

## Post-NFIB: Does the Taxing Clause Give Congress Unlimited Power?

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In this report, the author discusses the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, which concluded that the penalty under Obamacare for failure to acquire suitable health insurance will be authorized by the taxing clause in the Constitution. He concludes that the decision is not nearly as broad as some critics have suggested and that it is unlikely, for several legal and political reasons, to lead to a significant expansion of congressional power. He also discusses what the case says about constitutional limitations on the taxing power, particularly the direct-tax apportionment rule. And he considers a bewildering hypothetical in Chief Justice John G. Roberts's opinion in *NFIB*.

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Before the Supreme Court handed down its decision in *National Federation of Independent Business v. Sebelius*<sup>1</sup> (*NFIB*), upholding the individual mandate penalty in "Obamacare" as a valid exercise of the

taxing power, I wrote an article for *Tax Notes* raising (and answering no to) the question in the title above.<sup>2</sup>

As it turned out, that article had almost nothing to do with what the Court said about the taxing power in *NFIB*. I was responding to an argument made by several commentators, including legal philosopher Ronald Dworkin, that programs funded by taxation, in whole or in part, might themselves be treated as exercises of the taxing power — without regard to the content of the programs. If the individual mandate penalty would be a tax, then, it was argued, the individual mandate itself — the requirement that most Americans, effective in 2014, acquire suitable health insurance or pay the penalty<sup>3</sup> — would be constitutional under the taxing clause.<sup>4</sup> Because almost everything government does is funded by taxation, the Dworkin position, taken seriously, would have left Congress with nearly unlimited power: Find a tax somewhere, and Congress can do what it wants. I thought then that his argument was over the top, and I still do.

The Court in *NFIB* did not discuss, much less accept, that extraordinarily expansive interpretation of the taxing power. Instead, the Court — Chief Justice John G. Roberts joined (reluctantly, I think) by Justices Stephen G. Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor — concluded only that the individual mandate penalty will be a tax validly enacted under the taxing clause.<sup>5</sup> That

<sup>2</sup>Erik M. Jensen, "Does the Taxing Clause Give Congress Unlimited Power?" *Tax Notes*, June 18, 2012, p. 1515, *Doc 2012-11707*, *2012 TNT 119-8*. In this report, as in the earlier one, I discuss only the taxing power aspects of the case, not what the Court said about issues involving Medicaid.

<sup>3</sup>See sections 5000A(a) (providing that "an applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month"); 5000A(c) (providing for penalty for noncompliance).

<sup>4</sup>See U.S. Const. Art. I, sec. 8, cl. 1 (granting Congress "Power To lay and collect Taxes, Duties, Imposts and Excises"); Ronald Dworkin, "Why the Mandate Is Constitutional: The Real Argument," *N.Y. Rev. Books*, May 10, 2012, at 4 (advancing the broad taxing clause argument as a backup to the commerce clause).

<sup>5</sup>I say Breyer et al. were reluctant because they thought the mandate was authorized by the commerce clause and that it should have been unnecessary to rely on the taxing clause. But given the position that the other justices took on the commerce

(Footnote continued on next page.)

<sup>1</sup>132 S. Ct. 2566 (2012), *Doc 2012-13784*, *2012 TNT 126-12*.

conclusion — questionable, but not crazy<sup>6</sup> — was enough so that, with some twists and turns discussed below, the core of Obamacare survived constitutional challenge. And that was so even though five of the justices (including the chief justice and dissenting justices Samuel Alito, Anthony M. Kennedy, Antonin Scalia, and Clarence Thomas) concluded that the generally applicable requirement to acquire insurance, the mandate, was *not* authorized by the commerce clause.<sup>7</sup>

In this report, I have recycled the title of the prior one because, after *NFIB*, new fears have been raised about the scope of congressional power. Commentators, generally from the right, have expressed concern that the taxing power analysis in Roberts's opinion might have created a new route to largely unlimited congressional power.<sup>8</sup> (Almost everyone was surprised by the Court's reliance on the taxing clause. I certainly was.) To concerned conservatives, reining in the commerce power matters little if Congress will be able to get much the same results — and, because Congress can tax lots of things having nothing to do with commerce,<sup>9</sup> maybe even more far-reaching results — by invoking, or relying surreptitiously on, the taxing power.

