly imposed liability.²⁰¹

from *Eastern Enterprises*, are ones in which no taking was found on the merits, not because the Takings Clause was inapplicable.

194. See *United States Fid. & Guar. Co. v. McKeithen*, 226 F.3d 412, 420 (5th Cir. 2000) (distinguishing *Eastern Enterprises* on the ground that “the assessments against these plaintiffs arise from the specific fund of [insurance] benefits they pay”); *United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir. 2001).

195. See, e.g., *Horne v. USDA*, 750 F.3d 1128, 1137 (9th Cir. 2014).

196. 524 U.S. at 504-05.

197. See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (upholding provisions of the Black Lung Benefits Act of 1972, 30 U.S.C. § 901 Federal Mine Safety & Health Act of 1977 § 401, P. Law 91-173, as amended by P. Law 95-164 (providing benefits to coal miners disabled as a result of Black Lung); The Federal Coal Mine Health and Safety Act of 1969, P. Law 91-173; 302 (c) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186 (1970 & Supp. V 1975).

198. See *Concrete Pipe*, 508 U.S. 602; *Connolly*, 475 U.S. 211.

199. 524 U.S. at 537.

200. *E. Enters.*, 524 U.S. at 532 (The federal “scheme reaches back 30 to 50 years to impose liability against Eastern based on the company’s activities between 1946 and 1965”).

201. The plurality rejected the notion that liabilities arising out of Eastern’s prior coal mining operations were indefinite in duration and scope. *Id.* at 535.

Both Justices O'Connor and Kennedy were greatly troubled by the severe retroactive impact of the Coal Act on Eastern.²⁰² To Justice O'Connor, this constituted a taking because it “divest[ed] Eastern of property long after the company” had settled its industry liabilities.²⁰³ In other words, the monetary obligations were imposed apart from any underlying regulated activity. For Justice Kennedy, this feature of the Act violated substantive due process but did not work a taking.²⁰⁴ He was concerned with applying the Takings Clause to a limitless variety of monetary obligations, “lest all governmental action be subjected to examination under the constitutional prohibition against taking without just compensation.”²⁰⁵

Justice Kennedy need not have been so concerned. In most cases, a monetary demand is one of many elements of overall economic regulation of business activity.²⁰⁶ While the Takings Clause would nominally apply, either where the obligation was a direct monetary liability or a regulatory requirement in different form, it is unlikely that the challenge would succeed given the deferential standard of review under modern regulatory takings doctrine.²⁰⁷ *Connolly* establishes that point.²⁰⁸

What set *Eastern Enterprises* apart, at least for the plurality and concurrence, was that the monetary obligation was not part of broader regulation of the company, but the only regulation imposed.²⁰⁹ That is the right analytical framework to apply. That is, is the obligation to pay money attached to some underlying regulation of the entity? If so, then the financial burden should be analyzed in context. If not, the monetary liability stands alone as a naked interference with the obligor's assets.

In this respect, both Justices Breyer and Kennedy are right; some specific property must be identified in order to conduct a takings analysis. That can be a parcel of land, a coal mine or any other regulated property. But where there is no other economic interest being regulated—just the appropriation of money—*that* is the specific property that should count. This reconciles the cases involving a

202. 524 U.S. at 538.

203. *Id.* at 534.

204. *Id.* at 550.

205. *Id.* at 543.

206. See, e.g., *Concrete Pipe, Connolly*.

207. See *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 545 (2005) (describing the deferential standard of review in takings cases).

208. 475 U.S. at 227.

209. 524 U.S. at 509.

taking of money and recognizes that money is, in fact, Fifth Amendment property.

Still, Justice Breyer raises the concern that if ordinary monetary obligations were subject to takings analysis, it would be hard to distinguish such liabilities from taxes. “If the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, i.e., when it assesses a tax?”²¹⁰ Takings analysis does not usually apply to taxes, although some have urged that it should. We address that question next.

5. *If Monetary Exactions Are Subject to Takings Scrutiny, Why Aren’t Taxes?*

The title of this section repeats a question asked by many others: why aren’t taxes takings? The most prominent advocate of applying takings law to taxes, especially progressive income taxes, is Richard Epstein.²¹¹ To him, anything but a flat tax, imposes disproportionate burdens that violate the equality principle in takings theory.²¹²

The short answer to Epstein is that the Supreme Court’s hands-off treatment of taxes, compared to other “deprivations of private wealth[,] is one of the most long-standing and entrenched concepts of American Constitutional law.”²¹³ In *McCulloch v. Maryland*,²¹⁴ Chief Justice Marshall declared that “[t]he only security against the abuse of [taxation] is found in the structure of the government itself.”²¹⁵ In his noted 19th century treatise on constitutional law, Thomas Cooley reiterated the point that “courts scarcely venture to declare that [the taxing power] is subject to any restrictions whatever.”²¹⁶ Thus, the Court has declared that “taxation for a public purpose, however great,” is not considered “the taking of private property,”²¹⁷ but the

210. *Id.* at 556. *See also* Krotoszynski, *supra* note 11, at 729.

211. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 297–300 (1985).

212. *Id.* at 298.

213. Amnon Lehavi, *The Taking/Taxing Taxonomy*, 88 *TEX. L. REV.* 1235, 1255 (2010).

214. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

215. *Id.* at 428 (1819).

216. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 479, 487–88, 494 (Alexis C. Angell ed., 6th ed. 1890).

217. *See* *Taking/Taxing Dichotomy* at 1255 (citing *Cnty of Mobile v. Kimball*, 102 U.S. 691, 703 (1880)). *See also* Merrill, *supra* note 14, at 980–81.

theoretical justification for the distinction between taxes and the taking of money via regulation remains elusive.²¹⁸

A grand unified theory of taxing and takings would normalize the disparate doctrines. Epstein argues that disproportionate taxes should be treated as takings;²¹⁹ Penalver argues the opposite: It is takings law that should be reformed to resemble the deferential treatment of taxes.²²⁰ Until symmetry is achieved, we are left with the historical dichotomy between takings and taxing and post-hoc explanations for that difference.

Eric Kades argues that the distinction lies in the generality of taxes in contrast to the targeted nature of most takings; i.e., “the breadth of the burdens imposed.”²²¹ Moreover, taxes usually finance public goods with some degree of reciprocal benefit to the taxpayer, whereas the fruits of a taking also benefit society generally, but not particularly the property owner whose assets have been claimed.²²² Thus, for Kades, it is the proportionality and reciprocity of the burdens and benefits attendant to taxes that differentiate and save them from the Takings Clause.²²³ In this calculus, the legislature is given wide berth; mathematical equivalence is not required. However, “palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation [will not be permitted] under the guise of exerting the power of taxing.”²²⁴

As an equality principle, the Takings Clause would not be violated by the levy of uniform fees, or broad-based taxes, even those of a progressive or regressive nature. The converse is also true. Taxes imposed on isolated individuals or properties are subject to takings scrutiny.²²⁵ What matters under this theory isn’t the taxonomy used (taxes vs. liabilities vs. regulation), but the fundamental fairness

218. See generally Eduardo Moises Penalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182 (2004).

219. *Id.*

220. See *supra* note 212.

221. Kades, *supra* note 165, at 202.

222. *Id.*

223. *Id.* at 200–05. See also Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285 (1990); *Taking/Taxing Dichotomy*, at 1256, and sources cited at note 126–30.

224. *Dane v. Jackson*, 256 U.S. 589, 599 (1921) (quoted in Kades, *supra* note 165, at 205).

225. Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL’Y 85, 104 (1996) (“Surely an income tax of 100% imposed on a single individual—for example, Bill Gates—would violate the Takings Clause.”).

of the exaction. We return to this point in subpart B below, in discussing the broad reach of the ACA, but at least one answer to the taxing/taking dichotomy is that the former spreads burdens while the latter concentrates them.

There are other theoretical explanations for the dichotomy. One is that taxing is a “background institution” in American law,²²⁶ reflected in ancient antecedents and reinforced in the Constitution’s assumption that the power exists²²⁷ and mention of taxation as the first of Congress’ enumerated powers.²²⁸ As the Supreme Court explained in *Lucas v. South Carolina Coastal Council*,²²⁹ property rights are subject to background (pre-existing) principles in relevant law that limit those rights. On this theory taxes would be exempt from takings scrutiny unless they significantly differed in quality or degree from what was understood to be within government’s power at the time the Fifth Amendment was adopted. (Consumption mandates were clearly not within that contemplation.)

Taxes are usually imposed on voluntary economic activities. This is true of most common forms of taxation—property, income, business, license and consumption (sales taxes)—all of which can be avoided by staying out of the market being taxed. Even estate and gift taxes apply to an economic transfer. Consumption mandates (and other takings) force an economic action, they don’t tax a pre-existing one. The analogous tax is a capitation or head tax, “a tax on the privilege of being.”²³⁰ Head taxes, or “levy by the poll,”²³¹ are a discredited notion these days, and often prohibited in state and federal law,²³² although perhaps not unconstitutional.²³³

In this sense, taxes and takings are economic opposites. This is especially so when it comes to consumption mandates which force the

226. See Taking/Taxing Dichotomy at 1260.

227. It is mentioned explicitly seven times in the original Constitution, eight if one includes the “duty of tonnage” clause in U.S. CONST. art. I, § 10, cl. 3 (limiting the taxing power of states).

228. U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power to lay and collect Taxes”).

229. *Lucas*, 505 U.S. at 1003–04.

230. BLACK’S LAW DICTIONARY 1159 (6th ed. 1990); 51 AM. JUR. 1ST TAX § 412 (2010).

231. *Breedlove v. Suttles*, 302 U.S. 277, 281 (1937).

232. *Id.* (“To prevent burdens deemed grievous and oppressive, the constitutions of some States prohibit or limit poll taxes.”); Anti-Head Tax Act, 49 U.S.C. § 40116 (1996) (prohibiting “head charges” by states on air transport).

233. *NFIB*, 132 S. Ct. at 2599.

obligor into the marketplace.²³⁴ The theory of the ACA is that insurance markets are distorted because of free riders and adverse selection.²³⁵ The mandates and other regulatory features of the ACA are designed to achieve a more idealized market in private goods. Free-market economics is the underlying theory, or at least the political argument advanced to secure passage of the law. Taxes, in contrast, promote a different economic theory—that certain public goods cannot be provided by markets, or inefficiently so, and must be socialized through public funding. Takings treat the good as a private one (only “private property” is protected), even though it is put to a “public use.” So, economic theory treats taxes and takings as responding to different market limitations and natures of the “good” achieved.

Both taxes and takings are designed to promote the public welfare, but some distinction must be maintained lest one clause or the other collapses. The Court has “repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained [lawfully] by imposing a tax.”²³⁶ The distinction between the two lies as much in the structure of a monetary obligation as in its purpose or effect. In analyzing the ACA, it may be sufficient to note that the mandate transfers an individual’s money to private parties while a tax transfers it to the government.

This section addressed only the question of how money can be treated as property without subjecting tax obligations to the Takings Clause. The more particular questions of whether the required insurance premium is a form of tax, and whether the mandate can be avoided by paying a tax instead, are discussed in Parts III and V below.

C. The “Universal” Requirement of Mandatory Insurance

Assuming that mandated consumption is the type of interference with property that modern takings doctrine addresses, the next question is whether such mandates imposed on large subsets of the

234. Indeed, this was Chief Justice Robert’s reasoning in *NFIB* in holding that Congress could not regulate inactivity under the Commerce Clause. *Id.* at 2622.

235. Adverse selection in the insurance market is the phenomenon of persons with higher risk of loss buying (or buying-up) insurance coverage. The corollary is persons with low risk (i.e., in good health) deferring insurance purchases until they need coverage. See generally David M. Cutler, Richard J. Zeckhauser, *Adverse Selection in Health Insurance* (NBER Working Paper No. 6107, 1997), available at <http://www.nber.org/papers/w6107>. It is a principal economic justification for universal insurance.

236. *Koontz*, 133 S. Ct. at 2601.

entire population satisfy the “fairness and justice” tenet of the clause. Most takings cases involve unique burdens that single out particular property owners for adverse treatment. The insurance mandates in the ACA are much broader in application, although in practice only those not covered under an employer or public plan, or otherwise exempt, will have to buy private insurance. Does the generality of the mandate work to avoid a taking?

In his work on the theoretical and historical origins of the Takings Clause,²³⁷ William Michael Treanor argues that the clause was designed to guard against “process failure”—where republicanism failed to properly balance social and individual interests in the use of property.²³⁸ For Madison, certain classes of property owners were “particularly vulnerable to majoritarian decisionmaking” and needed protection from the political process.²³⁹ Thus, Treanor argues, “the background understanding, the framers’ intent, and the ratifiers’ intent all indicate that the Fifth Amendment’s Takings Clause should be understood as concerned with redressing political process failure.”²⁴⁰

Lawrence Lessig argues that this original understanding should be “translated” to fit modern conditions.²⁴¹ Rather than landowners and slave-owners who, at one point, may have been the most likely victims of majority passion,²⁴² today it is the working class: the very persons most adversely affected by the ACA’s mandate.²⁴³

These process concerns fit nicely with the “justness and fairness” tenet of the Takings Clause as developed in modern cases. Republicanism (majoritarianism) can safely be entrusted with mediating most competing interests. But property requires protection from the occasional process failure. That occurs when

237. Treanor, *supra* note 169, at 782.

238. *Id.* at 819–55.

239. *Id.* at 856 (“Every peculiar interest whether in a any class of citizens, or any description of States, ought to be secured as far as possible. Wherever there is danger of attack there ought to be given a constitutional power of defense”).

240. *Id.* at 855 (internal parentheses omitted).

241. *Id.* at 856 (citing Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993)).

242. Treanor, *supra* note 169, at 850–51.

243. *Id.* at 871 (the Takings Clause protects those without power to “protect themselves through the political process . . . to ensure that they do not receive an unfair share of the public’s burden”). See also Hanoach Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 779 (1999) (“takings law can be designed with . . . an ‘equalizing tendency’ in order to ‘more vehemently protect the property interests of the poor and the weak’”).

disproportionate claims are laid on one group (such as those with less economic power) or class of property.²⁴⁴

This theory is also consistent with early takings cases raising concerns about disproportionate burdens placed on unique property. Thus, in finding a taking in *Pennsylvania Coal*, Justice Holmes distinguished regulations that provided “an average reciprocity of advantage” to the property owner.²⁴⁵ Modern cases take this notion further. It has been said the Takings Clause prevents government “from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²⁴⁶ Thus, in *Penn Central*, the Court noted that inequality of burdens was an important factor in takings cases.²⁴⁷ But it is only one of several factors influencing the analysis²⁴⁸ and not dispositive either way.²⁴⁹

Even though the burden of mandatory insurance is widespread, it is disproportionate in many cases, especially where low-risk individuals are forced to subsidize high-risk ones, and those who do not consume health care services are forced to subsidize those who do.²⁵⁰ Premium prices and other terms will hardly be uniform across affected purchasers. The likelihood of uneven exactions is high, especially when you consider that mandates disproportionately

244. See Levmore, *supra* note 223, at 310 (takings “law reflects a concern for minorities that are unlikely to be able to take care of themselves through the political process”).

245. *Pa. Coal Co.*, 260 U.S. at 415.

246. *Armstrong*, 364 U.S. at 49. See also *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 83 n.7 (1980) (citing *United States v. Rands*, 389 U.S. 121, 126 (1967)) (“The Fifth Amendment ‘prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.’”).

247. *Penn Cent.*, 438 U.S. at 124.

248. *Id.*

249. See *id.* at 131–32 (the Court noted over 400 landmarks and 31 historic districts were affected by the challenged law, but devoted most of its analysis to the law’s economic impact on *Penn Central*). But see Michelman, *supra* note 91, at 1171 (arguing that fairness is, ultimately, the only “correct” test for determining when just compensation is required).

250. See, e.g., 42 U.S.C. § 18091(2)(I) (the mandate “broaden[s] the health insurance risk pool to include healthy individuals, which will lower health insurance premiums”); Larry Levitt, Gary Claxton, & Anthony Damico, *The Numbers Behind “Young Invincibles” and the Affordable Care Act*, KAISER FAMILY FOUND. (Dec. 17 2013) (“older adults will be paying premiums that do not fully cover their expected medical expenses, while younger adults will be paying premiums that more than cover their expenses. For this system to work, young people need to enroll in sufficient numbers to produce a surplus in premium revenues that can be used to cross-subsidize the deficit created by the enrollment of older people.”).

burden middle-class families.²⁵¹ If the lowest level “bronze” policy costs an average family over \$12,000 per year, includes a \$10,000 deductible and a 40% co-payment, it is not easy to see what benefit they will derive from their forced purchase. In contrast, the benefits flowing to large employers and those who are already insured, who will now see lower premiums, both because of the larger pools of insureds and more rationalized health care delivery, are far more perceptible. It may be too soon to know whether an “average reciprocity of advantage” will materialize. Ultimately, as-applied takings claims may succeed where facial ones might not.²⁵²

If the Takings Clause were simply a specific application of general equality principles, then the broad reach of the ACA would likely mitigate against finding a taking. However, if the clause is intended to guard against burdens that benefit society generally, but not particularly the person whose assets have been claimed, then the ACA may be problematic. Indeed, the ACA’s insurance mandate was justified mainly on the basis of the public good achieved, rather than reciprocal benefit to involuntary purchasers.²⁵³

Congressional findings underscore this point.²⁵⁴ The insurance mandate is intended to address the impact of the uninsured on the United States economy (“up to \$207,000,000,000 a year”), abate “[t]he cost of providing uncompensated care to the uninsured” (\$43 billion in 2008) and “lower health insurance premiums.”²⁵⁵ These are certainly salutary objectives, but the point that mandated individuals are expected to provide a public benefit remains unproven.²⁵⁶ The Eleventh Circuit stated the point more emphatically:

251. Vanessa Fuhrmans, *Mandated Health Insurance Squeezes Those in the Middle*, WALL ST. J., Sept. 16, 2009, <http://online.wsj.com/news/articles/SB125304790936413347?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB125304790936413347.html>.

252. See, e.g., *Schneider v. Cal. Dep’t of Corrs.*, 345 F.3d 716, 720–21 (9th Cir. 2003) (explaining that that taking of interest earned on some accounts might require compensation even if the overall scheme survived *Brown*).

253. See generally *Health Care that Works for Americans*, available at <http://whitehouse.gov/healthreform/healthcare-overview> (describing “comprehensive reforms that improve access to affordable health coverage for everyone and protect consumers from abusive insurance company practices”).

254. Congress’ findings on the need for the individual mandate are contained in 42 U.S.C. § 18091.

255. 42 U.S.C. § 18091(2)(E), (F), (I). In *Florida v. United States HSS*, the Eleventh Circuit estimated the amount of cost-shifting (increased cost to those with insurance to compensate for those without) to be roughly \$368 to \$410 per year per insured. 648 F.3d 1235, 1244 (11th Cir. 2011).

256. The only reciprocal benefit cited by Congress is in the potential reduction in the number of personal bankruptcies. *Id.* § 18091(2)(G).

The individual mandate forces healthy and voluntarily uninsured individuals to purchase insurance from private insurers and pay premiums now in order to subsidize the private insurers' costs in covering more unhealthy individuals under the Act's reforms.²⁵⁷

In this sense, the ACA may be a prime example of "process failure." The "fairness and justice" element of the Takings Clause is the least developed (although perhaps the most cited). Its application to broad-based consumption mandates is somewhat uncertain. If a takings claim were to fail, it could very well be here. But, in term of democratic process, the availability of political correction for burdens placed on the uninsured is more theoretical than real.²⁵⁸

D. Applying the Takings Clause

We have described three predicates for applying the Takings Clause to consumption mandates. First, money has to be the type of Fifth Amendment property the clause protects. Second, a purchase obligation has to be the type of governmental interference with property that equates with condemnation. And third, the broad generality of the requirement to have or buy insurance cannot be such as to render the individual rights protection of the clause inapposite. Assuming these threshold inquiries are satisfied, we would then scrutinize the mandate for its compatibility with existing takings law.

The Fifth Amendment protects property in two ways: against unreasonable regulatory interference and against expropriation. The former is stated in the Due Process Clause; the latter in the Takings Clause. While the Takings Clause may have been intended to deal solely with the government's exercise of its eminent domain power (expropriation), rather than its police power (regulation), it was early applied to both. The basic theory was articulated by Justice Holmes in *Pennsylvania Coal*.²⁵⁹ Regulation that "goes too far" ought to be

257. *Florida v. United States HHS*, 648 F.3d at 1299–1300.

258. Of the 50 million uninsured, 16.6% are children, 19.3% are non-citizens, 53.2% are minority, and 51.8% are poor. See JACK HADLEY AND JOHN HOLAHAN, THE KAISER COMM'N ON MEDICAID AND THE UNINSURED, THE COST OF CARE FOR THE UNINSURED: WHAT DO WE SPEND, WHO PAYS, AND WHAT WOULD FULL COVERAGE ADD TO MEDICAL SPENDING? 13 (Kaiser Family Foundation 2004). Accordingly, the burden of mandatory insurance falls disproportionately on demographics with historically reduced political influence.

259. *Pa. Coal Co.*, 260 U.S. 393.

treated as the functional equivalent of eminent domain.²⁶⁰ Indeed, a regulation that affects a “taking” is often referred to as “inverse condemnation.”²⁶¹ It is “inverse” because government has expropriated property through its police power rather than through its power of eminent domain. The extension of the Takings Clause to regulatory action, however, requires courts to determine exactly when regulation becomes condemnation; i.e., just how far is “too far”?

To aid in this analysis, the Supreme Court has divided takings doctrine into two parts: “physical” (or possessory) and “regulatory” takings.²⁶² The latter has been further divided into “categorical” and “non-categorical” takings.²⁶³ Along the way there are several variations, such as regulatory exactions.²⁶⁴ Although this process results in doctrinal complexity, it provides lower courts with some guidance to respond to the nuances of modern regulation.