Those fears are not totally unfounded.<sup>10</sup> But this report argues that the fears are overblown and that *NFIB* is unlikely to result in any significant expansion of the taxing power. In fact, I shall argue that the effect of recharacterizing penalties as taxes could have the opposite effect, with Congress increasingly hamstrung by greater scrutiny of even the most mundane regulatory penalties.

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clause, the only way to uphold the mandate and penalty was for the concurers to join the chief justice's taxing power analysis.

<sup>6</sup>I discussed the tax versus penalty issue in Jensen, "The Individual Mandate and the Taxing Power," *Tax Notes*, Jan. 2, 2012, p. 97, *Doc 2011-23836*, 2012 *TNT* 2-2.

<sup>7</sup>See U.S. Const. art. I, sec. 8, cl. 3 (giving Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes").

<sup>8</sup>See, e.g., Written Statement of Lee A. Casey Before the Committee on Ways and Means (July 10, 2012), at 2, *Doc 2012-14515*, 2012 *TNT* 133-43 (arguing that "the Supreme Court has fashioned a breathtaking new power for Congress. . . . [I]t has necessarily held that Congress can impose a tax . . . on the mere failure to undertake some prescribed course of action"); Written Statement of Carrie Severino Before the House Ways and Means Committee (July 10, 2012), at 2, *Doc 2012-14517*, 2012 *TNT* 133-45 (stating that the Roberts "opinion creates a previously unheard-of form of tax that is triggered by mere *inactivity*" and "for the first time Americans *will have to act* in order for the tax *not* to apply"); *id.* at 3 (listing hypothetical federal taxes on those who refuse to wear seatbelts or motorcycle helmets; who do not take advantage of preventive medical services; who fail to recycle; who do not own a gun; and who refuse to buy solar panels).

<sup>9</sup>Including mere existence. See *infra* note 49.

<sup>10</sup>And there are symmetrical hopes coming from the left.

I first describe the high points of the chief justice's opinion on the taxing power. In the second section I discuss what might be even more important: the positions Roberts did *not* take about the scope of the taxing power. In Section III I explain why I am skeptical that the practical result of *NFIB* will be an expansion of the taxing power. Section IV provides some thoughts about constitutional limitations on the taxing power after *NFIB*, particularly the direct-tax apportionment rule, discussed in the chief justice's opinion. And the report concludes, in Section V, with some ruminations about a bewildering example Roberts used in his opinion, an example that raises more questions than it answers.

### I. The Chief Justice's Opinion

To my mind, the chief justice's opinion made two big points about the taxing power. First, the individual mandate penalty could be treated as a tax even though Congress did not call it that and, if only for political reasons, did not want to call it that. I think Roberts was wrong that this penalty will really be a tax, but distinguishing between taxes and penalties can be hard.<sup>11</sup>

The second big point, related to the first, was that the mandate will not really be a mandate, at least when it comes to analyzing the taxing power. That fact, if fact it was, helped in determining that the purported penalty had been mislabeled. (To have a penalty, something must be penalized. No mandate, no penalty.) Of course Congress wanted everyone, or almost everyone, to acquire suitable insurance, wrote Roberts, but Congress didn't require that result.<sup>12</sup> It provided Americans the choice of having appropriate insurance or paying the tax/penalty. And Congress didn't think of the uninsured as lawbreakers.<sup>13</sup> It understood that people will do their own economic calculations, that some will decide to forgo insurance, and that as long as they pay the tax/penalty, everything is copacetic: The mandate "need not be read to declare that failing to [acquire insurance] is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS."<sup>14</sup> The "tax" then simply will

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<sup>11</sup>I discussed this and many other issues arising in *NFIB* in more detail in Jensen, "The Individual Mandate, Taxation, and the Constitution," 30 *J. Tax'n Invs.* 31 (Fall 2012).

<sup>12</sup>*NFIB*, 132 S. Ct. at 2594 ("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").

<sup>13</sup>Roberts actually used the term "outlaws." *Id.* at 2597.

<sup>14</sup>*Id.*

be imposed on the class of persons who do not have insurance (and who are not exempted from the rules).

This interpretation of the “mandate” is questionable enough as an abstract principle.<sup>15</sup> It becomes even more questionable when juxtaposed with what Roberts said about the mandate and the commerce power. There he repeatedly used words like “require,” “compel,” and “force” to describe what the mandate was intended to do to those without insurance.<sup>16</sup> Indeed, it’s because the mandate will be a command to the uninsured to enter the insurance market — to require the economically inactive to become economically active — that five members of the Court concluded the mandate could not be justified by the commerce clause. Roberts admitted that “the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it.”<sup>17</sup> But, he and four other justices concluded, the Constitution does not allow it.