Although money is property for Fifth Amendment purposes, it is often treated differently than other regulated property in takings cases. Irrespective of the amount taken, or the character of the government action, money was not seen as discrete property capable of physical occupation.²⁶⁵ This makes sense for practical reasons. Where economic regulation adversely affects the value of regulated property (e.g., price control) or requires expenditures (e.g., safety standards), both of which are commonly found, one could conceptualize the monetary differential (with and without regulation) as discrete property. Axiomatically, that discrete property is wholly taken by government action.²⁶⁶ Obviously, conceptual severance in this context would extend the Takings Clause to an absurd extreme and preclude any meaningful economic regulation. To avoid this problem, the Court has long resisted the fractionalization of regulated property into taken and remaining interests.²⁶⁷ As this relates to

260. *Id.* at 415.

261. *United States v. Clarke*, 445 U.S. 253, 257 (1980).

262. *See Brown v. Legal Found.*, 538 U.S. 216, 233 (2003).

263. *Id.* at 234.

264. *Lingle*, 544 U.S. at 546.

265. *See Yee v. City of Escondido*, 503 U.S. 519, 532 (1992); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

266. This is known as the “denominator problem;” i.e., in measuring the extent of regulatory impact, should the court look at the effect on the property as a whole, or just the fraction that is regulated.

267. *See, e.g., Concrete Pipe*, 508 U.S. at 644 (“a claimant’s parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable”); *Penn Cent.*, 438 U.S. at 130 (“‘Taking’ jurisprudence does not divide a single parcel into discrete

money, which is easily fractionated, any fee or charge levied would be seen as a physical occupation of the amount taken and therefore *per se* invalid.²⁶⁸

The financial obligations of regulated businesses are not easily subdivided. Although creative derivative instruments now exist that slice up and market discrete obligations, a business is typically regulated as a whole. That is why a railroad can be forced to continue running a particular line even at a loss.²⁶⁹ Financial obligations imposed on a business through routine economic regulation are simply components of an overall economic picture, rather than discrete money transfers. Thus, even where those obligations (viewed in context of the overall business regulation) are so severe as to constitute a taking, it is not the possessory kind.²⁷⁰

Until recently, cases involving the taking of money did not specify which strand of takings law—possessory or regulatory—was implicated. For instance, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*²⁷¹ cited both lines of cases in reaching its conclusion that interest earned on court-deposited funds constituted Fifth Amendment property.²⁷² *Phillips v. Washington Legal Foundation*,²⁷³ relied principally on possessory takings cases²⁷⁴ in coming to the same conclusion, but did not expressly so hold. The matter was settled, however, in *Brown v. Legal Foundation of Washington*,²⁷⁵ which held the taking of interest earned on money is a physical taking.²⁷⁶

[A] *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central's* ad hoc analysis [I]nterest earned in the IOLTA accounts “is the ‘private property’ of the owner of the principal.” If this is so, the transfer of the interest to the Foundation here seems more akin to the

segments and attempt to determine whether rights in a particular segment have been entirely abrogated.”).

268. See *Sperry Corp.*, 493 U.S. at 62, n.9 (“It is artificial to view [user fees] as physical appropriations of property.”).

269. See, e.g., *Atl. Coast Line R.R. Co. v. N.C. Corp. Comm'n*, 206 U.S. 1 (1907).

270. *E. Enters.*, 524 U.S. at 530.

271. *Webb's Fabulous Pharmacies*, 449 U.S. 155.

272. *Id.* at 163.

273. *Phillips*, 524 U.S. 156.

274. *Id.* at 169.

275. *Legal Found. of Wash.*, 538 U.S. 216.

276. *Id.* at 235.

occupation of a small amount of rooftop space in *Loretto*.²⁷⁷

The taking of interest on money, at least from individuals not involved in regulated activity, is a physical taking, as is the taking of dividends on stock.²⁷⁸ Should forced transfer of a portion of the corpus also be treated as a physical taking?

Probably not. Here is where the distinction between fungible and discrete property (money vs. things) has the greatest significance. Money is infinitely divisible, at least down to a ha'penny.²⁷⁹ Treating a monetary obligation as a possessory taking of a fractionated part of one's assets, which would apply equally no matter how small the liability, essentially forbids its imposition.

True, all attributes of ownership in the price paid are now in the hands of another (an insurance company in the case of the ACA), tantamount to transfer of fee in that amount of money; i.e., "ouster" of the former owner. But the proposition proves too much. "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the [asset] in question."²⁸⁰ Since consumption mandates and other monetary obligations can be paid from any asset (so long as it is paid in legal tender), it is unlikely to deprive the owner of all value. More specifically, the notion that a quantifiable monetary interest is discrete property subject to categorical rules has been tried²⁸¹ and rejected in other contexts.²⁸²

Thus, *Brown* should be limited to the case where government identifies a discrete corpus of money for expropriation; e.g., a particular bank account, rather than a specific sum of money. This

277. *Id.*

278. *Canel v. Topinka*, 342 Ill. App. 3d 65 (Ill. App. Ct. 2003).

279. *Cf. Leon Uris*, Q.B. VII 421 (awarding damages of a ha'penny, "the smallest coin in the realm").

280. *Concrete Pipe*, 508 U.S. at 643.

281. *See Hall v. City of Santa Barbara*, 797 F.2d 1493 (1986) (finding a regulatory taking from a rent control ordinance that restricted the amount that landlords could increase rent, restricted the landlords' right to remove tenants, and allowed tenants to have perpetual leasing rights that they could convey).

282. *See Yee v. Escondido*, 503 U.S. 519 (1992) (finding no taking from a rent control ordinance that set rent for a mobile home park and set factors for any increase; the effect was that the tenants could sell the spot to the next tenant and accrue the value).

furtheres Radin's notion that fungible assets, while still subject to the Takings Clause, are not given the protection of per se rules.²⁸³

*Penn Central Transportation Co. v. New York City*²⁸⁴ creates the rubric for regulatory takings cases, which require "essentially ad hoc, factual inquiries."²⁸⁵ For those inquiries, the Court has "identified several factors that have particular significance," among the most important of which is "[t]he economic impact of the regulation on the claimant."²⁸⁶ The conceptual difficulty is in determining how much impact is tolerable before regulation "goes too far" and a taking occurs.²⁸⁷

"Economic impact" analysis requires a court to evaluate the extent of the regulatory burden on the claimant.²⁸⁸ If it is overall wealth that serves as the baseline, consumption mandates will have greater economic impact on some than others. This alone may preclude a *facial* takings challenge. But in some cases, at least, the mandate's economic impact on a person's assets will be severe, perhaps sufficient for an *as-applied* challenge. Yet, the very notion that the same mandate may be unconstitutional for some but not others is troubling. Even if we are to eschew per se rules, such as those for categorical takings, it may be best to treat monetary obligations differently for regulated enterprises and individuals not engaging in regulated activity. The *Penn Central* test makes sense (and was developed) for the former. In the case of individuals, however, the economic impact of a consumption mandate will always be significant. If it is a naked wealth transfer from A to B, it should

283. See *Sperry Corp.*, 493 U.S. at 62 n.9 ("[u]nlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately. If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto*.").

284. *Penn Cent.*, 438 U.S. 104.

285. *Id.* at 124.

286. *Id.* See also *Connolly*, 475 U.S. at 225 (regulatory takings entail analysis of "(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation interferes with the claimant's reasonable investment-backed expectations, and (3) the nature of the governmental action").

287. Some cases suggest that a court can declare a regulatory taking if the challenged law fails to "substantially advance legitimate state interests." *Agins v. Tiburon*, 447 U.S. 255 (1980). This qualitative analysis never fit comfortably with the essentially economic analysis of *Penn Cent.*, and has been severely limited. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 532 (2005).

288. Another formulation of the inquiry is whether the regulatory burden is proportional "to the legitimate obligations society may impose on individual entities." *B&G Constr. Co. v. Dir.*, OWCP, 662 F.3d 233, 260 (3d Cir. 2011).

not matter how much money the individual has remaining in the bank.

Another problem arises with treating consumption mandates as takings: the involuntary purchaser receives something of value for the price paid. Of course, that can also occur with more traditional takings. For instance, in *Suitum v. Tahoe Regional Planning Agency*,²⁸⁹ transferable development permits (“TDRs”) were offered to a landowner who was denied a building permit. Justice Scalia described the issue in his concurrence:

TDRs, of course, have nothing to do with the use or development of the land to which they are (by regulatory decree) “attached.” The right to use and develop one’s own land is quite distinct from the right to confer upon someone else an increased power to use and develop his land. The latter is valuable, to be sure, but it is a new right conferred upon the landowner in exchange for the taking, rather than a reduction of the taking.

Putting TDRs on the taking rather than the just-compensation side of the equation . . . is a clever, albeit transparent, device that seeks to take advantage of a peculiarity of our takings-clause jurisprudence: Whereas once there *is* a taking, the Constitution requires just (i.e., full) compensation . . . , a regulatory taking generally does not *occur* so long as the land retains substantial (albeit not its full) value. If money that the government-regulator gives to the landowner can be counted on the question of whether there *is* a taking . . . , rather than on the question of whether the compensation for the taking is adequate, the government can get away with paying much less. That is all that is going on here.²⁹⁰

The Brennan²⁹¹/Scalia colloquy implicit in *Penn Central* and *Suitum* is important to the constitutionality of insurance mandates. Even though the property transferred from A to B (the insurance

289. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 747 (1997).

290. *Id.* at 747–48 (citations omitted). Justices O'Connor and Thomas joined in the opinion. See also *Penn Cent.*, 438 U.S. at 151 (Rehnquist, J., dissenting) (it is a judicial question whether TDRs constitute “full and perfect equivalent for the property taken”).

291. Justice Brennan authored the majority opinion in *Penn Central*.

premium) is functionally taken in its entirety, something (insurance coverage) is given in return. Perhaps the insurance has economic value to the insured even if she doesn't want it. If the exchange is "on the taking side of the equation," then it mitigates against total loss of the price paid. No taking results. However, if it is "on the just compensation side of the equation," then we would have to determine whether the exchange commodity (health insurance) equals "just compensation."

A further problem arises where the exchange commodity is health insurance; it is not alienable. Health insurance policies are personal and not transferable for value.²⁹² At least in the case of TDRs, the benefits conferred on the regulated landowners were, by definition, transferable and had market value. If the commodity's lack of alienability renders them valueless, at least to someone who doesn't want insurance, then the Brennan/Scalia dichotomy is beside the point. The full value of money (purchase price) is taken, and no (marketable) value is given in return.

In sum, although the imposition of monetary obligations is routine for regulated businesses, exactions from individuals (not otherwise engaged in regulated activity) is not. A categorical rule is unworkable for the former, but perhaps not for the latter. If money is property and if it is taken in the Fifth Amendment sense by consumption mandates, then the taking might be seen as a categorical one of the amount so taken, thereby triggering the compensation requirement.