I don’t understand how the commerce clause and the taxing clause parts of the chief justice’s opinion cohere. If there’s force for one purpose, why isn’t there for the other? And that’s why there’s now a concern about how Congress might use, or misuse, the taxing power — to get the effects of compulsion while pretending that compulsion isn’t involved. It’s been argued that Congress might be able to get results unavailable under the commerce clause by relying on the taxing power — either directly (that is, openly invoking the taxing power so that courts are likely to defer to that characterization) or surreptitiously (that is, as may have happened with the individual mandate: not saying that taxation is involved, but expecting the administration to defend the constitutionality of the legislation on the basis of the taxing power).

## II. What the Roberts Opinion Did Not Say

That all sounds like heady stuff, but, as part of the process of allaying fears about the post-*NFIB* scope of the taxing power, I want to emphasize several points that the chief justice did not make in his opinion. Many expansive conceptions of the

taxing power had been urged by commentators, and by the Obama administration in lower courts, as alternative justifications for the mandate. But Roberts and the Court mentioned none of them.

Economists have often said that when government imposes costs on its citizens, the effect is similar, if not identical, to taxing them. Regulation drives up costs, which are ultimately borne by citizens — just like taxes. Whatever the merits of that proposition as an economic postulate, however, nothing in the chief justice’s opinion came close to accepting that argument as a legal matter.

A related point: It might make sense to view arrangements that are arguably economically equivalent to taxes as taxes for some purposes. Economists do that all the time. But Roberts did not say that those arrangements are “taxes” for purposes of the taxing clause.<sup>18</sup> Quite the contrary. In providing assurance that the taxing power is not as potentially abusive as the commerce power, the chief justice noted that the taxing clause provides authority to require “an individual to pay money into the Federal Treasury, no more.”<sup>19</sup> That’s as traditional an understanding of taxation as one can imagine.

The chief justice also did not say, as the government had argued before lower courts considering the individual mandate, that the mandate-plus-penalty will be a taxing measure with associated regulatory provisions.<sup>20</sup> That conception seemed to turn the statutory structure upside down, to make the Patient Protection and Affordable Care Act into a fundamentally revenue-raising enactment.

And the chief justice did not say, as I noted at the beginning of this report, that funding a program through taxation makes the program a constitutional exercise of the taxing power.

The Court adopted none of those broad conceptions of the taxing power.<sup>21</sup> Further, as already noted, the chief justice did not say that the individual mandate really will be a mandate to acquire insurance. So it’s not that the taxing clause supports

<sup>15</sup>The chief justice admitted that he was not reading the statute in the most plausible way: “The question is not whether that is the most natural interpretation of the mandate, but only whether it is a ‘fairly possible’ one.” *Id.* at 2594.

<sup>16</sup>*Id.* at 2585 (characterizing the mandate as “requiring that individuals purchase health insurance”); *id.* at 2586 (“Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product”); *id.* at 2591 (“The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity”).

<sup>17</sup>*Id.* at 2600.

<sup>18</sup>See Jensen, “The Individual Mandate and Tax Incentives,” *Tax Notes*, May 14, 2012, p. 879, *Doc 2012-9227*, or *2012 TNT 95-11* (discussing how economic equivalence doesn’t necessarily mean legal equivalence).

<sup>19</sup>*NFIB*, 132 S. Ct. at 2600.

<sup>20</sup>See *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp.2d 768, 782 (E.D. Va. 2010), *Doc 2010-26522*, *2010 TNT 239-8* (noting the government’s argument that the individual mandate will be revenue-raising, and the associated regulatory provisions bear a reasonable relation to the statute’s taxing purpose”).

<sup>21</sup>It’s true that the Court didn’t explicitly reject them either, but it’s hard to imagine that a majority of the Court would have accepted any of those alternatives, particularly given the chief justice’s traditional conception of taxation. See *supra* text accompanying note 19.

a mandate. It's that the taxing clause supports the "tax" imposed on those who don't do what Congress really didn't require them to do in the first place. The "mandate" is just a congressional hope: It would be nice if you would get insurance, but it's OK if you don't want to.<sup>22</sup>

That's a strange understanding of what Congress really intended with the mandate and penalty, but that understanding limits the future effect of the *NFIB* decision. Focusing on the "penalty" by itself, concluding that it really will be a "tax" and therefore justified by the taxing clause, may be questionable, but it's hardly an earth-shattering turn of events.