III. Purchasing Mandates as Fees or Taxes

In many respects, insurance mandates are like "benefit programs financed by benefit taxes."²⁹³ Or they may be "user fees," where everyone is simply paying a fee for service. Both taxes and user fees are subject to considerably reduced constraints under the Takings Clause.²⁹⁴ If deemed a tax or user fee, compulsory health insurance (or other purchasing mandate) would be subject to minimal

292. See *United States v. Bello*, 2008 U.S. Dist. LEXIS 96896 (D. Utah Nov. 20, 2008).

293. See Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, *American Economic Review*, Vol. 79, No. 2, *Papers and Proceedings of the Hundred and First Annual Meeting of the American Economic Association* (May 1989), 177, 182 ("The nonredistributive character of mandated benefit programs is a direct consequence of the fact that, as with benefit taxes, workers pay directly for the benefits they receive").

294. See *Cole v. La Grange*, 113 U.S. 1, 8 (1885) ("[T]aking of property by taxation requires no other compensation than the taxpayer receives in being protected by the government."); *Cnty. of Mobile v. Kimball*, 102 U.S. 691, 703 (1880) ("[N]either is taxation for a public purpose, however great, the taking of private property.").

rationality review. However, the compulsory character of the payment, and the fact that it is imposed whether or not the individual actually consumes the exchange commodity (i.e., whether she makes use of covered health services), makes the payment seem more like a tax than a fee.²⁹⁵ But that may not matter.²⁹⁶

State and federal governments' taxing powers are not typically subject to Takings Clause analysis, even where potentially confiscatory.²⁹⁷ If compulsory consumption is treated as a tax, it would likely escape Fifth Amendment strictures. Note, this focuses on the insurance premium as a form of tax, not the separate issue discussed below of whether the mandate can be avoided by paying a tax to the IRS.

Nowhere does the ACA refer to the premium one pays for required insurance as a tax. This makes it quite unlike Social Security, Medicare and Medicaid, government programs funded by payroll taxes. While there are explicit taxes in the ACA, such as those imposed to fund the expansion of Medicaid, the individual mandate relies on market pricing and money paid directly to insurers.

This is understandable—fees and taxes are the tools of government. While universal healthcare may be a social *good*, political dynamics in the United States prevent it from becoming a social *program*.²⁹⁸ The history of other social insurance campaigns has

295. Only a legislative body may levy a “tax” and a tax may be based solely on ability to pay, without regard to any benefit conferred on the taxpayer. *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340 (1974). On the other hand, a “fee” constitutes a charge that an agency exacts in return for a benefit voluntarily sought by the payer. *Id.* at 340–41.

296. “User-fees” and “special assessments” that do more than recover costs of benefits provided are usually treated as taxes, and subject to the same constraints. *Massachusetts v. United States*, 435 U.S. 444, 463 (1978); *Sperry Corp.*, 493 U.S. at 63. Where not valid as a tax they may constitute a taking. *See also Webb's Fabulous Pharmacies*, 449 U.S. 155.

297. *See Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24–25 (1916) (“the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause [or treatment as] a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment”). Some scholars believe otherwise. *See Epstein, supra* note 211, at 295–305; Massey, *supra* note 225. On the Court, however, the proposition that taxes can constitute a taking has recently commanded only the view of Justice Powell. *See Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 379 (1974) (Powell, J., concurring) (“a combination of unreasonably burdensome taxation and public competition would be the functional equivalent of a governmental taking of private property for public use and would be subject to the constitutional requirement of just compensation”).

298. Lawrence H. Summers described the public choice problem of providing government benefits: “in the United States, the nature of budgetary bargaining makes it

taught American politicians an important lesson: keep healthcare and health insurance private, at least beyond Medicare.²⁹⁹

For constitutional purposes, can government have it both ways? Can it mandate consumption of private goods, yet defend the required premium as merely a form of government tax or fee? There are several process and structural problems in doing so. The political safeguard of accountability may be lacking when the “tax” is imposed and collected by private parties who are not otherwise subject to constitutional constraint.³⁰⁰ At best, the private suppliers of the goods and services that individuals are forced to purchase are exercising power delegated by Congress. Thus, the mechanism of insurance mandates must also satisfy non-delegation principles if it is to survive scrutiny as a tax.

A. Is an Insurance Premium a Form of Tax?

Government *takes* our money all of the time. It taxes us. Isn't a forced insurance mandate just a novel tax? The short answer is that mandatory consumption is not a tax and lacks the democratic safeguards our laws impose on taxing regimes. If Congress' power to “lay and collect taxes”³⁰¹ could be extended to any activity involving the taking of money or other property, then the Takings Clause simply withers. For that reason, proper characterization of an exaction is important at the threshold.

Taxation is one of the “great powers” of sovereign governments “acting directly on the people.”³⁰² “It is obvious, that [taxation] is an incident of sovereignty,”³⁰³ “the strongest, the most pervading of all the powers of government.”³⁰⁴ At least in theory, governments are directly accountable to the very subjects of the tax through the ballot. Where they are not, as with discriminatory tax externalities under the Dormant Commerce Clause, the Supreme Court applies strict

difficult to find funds even for programs that are very widely regarded as having substantial benefit-cost ratios.” Summers, *supra* note 293, at 180.

299. Some have advocated eliminating or privatizing Medicare. See, e.g., Andrew Taylor, *Paul Ryan Budget Proposal Passes House Vote*, HUFFINGTON POST (April 15, 2011), http://www.huffingtonpost.com/2011/04/15/paul-ryan-budget-proposal-vote_n_849800.html (advocating for the replacement of Medicare with a private voucher-like system).

300. It is assumed for this analysis that private insurance companies, even those participating in government-run insurance exchanges, do not satisfy the “state action doctrine” and are not subject to constitutional constraint.

301. U.S. CONST. art. I, § 8, cl. 1.

302. *McCulloch*, 17 U.S. at 404, 407.

303. *Id.* at 429.

304. *Loan Ass'n v. Topeka*, 87 U.S. 655, 663 (1875).

scrutiny.³⁰⁵ In contrast, most non-discriminatory taxes survive judicial review because a political remedy exists to check abuses.³⁰⁶ Public accountability therefore seems crucial to the constitutional question. Arguably, the ACA's mandate as a whole is subject to that accountability, but the actual tax bite is one step removed.

Private insurers (and other vendors) who "tax" their customers through premiums are accountable to a different constituency—their shareholders. Consumers have little power to remove management of a company if their prices or practices become abusive or their products inferior. Tax revolts show the power of the electorate;³⁰⁷ consumer revolts are usually less effective, especially where consumption is mandated and statutory monopolies exist.³⁰⁸

In theory, consumer market power might compensate in part for lack of political control. Vendors who fail to meet consumer preferences are punished in the market. But the health insurance market is far from idealized, which is why the federal government has decided that it needs to be regulated. If that regulation were an adequate substitute for the invisible hand of the (self-correcting) market,³⁰⁹ it might satisfy the accountability basis for taxation, especially if there were serious oversights by a government agency. But neither state regulatory agencies nor the Secretary of HHS under the ACA has much power over insurance practices, especially rate-setting. To be sure, there are new non-discrimination provisions, reporting requirements, limits on "loss ratios," and other regulatory controls in the ACA. But neither state insurance commissioners nor the Secretary have the power to set or control premiums (which, according to the claim being tested, are taxes).

Nor are private insurance companies subject to constitutional constraint. Under the "state action doctrine" policy holders (*qua* taxpayers) would likely have no constitutional claims, such as due

305. See, e.g., *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (invalidating a discriminatory state tax).

306. See generally Erin A. O'Hara & William R. Dougan, *Redistribution Through Discriminatory Taxes: A Contractarian Explanation of the Role of the Courts*, 6 GEO. MASON L. REV. 869 (1998).

307. See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 3 (1992) (describing California's Proposition 13 as the fruit of a tax revolt). See generally Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFFALO L. REV. 819 (2002).

308. As Herbert Hovenkamp explains in *Legislation, Well-Being, and Public Choice*, the lack of defection in an economic market presupposes that the market is working well, which may not hold true in the case of market imperfections such as monopoly. 57 U. CHI. L. REV. 63, 102, 114 (1990).

309. Cf. SMITH, *supra* note 102, at 477–78.

process or equal protection, against insurers.³¹⁰ It is doubtful whether any decision of a private insurer, especially on premiums or risk rating, would be attributable to the federal or state governments, or even to a state-sponsored Health Benefit Exchange. Only “the enactment of a state law ‘*requiring*’ violation of individual rights, and ‘*enforcement*’ of such a law establish the requisite state action.”³¹¹ Even where insurance coverage is mandated by law, and insurers exercise power delegated by the state, their actions are not subject to the Due Process Clause.³¹² Private rights of action might exist under federal or state statutes, although apparently not under the ACA.³¹³ Accordingly, treating the ACA’s mandate as a tax poses its own set of constitutional problems. As discussed below, both the anti-delegation doctrine and democratic principles are firmly implicated.

B. The Delegation Problem

Under the ACA, the federal government regulates the loss ratio in insurance premiums.³¹⁴ The applicable formula is $P \bullet (1.25 \times L) + T$.³¹⁵ Premiums may not exceed 125% of medical loss (claims payments) plus taxes and other allowed expenses, such as reinsurance. The excess is the loading factor. As noted earlier, health care costs are in excess of \$2.8 trillion per year, much of which is captured by the variable “*L*.” Neither that variable nor *T* (which is excluded from the loss ratio) is regulated by the ACA, although some of the reforms in the Act are likely to slow the rate of inflation in overall health care costs.

Since the cost of mandated premiums depends mostly upon factors outside of regulatory control, the premium (*qua* tax) is ultimately set by private insurers. Insurance companies are subjected to an annual review of increases in premiums (“premium review process”) and must submit a justification for an “unreasonable”

310. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (“The constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities.”).

311. *Citizens for Health v. Leavitt*, 428 F.3d 167, 180 (3d Cir. 2005) (finding no state action where the Secretary of HHS authorized private health insurers to disclose private patient information).

312. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

313. *See* ACA, § 3512(a)(1), (2).

314. *See supra* Part I.B.2.

315. Where *P* is the premium cost, *L* is the incurred loss (claims payment) and *T* represents taxes and other allowable deductions from the denominator. This formula is for individual and small group policies. For large group policies, the ratio is 1.18.

premium increase prior to implementation.³¹⁶ Given this procedure, the Secretary of HHS has the authority to determine that a premium increase is unreasonable, but lacks any remedial power. She can demand only that a justification be made available to the public on the insurer's website.³¹⁷ While this power extends to individual insurers, the Secretary has no power to deny a company's ability to increase premiums or any further ability to regulate premium rates.

Thus, while Congress has made the policy decision that all Americans must be insured, it has essentially delegated to insurance companies the task of setting, collecting and using premiums,³¹⁸ as well as the precise scope of coverage and reimbursement rates for drugs and medical care.³¹⁹ If we want to treat health insurance premiums as a tax, most, if not all, attributes of the taxing power have been delegated away. This puts the ACA within the scope of the non-delegation doctrine³²⁰ and its successor, the "intelligible principle" doctrine.³²¹

The non-delegation doctrine stems from the Constitution's mandate that "legislative powers herein granted shall be vested in a Congress of the United States."³²² Strictly speaking, the non-delegation doctrine would prohibit Congress from delegating any of its legislative power—including its power to tax³²³—to any body outside of Article I.³²⁴ The non-delegation doctrine reflects concerns about both separation of powers and democracy in today's expanding administrative state—all essential attributes of our government.³²⁵

While never explicitly overruled,³²⁶ some maintain that the non-delegation doctrine is dead.³²⁷ This shift, while perhaps in tension

316. ACA § 2794.

317. *Id.* at § 2794(a)(2).