### III. Is This an Expansion of the Taxing Power?

In form, *NFIB* thus reflects a very limited conception of what the taxing clause authorized Congress to do. And there are other reasons — some legal, some political — to question whether *NFIB* portends a dramatically increased use of the taxing power.

#### A. The Legal Reasons

To begin with, *NFIB* was an unusual case. The recharacterization of the penalty as a tax was accepted by none of the lower courts, and it was accepted by only five of the nine justices. Moreover, as I suggested earlier, four of the justices almost certainly weren't happy with relying on the taxing power. When it comes to taxation, *NFIB* is not a ringing endorsement for much of anything. I doubt that lower courts will see this decision as strong authority to use the taxing power to justify questionable exercises of congressional power, especially when Congress does not purport to be relying on the taxing power.

Another reason to be skeptical about the practical effect of *NFIB* is that it often doesn't matter whether a charge is a penalty or a tax. The recharacterization mattered in *NFIB* because the Court had concluded that the mandate and associated penalty could be constitutionally justified only under the taxing power. But that's not the usual situation. If a charge would be constitutional anyway — a penalty imposed, say, for violating a regulation of commerce — recharacterizing the penalty as a tax doesn't enhance

congressional power. It's not as though having two constitutional provisions to support a particular enactment doubles congressional power.<sup>23</sup>

Besides, recharacterizing a penalty as a tax potentially brings the constitutional limitations on the taxing power into play. If that happens and a limitation applies (that is, either the direct-tax apportionment rule or the uniformity rule for indirect taxes is not satisfied), a charge would be invalid if treated as a tax.<sup>24</sup> Coming up against a constitutional limitation on the taxing power isn't likely, particularly given the chief justice's cramped understanding of "direct taxes," which I address in the next section. But it can happen, and if it does, recharacterization of a penalty as a tax will *lessen* congressional power.<sup>25</sup>

And there are other, legal limits to what Congress can do with taxes.<sup>26</sup> The *NFIB* Court moved the boundary between taxes and penalties, but it didn't do away with that distinction. For those concerned about abuse of the taxing power, the chief justice emphasized that it does not permit "punitive exactions."<sup>27</sup> If Congress is willing to characterize as a tax what we might otherwise think of as a penalty, courts generally won't reject that characterization. But the chief justice's opinion in *NFIB* pointedly did

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<sup>23</sup>Yes, if the scope of the commerce clause really contracts, and pigs fly, the taxing clause will once again matter in more regulatory situations. See Jensen, *supra* note 6, at 107-110 (discussing congressional use of the taxing power — often successfully, but not always — in eras when the conception of the commerce clause was much narrower than today). Here, too, however, we should see *NFIB* as an unusual case. The chief justice's analysis under the commerce clause — that the mandate required those uninvolved in economic activity to enter into economic activity — does not describe ordinary attempts by Congress to regulate commerce. So don't hold your breath waiting for a diminished commerce power, unless you're sitting next to the pigs.

<sup>24</sup>See *infra* text accompanying notes 35-51 (discussing these limitations). In special circumstances, the export clause could also be important. See U.S. Const. Art. I, sec. 9, cl. 5 (providing that "No Tax or Duty shall be laid on Articles exported from any State").

<sup>25</sup>For example, even if there were no explicit taxing power, Congress might have authority to enact duties on imports under the commerce clause and might be able to vary the amount of the levies from port to port across the country. Because that levy would unquestionably be a tax, however, see *supra* note 4 (noting the taxing clause's reference to "Imposts" and "Duties"), geographical uniformity would be required, see U.S. Const. Art. I, sec. 8, cl. 1 (requiring that "all Duties, Imposts and Excises shall be uniform throughout the United States"), and different duties applicable in ports in different states would violate uniformity.

<sup>26</sup>Another issue lurking here relates to penalties that are imposed by regulatory agencies. If such a penalty is recharacterized as a tax, we would be facing a serious delegation question: Can a regulatory agency lay and collect taxes, or is the taxing power reserved to Congress?

<sup>27</sup>*NFIB*, 132 S. Ct. at 2599.

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<sup>22</sup>Professors Jordan M. Barry and Bryan T. Camp have discussed another peculiarity in the statute: The penalty is not much of a penalty, making the mandate even less of a mandate. Given the limitations in section 5000A(g), the IRS can force recalcitrant persons to pay the penalty only to the extent they are entitled to refundable credits that exceed their net liability. Barry and Camp, "Is the Individual Mandate Really Mandatory?" *Tax Notes*, June 25, 2012, p. 1633, *Doc 2012-12531*, 2012 TNT 122-10.

not repudiate the Court's 1922 decision in the *Child Labor Tax Case (Bailey v. Drexel Furniture Co.)*,<sup>28</sup> in which the Court did not defer to Congress's attempt to circumvent constitutional limitations by invoking the taxing power.<sup>29</sup>

Let's deal with a concrete case, one in which characterization of a penalty as a tax would be critical because the Supreme Court has said Congress cannot act under its commerce power. I've been asked whether, after *NFIB*, Congress might now use the taxing power to circumvent the Court's 1995 decision in *United States v. Lopez*,<sup>30</sup> the first modern Court case to find limits on the commerce power. In *Lopez*, the Court held that possession of a gun near a school is not an economic activity that substantially affects interstate commerce and that, as a result, a federal statute that prohibited guns near schools, the Gun-Free School Zones Act of 1990,<sup>31</sup> was not authorized by the commerce clause.

I suppose artful drafters could produce a statute that would impose a "tax" on those brandishing guns on or near school grounds. Although taxes are generally unpopular (about which more in a moment), many members of Congress might find it difficult to vote against such a "tax." It's hard for a politician to appear indifferent to schoolyard fire-fights.

But a "tax" like that would be very different from the individual mandate penalty. I can't see how the chief justice's song and dance in *NFIB* — Congress just hoped folks would acquire insurance — would translate to the guns-in-school-zones context. Would anyone believe that, by enacting this "tax," Congress would simply be providing folks a choice between bringing firearms onto school grounds and paying a tax? Of course not. Any court would see

<sup>28</sup>259 U.S. 20 (1922).

<sup>29</sup>*NFIB*, 132 S. Ct. at 2595, 2599. In *Drexel Furniture*, the Court held that a charge that Congress had denominated as a tax, imposed on employers of child laborers — done in that way because the Court had earlier concluded that Congress could not regulate child labor directly; see *Hammer v. Dagenhart*, 247 U.S. 251 (1918) — was not a tax authorized by the taxing clause. Roberts emphasized that the charge in that case was a heavier burden than was then typical of taxes; a scienter requirement was part of the statute (not usually the case with a tax); and the purported tax was enforced in part by the Department of Labor, an agency not ordinarily given jurisdiction over tax matters. *NFIB*, 132 S. Ct. at 2595 (*Hammer v. Dagenhart* was later overruled — see *United States v. Darby*, 312 U.S. 100 (1941) — making the narrow issue in *Drexel Furniture* no longer relevant. But Roberts made it clear that *Drexel Furniture* still stands for the proposition that a charge isn't necessarily a tax just because Congress calls it one).

<sup>30</sup>514 U.S. 549 (1995).

<sup>31</sup>18 U.S.C. section 922(q).

such a "tax" for what it would be: a penalty for unlawful behavior, not a levy authorized by the taxing clause.

## B. The Political Reasons

Whatever the legal analysis, the ultimate check against questionable exercises of congressional power is not the Constitution, as important as that document is; the ultimate check is the political process.<sup>32</sup> Many, if not most, of the floats in the parade of horrors hypothesized by critics of the Roberts opinion have no chance of making it to 34th Street; it would be a miracle if Mrs. Walker let them start down Central Park West.<sup>33</sup>

Is it likely after *NFIB* that Congress is going to start relying willy-nilly on the taxing power to do things it wants to do that, before *NFIB*, might not have been thought of as implicating the taxing power? I think not. Taxes are not politically popular — how's that for an insight? — and members of Congress who like their jobs aren't going to support one "tax" after another.

Moreover, in general there's nothing to be gained by the tax characterization,<sup>34</sup> except to the opponents of proposed legislation, who can use the tax label as a reason for resistance — certainly if the penalty is called a tax, but, after *NFIB*, even if it isn't. Is every act with a civil penalty attached now going to be characterized as a tax hike? Probably yes, because of politics, not constitutional law, but politics that picks up on the Supreme Court's signal.