318. Premiums are paid directly to insurance companies. ACA § 1312(b).

319. ACA ranks the actuarial value of insurance policies and defines "essential minimum coverage" for mandated policies. It also prohibits certain insurer practices such as lifetime limits and exclusion of pre-existing conditions. But it does not set rates or regulate other underwriting practices.

320. *See* *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

321. *See* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

322. U.S. CONST. art. 1, § 1.

323. U.S. CONST. art. 1, § 8, cl. 1.

324. 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW* § 2.6 (3d ed. 1994).

325. Victor B. Flatt, *The "Benefits" of Non-Delegation: Using the Non-Delegation Doctrine to Bring More Rigor to Benefit-Cost Analysis*, 15 WM. & MARY BILL RTS. J. 1087, 1093 (2007).

326. *Synar v. United States*, 626 F. Supp. 1374, 1384 (D.D.C. 1986) (explaining that "such cases indicate that while the delegation doctrine may be moribund, it has not yet been officially interred by the Court").

with Article I, makes practical sense. As the country faces increasing complex and technical issues, elected officials often do not possess the skills necessary to make efficient decisions.³²⁸ Thus, Congress may choose to delegate the “details” of an articulated policy to a body comprised of experts better able to make highly technical decisions, and does so all the time.³²⁹ Admittedly, the fields of health care delivery and finance are technically complex. However, it is important to note that most defenses of delegation are crafted around an assumption that Congress has delegated to a *public* agency.³³⁰ These arguments may apply with lesser force respecting a delegation to a *private* (for-profit) entity.

Though the non-delegation doctrine no longer applies with highly textual force, Congress still may not delegate its essential functions.³³¹ The successor to the non-delegation doctrine—the “intelligible principle” doctrine—demands that “when Congress confers decision-making authority upon agencies, *Congress* must lay down by legislative directive an intelligible principle to which the person or body authorized to [act] is directed to conform.”³³² This means that Congress must adopt basic policy to guide the delegate’s discretion.³³³ Modern delegations have been judged against this standard.³³⁴

The intelligible principle doctrine plays an important role in separation of powers.³³⁵ When Congress delegates *quasi*-legislative powers to an agency, such as rate-setting, review under the Administrative Procedure Act³³⁶ assures that the agency is not acting

327. *Nat'l Cable*, 415 U.S. at 353 (Marshall, J., dissenting).

328. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 674 (1980) (Rehnquist, J., concurring).

329. *See id.*

330. *See generally* Gillian E. Metzger, *Private Delegations, Due Process, and the Duty to Supervise*, in *Government By Contract* (Jody Freeman & Martha Minow eds., 2009); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2167-68 (2004).

331. *Schechter*, 295 U.S. at 529.

332. *Whitman*, 532 U.S. at 472 (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

333. *J.W. Hampton*, 276 U.S. at 409.

334. *See, e.g.*, *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 536 (2009).

335. *FCC v. Fox TV Stations, Inc.*, 1229 S. Ct. 1800, 1823 (2009) (Kennedy, J., concurring) (“If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and balances.”).

336. 5 U.S.C. § 701, *et seq.*

ultra vires its delegated authority.³³⁷ Accordingly, “Congress must “clearly delineat[e] the general policy” an agency is to achieve and must specify the “boundaries of [the] delegated authority.”³³⁸ This specificity is necessary because of the “hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.”³³⁹ But such vigilance is absent from the ACA, if it is construed as delegating to private insurers the power to tax. It is not clear what routes or standards for judicial review exist under the ACA to check the exercise of delegated taxing power by private insurers, or to guard against the “hydraulic pressure” of profit motives.

*Carter v. Carter Coal Co.*³⁴⁰ was the last of the of the non-delegation cases to invalidate New Deal legislation and perhaps the Court’s sharpest critique. “This is a legislative delegation its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.”³⁴¹

The ACA gives insurers a similar power, whether they operate within an Exchange or not. While Title I imposes some restrictions in hopes of “keeping insurance companies honest,” these restrictions have nothing to do with limiting the insurer’s power to set premiums.³⁴² Rather, as in *Carter Coal*, a private party will have the power to set premiums, limited only by market forces as insurance companies “compete for business based on cost and quality”³⁴³ Furthermore, allowing private insurance companies to regulate their own premium rates is certainly not a delegation to a “presumptively

337. See R. Stewart & C. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1248 (1982) (the APA was a “working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards”).

338. *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989).

339. *Id.* at 382.

340. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

341. *Id.* at 311.

342. These restrictions ban insurance companies from: (1) Denying coverage or setting premiums based of your health status, medical history, genetic information or evidence of domestic violence; (2) Setting different premiums based on gender or salary; (3) Dropping coverage when someone gets sick; and (4) Refusing to renew someone’s coverage because of an illness. See *Title I. Quality, Affordable Health Care for All Americans*, WHITEHOUSE.GOV, [http:// www.whitehouse.gov/health-care-meeting/proposal/titlei/honesty](http://www.whitehouse.gov/health-care-meeting/proposal/titlei/honesty).

343. *Id.*

disinterested” body,³⁴⁴ rather, it is giving the fox the keys to the henhouse.

The delegation of taxing power was disapproved in *Clinton v. New York*,³⁴⁵ which invalidated the Line Item Veto Act.³⁴⁶ In his concurrence, Justice Kennedy spoke of the impact on individual rights:

[I]f a citizen who is taxed has the measure of the tax . . . determined by the Executive alone, without adequate control by the citizen’s Representatives in Congress, liberty is threatened. Money is the instrument of policy and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints.³⁴⁷

If the requirement to pay insurance premiums to private insurance companies is a tax, it is one whose rate has not been set by Congress, but by the very self-interested recipient of the tax revenue. Under the ACA, the non-delegation (or intelligible principle) doctrine and strict bicameralism and presentment requirements go hand in hand to defeat this characterization.

In the final analysis, taxes, fees and assessments suffer from the same conceptual difficulty when applied to the case of mandated purchase of private goods—the lack of accountability and control. The theory of the free market is that markets impose discipline on firms through consumer preferences. When preferences are constrained, say in the presence of monopolies or oligopolies, markets fail. Antitrust and competition law is designed to restore competitive markets. Mandated consumption laws are not simply inconsistent with market principles; they may also promote monopolies. One solution is to regulate the monopolies as is done with public utilities. If insurance regulators become extensions of Public Utility Commissions, then some discipline will be maintained. But while public utilities often have monopoly presence and power, they do not have the luxury of legislatively captured consumers. Thus, one can avoid the gas company by going all-electric, or the

344. *Carter Coal*, 298 U.S. at 311.

345. *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding that delegation violated bicameralism and presentment).

346. 110 Stat. 1200, 2 U.S.C. § 691.

347. *Clinton*, 524 U.S. at 451.

phone company by getting cable phone service. Compulsory purchases eliminate that consumer choice and ability to substitute goods. In that sense, mandated purchases are involuntary taxes, but without the political accountability and structural safeguards those entail.

IV. Health Insurance as “Just Compensation” for the Money Taken

We concluded above that unwanted purchases may have little or no value to the forced purchaser, at least in the case of non-marketable goods. As the Chief Justice wrote in *NFIB*: “The mandate primarily affects healthy, often young adults who are less likely to need significant health care and have other priorities for spending their money.”³⁴⁸ Compensation jurisprudence, however, looks mainly at objective value rather than subjective value to the claimant.³⁴⁹ While this rule has not been extended to inalienable property, it is not implausible that a court could hold that every exchange commodity has value for the purpose of determining whether just compensation has been paid.

Under this approach, health insurance, even if unwanted, has value. Perhaps the exchange is a fully compensated taking, thereby satisfying the Takings Clause.³⁵⁰ Indeed, unless a forcibly consumed product is not worth the price paid, it would always seem to satisfy the requirement for just compensation—only if, however, the Fifth Amendment allows compensation to be paid in goods and services (e.g., insurance products), rather than cash. The Supreme Court has frequently said that it cannot. Indeed compensation for takings has long been required to be paid in money or its equivalent.³⁵¹

“Just compensation” is “full compensation.”³⁵² It means “the full and perfect equivalent in money of the property taken.”³⁵³

348. *NFIB*, 132 S. Ct. at 2590.

349. *Kearney & Trecker Corp. v. United States*, 688 F.2d 780, 782 (1982) (stating that the objective value of the property taken, not the loss to the property owner, that is the measure of compensation).

350. Only uncompensated takings violate the Fifth Amendment. *Suitum*, 520 U.S. at 734.

351. See *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 315 (Patterson, Circuit Justice, C.C.D. Pa. (1795) (“No just compensation can be made except in money.”).

352. *United States v. 564.54 Acres of Monroe and Pike Cnty. Land*, 441 U.S. 506, 510 (1979); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) (“[C]ompensation must be a full and perfect equivalent for the property taken”).

Equivalency is “the market value of the property at the time of the taking contemporaneously paid in money.”³⁵⁴ While this rule is conceptually pure, the factual ascertainment of value is often difficult and results in large legal fees in condemnation cases.³⁵⁵ Fortunately, the monetary equivalent of money taken under forced consumption schemes is tautologically easy to determine. But it “leads to the curious conclusion that the government may take . . . money as long as it pays the money back.”³⁵⁶

The Court has disavowed the categorical command of its earlier cases and suggested that some forms of in-kind compensation might be constitutional. The *Regional Rail Reorganization Act Cases*³⁵⁷ involved a complicated bankruptcy reorganization in which Congress ordered the transfer of the railroads’ assets to a newly created rail corporation, Conrail, in exchange for shares in the new company.³⁵⁸ Under the Rail Act, any deficiency in exchange value could be claimed against the United States in the Court of Claims pursuant to the Tucker Act.³⁵⁹ Because of the availability of a monetary plus-up, the Court held that an unconstitutional taking would not occur irrespective of the value of exchanged stock.³⁶⁰

The Court went further than merely holding that no taking had occurred. It suggested that even if the Rail Act caused a taking, the Conrail stock given in exchange for assets of the bankrupt railroads might count toward “just compensation.” “[C]onsideration other than cash—for example, any special benefits to a property owner’s

353. *United States v. Miller*, 317 U.S. 369, 373 (1943); *see also* *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473–74 (1973) (“[J]ust compensation’ means the full monetary equivalent of the property taken.”).

354. *Olson v. United States*, 292 U.S. 246, 255 (1934). *See also* *Shurtleff v. Salt Lake City*, 82 P.2d 561 (Utah 1938) (“[J]ust compensation for property taken for public use means compensation in money; that it would make no difference how valuable the property that was contemplated as a substitute is, it could not be substituted in lieu of money, against the wishes of the condemnee.”); *State ex rel. Rich v. Dunlick, Inc.*, 286 P.2d 1112, 1116 (Idaho 1955).

355. *See Miller*, 317 U.S. at 374; *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 633 (1961).

356. *Branch ex rel. Me. Nat’l Bank v. United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995). *See also* *Homebuilders Ass’n of Metro. Portland v. Tualatin Hills Park & Recreation*, 62 P.3d 404, 411 (Or. Ct. App. 2003) (noting the circularity in reasoning).

357. *Reg’l Rail Reorganization Act Cases*, 419 U.S. 102, 150–51 (1974).

358. The *Regional Rail Reorganization Act of 1973* (“Rail Act”), 87 Stat. 985, 45 U.S.C. § 701.

359. 28 U.S.C. § 1491.

360. *See also* *Epstein v. Carolina Env’tl. Study Grp., Inc.*, 438 U.S. 59, 94, n. 39 (1978) (declining to address claim that the Price-Anderson Act worked a taking because compensation would be available under the Tucker Act).

remaining properties—may be counted in the determination of just compensation.”³⁶¹ A similar statement is found in an 1897 case, *Bauman v. Ross*.³⁶² After surveying state rules on just compensation, the Court stated: “[t]he Constitution . . . contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and . . . no such prohibition can be implied.”³⁶³

Along similar lines, Richard Epstein has propounded a theory of “implicit in-kind compensation” to explain how regulatory impacts on property can survive Fifth Amendment analysis.³⁶⁴ Under this theory, regulatory diminution in value caused by land use restrictions are offset by complementary restrictions on others’ properties that inure to the claimant’s advantage. To Epstein, there is a taking, but it is compensated by reciprocal advantage.³⁶⁵ Extension of this theory to mandated consumption would similarly avoid takings problems.

The allowance of in-kind compensation for takings makes sense where the benefit conferred is marketable and has ascertainable market value. If a railroad receives stock in Conrail in exchange for taken assets under the Rail Act, and that stock is marketable, then the property owner has been at least partially compensated for the taking. True, to receive cash compensation, the owner has to go through an extra step (selling the exchange asset), and this may be an item of cost, but in the end she will wind up with money, just as the early cases demanded.

Bauman and the *Regional Rail Reorganization Act Cases* provide two important limitations on the availability of in-kind compensation for takings. First, to be included in the calculus of just compensation, the exchange must be marketable and have a cash equivalency.³⁶⁶ That means it must be a unique private benefit to the person whose property is taken and it must be alienable; i.e., convertible to cash. Second, a mechanism must exist for both valuing the exchange and making up for any deficiency between that value and the “just

361. *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 151.

362. *Bauman v. Ross*, 167 U.S. 548 (1897).

363. *Id.* at 584.

364. Epstein, *supra* note 211, at 195–215.

365. *But see* 3-8A NICHOLS ON EMINENT DOMAIN § 18.02 (2008) (only benefits that specially benefit the condemnee’s property can be considered, not those flowing to the public generally).

366. *Cf. Suitum*, 520 U.S. at 750 (Scalia, J., concurring).

compensation” demanded by the Fifth Amendment.³⁶⁷ Absent a judicial or administrative mechanism for assuring that the property owner has been made whole, full compensation is not achieved.

Applying these rules to insurance mandates generates the conclusion that the health insurance provided in exchange for the insured’s premium cost is not “just compensation” for the taking of money. The insurance provided fails both prongs of the *Bauman/Rail Reorganization* test. First, health insurance is personal to the insured and has no separate marketable value; indeed no market.³⁶⁸ The unwilling insured cannot simply assign her rights for reimbursement or managed care to another. Since she cannot convert the exchange asset into cash, the cash or cash-equivalency requirement is not satisfied.

Second, for most who are compelled to buy insurance, the actuarial value of their insurance benefit is worth far less than the premium they pay.³⁶⁹ As the Chief Justice has said, “for most of those targeted by the mandate, significant health care needs will be years, or even decades, away.”³⁷⁰ Moreover, insurance premiums cover not only the actuarial value of covered benefits but also a “loading factor” that includes administrative expenses, overhead and shareholder profit.³⁷¹ “[I]nsurance premiums received by an insurance company are always larger than the expected loss.”³⁷² The loading factor is itself a function of demand. Elastic demand presumably puts downward pressure on overhead and profit. Mandated demand may have the opposite effect. A Rand Corporation study reported that insurance exchanges in Massachusetts actually had the effect of increasing administrative expenses.³⁷³ However, the ACA caps the loading factor at 20%, so the Massachusetts “effect” may not occur.

367. *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 149 (“[T]he availability of the Tucker Act guarantees an adequate remedy at law for any taking which might occur as a result of the final-conveyance provisions.”).

368. *See generally* 1 STEMPER ON INSURANCE CONTRACTS, §3.15, 3-104.

369. *NFIB*, 132 S. Ct. at 2590 (“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.”).

370. *Id.* at 2591.

371. 42 U.S.C. § 300gg-18(b).

372. Masaaki Kijima & Teruyoshi Suzuki, *Optimal Insurance Coverage of a Durable Consumption Good with a Premium Loading in a Continuous Time Economy*, http://www.actuaries.org/ASTIN/Colloquia/Manchester/Papers/suzuki_paper_final.pdf.

373. Christine Eibner, *Establishing State Health Insurance Exchanges* 53, RAND HEALTH (2010), http://www.achp.org/themes/ACPH_Main/files/Rand_Corp_Article_on_Exchanges.pdf.

Still, if a policy costs 20% more than the direct and indirect benefits it returns to policyholders (and assuming that value can be an offset against just compensation), there is still a deficiency to be paid.

Moreover, insurance underwriting practices and regulation allow for grouping of individuals of different risks. Indeed, the ACA accomplishes overall premium reductions by mandating that low-risk individuals be added to the pool. In essence, the healthy are required to subsidize the sick. This is of course important to any socialized system of insurance. It makes sense economically and for health and public policy reasons. Yet, for individuals who subsidize others through their forced purchases, the insurance they receive in return may have a Fifth Amendment value that is only a fraction of their premium cost.

What is at stake in valuing insurance for “just compensation” purposes is nothing less than an economic analysis of the private health insurance industry. The principal debate in universal healthcare is whether the goals of expanding coverage, constraining costs and improving the quality of care are best met by government intervention or private markets. So far that has been primarily a political debate. But once courts are required to assign economic values to health insurance policies, to assure that just compensation has been provided, the focus switches from ideological and political views to cold economics.

In a mandated market system where private insurance returns only 70-80 cents in healthcare coverage for every dollar of premium³⁷⁴ it is hard to say that full compensation has been provided. Then, persons whose property has been taken by mandated consumption would be entitled to be made whole with cash.³⁷⁵ Congress cannot mandate by legislative fiat that the insurance provided in exchange for the money taken is “just compensation.” That is a judicial question.³⁷⁶

In sum, even if the health insurance coverage provided in exchange for the mandate that an individual buy insurance could be considered in determining a) whether a taking has occurred, or b) if so, whether just compensation has been paid, it is unlikely to satisfy the Fifth Amendment. At the very least, the actuarial value of healthcare covered by the insurance policy would have to roughly

374. Mark Votruba, *Form & Reform: The Economic Realities of the United States Healthcare System*, 23 J.L. & HEALTH 89, 93–94 (2010).

375. *Gen. Motors Corp.*, 323 U.S. at 379 (“owner must be put in as good position pecuniarily as if his property had not been taken”).

376. *Monongahela Navigation Co.*, 148 U.S. at 327.

equal the premium paid. Even if the insurance industry were willing to open its books and submit that question to courts, it is not at all clear that an even value of exchange is provided when it comes to for-profit health insurance.

V. The Option to Pay a “Tax” Instead of Buying Insurance

In enacting the individual mandate, Congress relied on its power to regulate interstate commerce. It reasoned that the uninsured adversely affect markets in health care and insurance, and could therefore be regulated under the “affecting commerce” lines of cases.³⁷⁷ *NFIB* rejected that reasoning, holding that uninsured persons were not engaged in commercial *activity*, and that Congress’ power over commerce did not extend to *inactivity*: “[t]he Framers gave Congress the power to regulate commerce, not to compel it.”³⁷⁸

The government’s fallback position was that the mandate could be sustained as an exercise of Congress’ power to “lay and collect taxes.”³⁷⁹ Chief Justice Roberts, who had voted with the other conservatives on the commerce issue, joined the four dissenting justices in accepting the tax power argument, thus upholding the mandate. “[I]f 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.”³⁸⁰ It is well-settled law that Congress may tax where it lacks enumerated power to regulate, and such taxes can do more than raise revenue—they can induce behavior akin to regulation.³⁸¹

And that is how the Chief Justice construed the mandate:

[I]f 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 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.³⁸²

377. See *Heart of Atl. Motel v. United States*, 379 U.S. 241, 258 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964).

378. *NFIB*, 132 S. Ct. at 2589. The Court also refused to justify the mandate under the Necessary and Proper Clause. U.S. CONST. art. I, § 8, cl. 18.

379. U.S. CONST. art. I, § 8, cl. 1.

380. *NFIB*, 132 S. Ct. at 2594.

381. *Sonzinsky v. United States*, 300 U.S. 506, 512 (1937).

382. 132 S. Ct. at 2594

The Chief Justice conceded that treating the ACA's penalty as a tax was likely not "the most natural interpretation of the mandate, but only . . . a 'fairly possible' one."³⁸³ That was sufficient to sustain it as an exercise of Congress' taxing power.³⁸⁴ He was similarly untroubled by a "tax" imposed on inactivity.³⁸⁵ While that doomed the mandate as a regulation of commerce, it did not as a tax. "[T]he Constitution does not guarantee that individuals may avoid taxation through inactivity."³⁸⁶

To support his theory that Congress has power to tax inaction, the Chief Justice cited a number of examples, including capitation taxes and various tax incentives designed to encourage consumption, such as buying energy-efficient windows.³⁸⁷ "Congress's use of the Taxing Clause to encourage buying something is . . . not new."³⁸⁸ However, every example cited involved a tax-deduction or credit for the desired behavior, not an affirmative tax for declining to participate, as the Chief Justice intimated.³⁸⁹

While the difference between negative and positive taxes may not trouble an economist, it should a constitutional court. Such a difference doomed the mandate's commerce clause justification,³⁹⁰ and has been important in a variety of other constitutional contexts.³⁹¹ Still, *NFIB* addressed only the Tenth Amendment issues in the ACA. As to those, "[t]he exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects."³⁹²

In other respects the sanction does not look like a tax at all; rather it looks like (and operates as) a penalty.³⁹³ It may be that the

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.* at 2599.

387. *NFIB*, 132 S. Ct. at 2593–97.

388. *Id.* at 2599.

389. E.g., "deter the purchase of imported manufactured goods." *Id.* at 2596. Capitation taxes are specifically mentioned in the Constitution (U.S. CONST. art. I, § 9, cl. 4), and are considered an obligation of citizenship. See Matthew Melone, *The Pundits Doth Protest Too Much: National Federation Of Independent Business v. Sebelius And The Future Of The Taxing Power*, 2012 MICH. ST. L. REV. 1189, 1208 (2012). Can the same be said for consumption?

390. 132 S. Ct. at 2587.