Congress isn't working well these days anyway, and all this might make things worse. With people thinking of all sorts of things as taxes, congressional gridlock strikes me as much more likely than congressional abuse of the taxing power.

## IV. *NFIB* and Constitutional Limits on Taxation

In this section I discuss what the chief justice said about constitutional limitations on the taxing power. He could have done a much more careful job in his opinion, but he broke little or no new ground.

When a tax is involved, it will be valid only if it survives scrutiny under the constitutional limitations on the taxing power — in particular, the

<sup>32</sup>Cf. Robert F. Nagel, "Unreliable Ally," *Weekly Standard*, July 16, 2012, at 11 ("Relying principally on the Supreme Court to define and restrain the power of the national government is largely a futile exercise").

<sup>33</sup>At least some of the examples of possible taxes on inactivity given by Carrie Severino in testimony before the Ways and Means Committee are of levies that have zero — zero! — chance of enactment. See *supra* note 8. A "tax" on not owning a gun? Come on. Not even a law professor would come up with a hypothetical like that.

<sup>34</sup>In general, Congress will be able to rely on authority other than the taxing clause for its enactments.

uniformity rule that applies to indirect taxes (generally taxes on articles of consumption)<sup>35</sup> and the apportionment rule applicable to direct taxes (other than taxes on incomes, exempted from apportionment by the 16th Amendment).<sup>36</sup>

The uniformity rule has been interpreted to require only geographical uniformity — that an indirect tax (a duty, impost, or excise) must operate in the same way from state to state (same rates, same tax base, and so on). That’s a fairly easy test to satisfy: A penalty recharacterized as an indirect tax is likely to be constitutional.<sup>37</sup>

But direct taxes have to be apportioned among the states on the basis of population. That means a state with one-twentieth of the population, say, must bear one-twentieth of the aggregate liability for any direct tax, regardless of how the tax base is distributed across the country. Apportionment makes direct taxes at best clumsy to use and often impossible. No federal tax has been apportioned since 1861, and an apportioned direct tax is almost certainly a political non-starter today.

To be sure, the distinction between direct and indirect taxes became much less important with the 1913 ratification of the 16th Amendment, making it possible for Congress to enact an unapportioned income tax and raise tons of revenue.<sup>38</sup> The Supreme Court had decided in 1895, in *Pollock v. Farmers’ Loan & Trust Co.*,<sup>39</sup> that the 1894 income tax was direct and, because not apportioned, unconstitutional.<sup>40</sup> A reaction to *Pollock*, the 16th Amendment was necessary to ensure that an income tax could work as intended.<sup>41</sup>

<sup>35</sup>See U.S. Const. Art. I, sec. 8, cl. 1 (“all Duties, Imposts and Excises shall be uniform throughout the United States”).

<sup>36</sup>See U.S. Const. Art. I, sec. 2 (providing that “Representatives and direct Taxes shall be apportioned among the several States which may be included within the Union, according to their respective Numbers”); Art. I, sec. 9, cl. 4 (providing that “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken”); see also *supra* note 24 (noting that the export clause is another potentially relevant limitation).

<sup>37</sup>But see *supra* note 25 (providing a hypothetical involving an indirect tax that would fail the uniformity rule).

<sup>38</sup>U.S. Const. amend. XVI (providing that “the Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration”).

<sup>39</sup>157 U.S. 429 (1895), 158 U.S. 601 (1895).

<sup>40</sup>The chief justice in *NFIB* characterized *Pollock* as having rejected the tax as it applied to income from property, thus tying that conclusion to the understanding at the founding that a tax on property would be direct. *NFIB*, 132 S. Ct. at 2598.

<sup>41</sup>An apportioned income tax was always constitutionally permissible, but it would have been impossible to base the tax on ability to pay. An income tax designed to ensure that the total collected from each state reflected that state’s share of the national population would have required that poorer states pay

(Footnote continued in next column.)

Congress isn’t going to enact an apportioned direct tax today. But what would happen if a purported penalty were recharacterized as a direct tax? Congress doesn’t apportion penalties, so that penalty/tax would be constitutionally invalid unless it might be treated as a tax on incomes. (None of this could happen, you say? It’s unlikely, to be sure, but in Section V, I discuss an example in the chief justice’s opinion that requires thinking in exactly these terms.)