391. See *infra* Part V.A.

392. *Id.* at 2594.

393. See *Seven-Sky v. Holder*, 661 F.3d 1, 6 (D.C. Cir. 2011) ("the aim of the shared responsibility payment is to encourage everyone to purchase insurance; the goal is universal coverage, not revenues from penalties"); abrogated in part, *NFIB*, 132 S. Ct. 2566. See also ACA § 5000A(b)(1) ("If a taxpayer who is an applicable individual [fails to

exaction is a tax for some constitutional purposes (e.g., Tenth Amendment), but not a tax for others (e.g., individual rights). This would hardly be the first time that such a duality was found for exactions nominally styled as taxes.³⁹⁴

The characterization is important because “taxes are not takings.”³⁹⁵ Yet the Supreme Court has “repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax.”³⁹⁶ Accordingly, we must analyze the exaction both as a tax and not a tax for Takings Clause purposes.

Whether the ACA sanction is a “tax” or not, there remains a conceptual problem with the supposed “option.” The tax applies only to a peculiar type of inactivity—refraining from buying. If mandated consumption is otherwise a taking that can be avoided only by paying money to the government, then a circularity of reasoning results. One can avoid paying only by paying. Since the escape route is illusory, a safer course might have been for Congress to enact a true tax, with offsets to encourage desired behavior.

A. Can Congress Tax the Refusal to Buy?

The requirement that individuals “maintain minimum essential [health insurance] coverage” is found in Section 5000A of the Internal Revenue Code.³⁹⁷ “If a taxpayer who is an applicable individual [fails to maintain insurance coverage] . . . there is hereby imposed on the taxpayer a penalty with respect to such failures.”³⁹⁸ The penalty “shall be assessed and collected in the same manner as [other] assessable penalt[ies].”³⁹⁹ The penalty scheme is discontinuous. Individuals with incomes below the filing threshold will not be assessed a penalty in the event of non-compliance. Uninsured individuals above the filing threshold must pay the full amount of the penalty, even if they have little or no other tax liability.

Where congress has the authority to regulate behavior, it may impose a penalty for misbehavior. However, where the underlying

maintain insurance coverage] there is hereby imposed on the taxpayer a *penalty* with respect to such failures”) (emphasis added).

394. See cases collected at *Sissel v. United States*, 760 F.3d 1, 7-9 (D.C. Cir. 2014).

395. *Brown*, 538 U.S. at 243 n.2.

396. *Koontz*, 133 S. Ct. at 2601.

397. See 26 U.S.C. § 5000A, contained in Subtitle D (“Miscellaneous Excise Taxes”), ch. 48 (“Maintenance of Minimum Essential Coverage”), added by ACA § 1501(b).

398. *Id.* at § 5000A(b)(1).

399. *Id.* at 26 U.S.C. § 5000A(g). Section 5000A(a) provides a variety of exceptions.

regulation infringes constitutional rights, imposing a penalty for their exercise would also be unconstitutional. Is the same true for *taxing* the exercise of constitutional rights?

Congress cannot penalize protected speech, and taxes targeted to such speech are a form of penalty.⁴⁰⁰ Still, many constitutionally protected activities are taxed, such as buying books and newspapers. Thus it matters for rights analysis whether the protected activity is being specially taxed, or simply subject to uniform taxes on all activity of similar character.⁴⁰¹ It is not just that targeted taxes often disclose a legislative intent to penalize a protected right, such taxes are often insulated from political redress.⁴⁰²

While Congress may not tax protected activities, it need not subsidize them. The Tax Code embodies a slew of subsidies including many exemptions, deductions and credits. This issue arose in *Regan v. Taxation With Representation*,⁴⁰³ where the Court upheld the limitation in Section 501(c)(3) on lobbying activities by tax-exempt organizations. Taxation Without Representation argued that denying an exemption for constitutionally protected lobbying, while allowing it for other activities, imposed an unconstitutional condition (surrender of First Amendment rights) on the receipt of tax benefits. The Court disagreed, holding that the tax exemption was a form of subsidy and Congress was not required to subsidize lobbying.⁴⁰⁴

This raises an interesting dialectic. On the one hand, Congress has no obligation to facilitate the exercise of constitutional rights through subsidies or otherwise. On the other, “government may not deny a benefit to a person because he exercises a constitutional right.”⁴⁰⁵ The line between subsidizing and burdening can be imprecise, but crucial where protected rights are concerned.

Where the denial of tax benefits is not closely related to Congress’ interest in avoiding subsidizing speech, the denial may operate as a tax on speech. That was the case in *FCC v. League of Women Voters*,⁴⁰⁶ where the Court struck down a ban on editorializing

400. *Regan v. Taxation Without Representation*, 461 U.S. 540, 543–44 (1983).

401. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 640 (1994) (“laws that single out the press, or certain elements thereof, for special treatment ‘pose a particular danger of abuse by the State’”). See also *Leathers v. Medlock*, 499 U.S. 439, 446 (1991); *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 585 (1983).

402. *Leathers*, 499 U.S. at 446.

403. *Regan*, 461 U.S. 540.

404. To the same effect as *Regan* is *Cammarano v. United States*, 358 U.S. 498, 512 (1959).

405. *Regan*, 461 U.S. at 545 (citing *Speiser v. Randall*, 357 U.S. 513 (1958)).

406. 468 U.S. at 398–99 (1984).

by broadcast stations that receive federal funds. “[A] noncommercial educational station that receives only 1% of its overall income from CPB grants is barred absolutely from all editorializing.”⁴⁰⁷ Thus, any restriction beyond that necessary to effectuate Congress’ intent to avoid subsidizing speech would be construed as a penalty on speech.

This foray into the subtleties of tax subsidies is necessary in order to understand how the tax penalty in Section 5000A works to burden constitutional rights. Congress spends a lot of tax dollars subsidizing public health services for the uninsured. It is not constitutionally obligated to do so. Conceivably, Congress could tie the \$695 tax on the uninsured to recouping part of that subsidy, although it did not make such a connection in the ACA. Moreover, not everyone who is obligated to pay the tax receives a subsidy or benefits equally. The uninsured typically underutilize medical services.⁴⁰⁸ Because of the lack of symmetry and articulated purpose, the ACA seems closer to *League of Women Voters* than to *Regan*.

Why couldn’t Congress simply raise income taxes across the board by \$695 and provide a \$695 credit for persons who “voluntarily” obtain health insurance? It already provides tax deductions for some medical expenses and employer-paid health benefits. Such a scheme would also bring the ACA within the examples cited in *NFIB*. A dual scheme of uniform tax *plus* tax credit would be constitutional so long as there was some credible connection to the cost of medical services to the uninsured. Presumably such a connection would be easy to make.

But Congress did not do that (raise taxes for all and give a credit to those who are insured), probably for the same reason that it declined to call the \$695 sanction a tax in the first place. Raising taxes is unpopular in this environment, and not all voters would “get” that the general tax increase coupled with tax credit was simply a disguised tax on the uninsured. In other words, democratic process safeguards on the taxing power might be an obstacle to the scheme.⁴⁰⁹ Even if not, there is much to be gained to insist that Congress go through the motions of overtly using its taxing power when constitutional rights are at stake. The delicate balance between allowing Congress to deny subsidies and disallowing it from

407. *Id.* at 400.

408. Jack Hadley & John Holahan, *The Kaiser Commission on Medicaid and the Uninsured, The Cost of Care for the Uninsured: What Do We Spend, Who Pays, and What Would Full Coverage Add to Medical Spending?* 4, KAISER FAMILY FOUND. (2004).

409. *Cf. Limbach*, 486 U.S. at 275–76 (disregarding form and looking to substance of taxes under Dormant Commerce Clause).

penalizing rights is best maintained if both form and substance are observed.

This analysis has so far presumed that a tax on the exercise of rights under the Takings Clause would be treated similarly to one imposed on First Amendment activities. That might not be the case. Outside of the Takings Clause, economic rights are at the opposite end of the judicial review spectrum from those that safeguard our democracy. So, while a tax on a property owner's refusal to cede real property would likely be subject to *per se* takings rules,⁴¹⁰ the analysis may be different if the tax is imposed on the refusal to spend money.

This is still mostly unsettled ground. *Koontz* notes that monetary exactions are takings while taxes are not, yet sidesteps the question of when the latter is merely a disguised instance of the former. "We need not decide at precisely what point a land-use permitting charge denominated by the government as a 'tax' becomes 'so arbitrary . . . that it was not the exertion of taxation but a confiscation of property.'"⁴¹¹ The dissent claimed the distinction between taxes and takings does not survive *Koontz*: "[h]ow is anyone to tell the two apart?"⁴¹²

Nor does *NFIB* resolve the question. Chief Justice Roberts' statements about Congress' ability to tax a person's refusal to comply with the insurance mandate is merely dicta on any issue other than the enumerated powers one decided in that case. Thus, we have only the general admonition that government cannot "achieve through special taxes what the Takings Clause of the Fifth Amendment forbids if done directly."⁴¹³

In the end, we are left with doctrinal uncertainty. Mandated payments are forbidden exactions unless they are taxes. Even taxes are unconstitutional where they operate as penalties on constitutional rights. Fortunately, it may be unnecessary to resolve the uncertainty here. If the ACA penalty is a "tax" only for Tenth Amendment purposes, then the taxes vs. takings quandary is avoided altogether.

B. Is the ACA Penalty a "Tax" For Takings Clause Purposes?

Taxes are not takings. But not every exercise of the tax power is a tax. By that we mean the type of tax that exempts it from the Takings Clause. We already know that calling something a tax does not necessarily mean it is.

410. *Cf.* *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 (1987).

411. *Koontz*, 133 S. Ct. at 2602 (internal citation omitted).

412. *Id.* at 2607.

413. *Coleman v. Comm'r of Internal Revenue*, 791 F.2d 68, 70 (7th Cir. 1986).

Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other. Congress may not, for example, expand its power under the Taxing Clause, or escape the Double Jeopardy Clause's constraint on criminal sanctions, by labeling a severe financial punishment a "tax."⁴¹⁴

In *NFIB*, the Court recited a legion of cases that looked beyond the label, treating a "tax" as something other.⁴¹⁵ For instance, *NFIB* held the ACA penalty was not a tax for purposes of the Anti-Injunction Act.⁴¹⁶ Conversely, payments not labeled as such, may nonetheless be taxes for purposes of Congress's taxing power.⁴¹⁷ *NFIB* holds that is the case with the insurance mandate. Thus, while the ACA payment may qualify as a tax for Tenth Amendment purposes, because it raises at least some revenue,⁴¹⁸ it may not be a tax for other purposes.

On the assumption that true taxes are exempt from the Takings Clause, we need to examine the ACA's penalty to see if it has the hallmarks of exempt taxes. In other words, we must "disregard[] the designation of the exaction, and view[s] its substance and application."⁴¹⁹

Its "substance" is not that of a tax. "Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage."⁴²⁰ This is a regulatory goal (undoubtedly salutary), and Congress expressly stated it as such—by repeatedly calling the non-compliance exaction a "penalty."⁴²¹

The Chief Justice goes to great lengths to explain why the ACA penalty is not a "penalty." It does not have the requirements of scienter or the obloquy of unlawful behavior, it applies to millions of Americans, and does not "impose[] an exceedingly heavy burden."⁴²²

414. *NFIB*, 132 S. Ct. at 2583.

415. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922).

416. *NFIB*, 132 S. Ct. at 2584. *See also Hotze*, 991 F. Supp. 2d at *21 (employer mandate not a tax even though Congress explicitly used the term); *Clear Channel Outdoor, Inc. v. Mayor and City Council of Balt.*, 2014 WL 2094028 at *5 (2014) (broadcast fee not a tax for purposes of Anti-Injunction Act).

417. *NFIB*, 132 S. Ct. at 2579 (citing License Tax Cases); *id.* at 2595 (citing *United States v. Sotelo*, 436 U. S. 268, 275 (1978)).

418. *Id.* at 2594 (citing *United States v. Kahriger*, 345 U.S. 22, 28 n. 4 (1953)).

419. *Id.* at 2573 (citing *United States v. Constantine*, 296 U. S. 287, 294 (1935)).

420. *Id.* at 2596.

421. Congress did, however, expressly refer to the employer sanction as a tax. *See, e.g.*, 42 U.S.C. §18081(f)(2)(A).

422. *NFIB*, 132 S. Ct. at 2595.

Accepting that as true—that the exaction is not a “penalty” in the criminal sense—that still does not mean it is always a “tax.”⁴²³

When the Supreme Court first declared that taxes are not takings, it had in mind those taxes that

exact [] a contribution from individuals . . . for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure.⁴²⁴

Subsequent to *NFIB*, two lower courts have held the ACA is not a “bill for raising revenue” in the meaning of the Origination Clause.⁴²⁵ This follows from *Twin City Bank v. Nebeker*,⁴²⁶ which held “revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue.”⁴²⁷ Many cases have reached the same result after “focus[ing] on the *purpose* of the challenged measure.”⁴²⁸ If the taxes “imposed are but means to the purposes provided by the act,” they are not taxes “for the support of government.”⁴²⁹

Under that standard, the Seventh Circuit has concluded:

[A]fter the Supreme Court’s decision in *NFIB*, it is beyond dispute that the paramount aim of the Affordable Care Act is “to increase the number of Americans covered by health insurance and decrease the cost of health care,” not to raise revenue by means of the shared responsibility payment.⁴³⁰

423. We inquire only whether the penalty is a tax in the usual sense, not whether it is coercive. In contrast, the Court held the Medicaid expansion was “coercive” and thus violated states’ rights. *NFIB*, 132 S. Ct. at 2606.

424. *Cnty. of Mobile*, 102 U.S. at 703.

425. *Sissel*, 760 F.3d 1.

426. *Bauman*, 167 U.S. 196.

427. *Id.* at 202.

428. *Sissel*, 760 F.3d at 17.

429. *Id.* at 18 (quoting *Millard v. Roberts*, 202 U.S. 429, 437 (1906)).

430. *Id.* at 19. See also *id.* at 20 (“revenues are a by-product of the . . . Act’s primary aim to induce participation in health insurance plans”). Other clauses similarly use unique criteria for determining whether a measure is a tax, often holding that it is not even where it is otherwise within Congress’s tax power. See, e.g., *Pace v. Burgess*, 92 U.S. 372, 374 (1875) (excise tax was not a tax for purposes of the Export Clause because it was simply a means of preventing fraud); *Thomson Multimedia, Inc. v. United States*, 340 F.3d 1355,

Where does that leave us for supposed option to pay a tax rather than pay for insurance? The Chief Justice wrote in *NFIB* that “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.”⁴³¹ Perhaps because he did not consider issues beyond that of enumerated power, he did not carry his analysis to its logical end. As we now see, at least for some constitutional purposes, the ACA “tax” is simply an enforcement mechanism, as it was intended all along by Congress. The only “alternative” it provides individuals is in the amount of money exacted from them by the ACA.

We reach a similar conclusion when considering the tax exception to the Takings Clause. As noted earlier, that exception has its roots in history, necessity and the spreading of public burdens. Those rationales seem ill-fitted to the individual mandate, which was not designed to do what taxes do—fund government.⁴³² And while the penalty is indeed widespread, broader than many taxes, it lacks the structural and process safeguard normally associated with taxes. For example, the fee charged in *Webb’s Fabulous Pharmacies* could not be considered a tax, and thus was confiscatory, because it was levied by a court, not a taxing authority.⁴³³ In a twist, the ACA was enacted by a body with taxing authority, but expressly not as a tax. It was turned into a tax by a court.

The coupling of mandate and “tax” is found in Title I—the ACA’s regulatory section—not Title IX, its revenue section. This was not simply a drafting oversight. Unlike other revenue raising measures that have *incidental regulatory* effect, this is a regulation with *incidental revenue raising* effect.⁴³⁴ The insurance mandate is the backbone of the ACA. If the mandate fails in its mission to add millions to insurance pools, much of the health reform measure is undermined. Indeed, all of the findings made by Congress in the ACA go to why it must mandate health insurance, not to why it needs to raise revenue, either generally or specifically to offset costs

1360–61 (4th Cir. 2003) (Harbor Management Tax was a user fee rather than a tax for the Port Preference Clause).

431. *NFIB*, 132 S. Ct. at 2600.

432. *Cf.* *United States v. Reorganized CF&I Fabricators*, 518 U.S. 213, 224 (1996) (“a tax is an enforced contribution to provide for the support of government”) (internal quotations omitted).

433. *Webb’s Fabulous Pharmacies*, 449 U.S. at 164.

434. *Cf.* *Reorganized CF&I Fabricators*, 518 U.S. at 224, (“A tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.”).

associated with the uninsured. The ACA works best if it raises *no* revenue; it succeeds only if the mandate is obeyed. Thus, we have an incidental tax intended as a regulatory measure. Perhaps, that is how it should be analyzed.

A District Court reached the opposite conclusion in *Hotze v. Sebelius*, holding the penalty was *not* a tax for the Anti-Injunction Act and Origination Clause, but *was* a tax for the Takings Clause. The court felt that *NFIB* foreclosed further consideration of the issue.⁴³⁵ This article disagrees with that reading of *NFIB*, which was a powers case, not a rights case. Considering the latter, the tax exception to the Takings Clause has never seen a tax like this: one that was deliberately enacted as a penalty; applies only to inactivity; imposed only on those who fail to comply with a regulatory command to spend money; has little revenue raising effect; and was never treated as a tax until it reached the Supreme Court.

We already know that some taxes are not taxes for Takings Clause purposes. They work as exactions instead. Whether the ACA tax meets any of those criteria, or creates a new category of *untaxes* is the next point to resolve. Hopefully this article has created a framework for that task.

Conclusion

“The U.S. health care system is on an unsustainable course . . . Reform is needed. Inaction is not an option.”⁴³⁶ That was the observation of Congress as it enacted the Affordable Care Act. The centerpiece of “reform” is the requirement that nearly every American purchase private health insurance if they are not otherwise insured. But, as the CBO observed, “[a] mandate requiring all individuals to purchase health insurance [is] an unprecedented form of federal action.”⁴³⁷ The only other federal mandate CBO could find that “appl[ies] to individuals as members of society” is the military draft.⁴³⁸

Yet the draft is constitutional.⁴³⁹ Consumption mandates may be too, despite their unprecedented character and interference with

435. *Hotze* at 34–35. *Hotze* dealt primarily with the employer mandate, which is more clearly a tax.

436. *Id.*

437. *The Budgetary Treatment of an Individual Mandate to Buy Insurance* 1, CBO MEMORANDUM (Aug. 1994), available at <http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf>.

438. *Id.* at 2.

439. *Gillette v. United States*, 401 U.S. 437, 461 (1971).

consumer preferences and assets. Subjecting them to the Takings Clause may ferret out some doctrinal uncertainties in that clause and possible economic injustices in the ACA. A takings analysis of insurance mandates also gives us an opportunity to consider government outsourcing of public goods more generally.

The biggest hurdle to finding a taking with insurance mandates is their widespread applicability, affecting millions of individuals, rather than concentrating public burdens on a few. Whether this defeats the claim depends on the “justness and fairness” principle embodied in the Takings Clause and its historical focus on “process failure.” The burdens of mandated consumption are indeed widespread, but the legislation imposing those burdens touts the benefit to society generally and to those not directly affected by the mandate. There is little mention of reciprocal benefits to the burdened class.

Each of these factors (monetary obligations are subject to takings scrutiny, mandates are not taxes, the burdens are disproportional and insurance is not fair compensation for the price paid) has to be answered affirmatively for a takings claim to succeed. Moreover, the option to pay a tax instead of buying insurance, which *NFIB* found sufficient to sustain the law under the Tenth Amendment, may also save it from the Takings Clause. But the exaction is not a tax in the strict sense and therefore may not be exempt from the clause.

There is ample social policy justification in requiring every person living in America to have insurance. The uninsured are a burden on the public treasury, the medical system in general, and those who already have insurance. Free-riders hardly have the moral high ground in this debate. The ACA clearly advances the social welfare. But every taking accomplishes some public benefit.

Congress’s tax power remains mostly untouched by this analysis, even its power to tax certain types of inaction. But some inaction cannot be taxed, such as failure to go to church or make political contributions. Whether Congress can tax failure to consume mandated goods depends both on whether there is a right not to consume and how the tax is structured. The answer may lie in the difference between a tax designed to raise revenue and one designed to regulate.

The process safeguard in overt use of the tax power was recently underscored by one of the key advisors on ACA, Jonathan Gruber.⁴⁴⁰

440. Gruber is director of the Health Care Program at the National Bureau of Economic Research, and was a consultant to Governor Mitt Romney on the 2006

In leaked comments from a 2013 academic conference Gruber created a political firestorm by stating that the ACA was deliberately written

in a tortured way to make sure CBO did not score the mandate as taxes. If CBO scores the mandate as taxes, the bill dies . . . If you made it explicit that healthy people would pay in and sick people get money, it would not have passed . . . Lack of transparency is a huge political advantage . . . That was really, really critical to get the thing to pass.”⁴⁴¹

If taxes are not takings, and ACA is defended on that basis, we ought to at least be sure that Congress has overtly resorted to its tax power in imposing monetary burdens. Getting there through the backdoor upends democratic values as well as settled takings doctrine.

Massachusetts health care reform and to President Obama on the ACA. See [http://en.wikipedia.org/wiki/Jonathan_Gruber_\(economist\)](http://en.wikipedia.org/wiki/Jonathan_Gruber_(economist)).

441. See Gruber, *Lack of transparency is a huge political advantage*, <https://www.youtube.com/watch?v=G790p0LcgbI>. Gruber has also stated that other parts of ACA were misbranded to avoid being seen as taxes. See Jake Tapper, *Obama promised Obamacare wouldn't do exactly what Gruber says it will do*, <http://www.cnn.com/2014/11/18/politics/gruber-obamacare-promises>. The Whitehouse has rejected these characterizations. See Robert Costa and Jose DelReal, *Health-Care Law's Opponents Riled Anew by 'Stupidity' Video*, WASH. POST, Nov. 13, 2014.

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