For the three of us in the world who care about the direct-tax apportionment rule, the chief justice’s opinion in *NFIB* is important: With almost no briefing and argument on the issue (not surprising, given the way lower courts had dealt with the individual mandate),<sup>42</sup> Roberts interpreted the meaning of “direct taxes” in a way sure to gladden Calvin Johnson’s heart: Apportionment will apply to capitations and taxes on property, and probably nothing else,<sup>43</sup> a conception that can be traced to the Supreme Court’s 1796 decision in *Hylton v. United States*.<sup>44</sup> And Roberts interpreted “capitation” in a way that effectively limits it to a lump-sum head tax,<sup>45</sup> which seems to make apportionment either irrelevant for a capitation<sup>46</sup> or at least easy for Congress to avoid.<sup>47</sup>

The chief justice’s bottom line was that the individual mandate penalty won’t be a lump-sum tax on “every person,” and it won’t be a tax on property. Therefore apportionment won’t be required, and it will be a valid tax.

a higher percentage of their income in taxes than richer states — a crazy and politically impossible result. By doing away with apportionment for taxes on incomes, the 16th Amendment made the modern income tax possible.

<sup>42</sup>The dissenters complained: “The meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters.” *NFIB*, 132 S. Ct. at 2655 (dissent). Actually there are two direct-tax clauses. See *supra* note 36.

<sup>43</sup>*Id.* at 2598. I’m sure Calvin would have preferred that there be no reference to taxes on property, but Roberts’s discussion of direct taxation is about as close as we could reasonably have gotten to the ideal Johnsonian world.

<sup>44</sup>3 U.S. (3 Dall.) 171 (1796).

<sup>45</sup>“Capitations are taxes paid by every person, ‘without regard to property, profession, or any other circumstance.’” *NFIB*, 132 S. Ct. at 2599 (quoting *Hylton*, 3 U.S. at 175).

<sup>46</sup>If everyone is taxed the same amount, isn’t the tax automatically apportioned?

<sup>47</sup>This seems to mean that if Congress exempts a couple of folks from a tax so that it’s not imposed on “every person,” we no longer have a capitation. As I have argued in these pages, the founders would have known that some impoverished people would have to be exempted from an otherwise applicable capitation tax, and the tax would still have been considered to be direct. See Jensen, *supra* note 6, at 113-114.

Given this longtime understanding of direct taxation, that's not a crazy conclusion on the direct-tax issue. But — there's always a but — a lot of issues weren't considered in the Roberts opinion. It would have been helpful for the chief justice to think about what the purposes of the apportionment rule were<sup>48</sup> before accepting *Hylton's* silly idea that forms of taxation unknown in 1789 cannot possibly be direct taxes. For another thing, it's not at all clear that the term "capitation" was understood at the founding to encompass only a lump-sum head tax, a tax on existence. A recent study has come to a diametric conclusion.<sup>49</sup>

In short, there's a lot to criticize in Roberts's rush to judgment on the direct-tax issue.<sup>50</sup> He should not have been making grand pronouncements about direct taxation in general and capitation taxes in particular without more help from the parties and the amici. However, what he described was pretty much what had become the conventional wisdom. Although he didn't take the opportunity to reinvigorate constitutional limitations on taxation — I suspect he could have convinced the four dissenters to go along if he had been so inclined — he also didn't do anything to change the status quo.

What the chief justice said was old news, but it's important old news. In *NFIB*, the Court, for the first time in decades, spoke about the meaning of "direct taxes," and now that it has done so, it is unlikely to revisit these questions in the foreseeable future. As a result, the chief justice's discussion about the apportionment rule and the meaning of capitations will probably govern in perpetuity. For those who care about close parsing of constitutional language, that may be sad — it has never made sense to

interpret a restraint on congressional power in such a peculiarly narrow way — but it's not surprising.

It's nevertheless worth emphasizing that as narrow as the chief justice's definition was, his opinion reinforced the long-time understanding that a national wealth or property tax would have to be apportioned, making such a tax effectively unworkable.<sup>51</sup> The apportionment rule may be a shadow of its originally intended self, but it still matters in 2012!

#### V. The Chief's Bewildering Example in *NFIB*

The apportionment rule is still relevant in 2012. In fact, it's relevant to an example that Roberts used in his opinion.

The direct-tax rules have always been confusing, and, in *NFIB*, the chief justice created some new confusion with a bewildering example that was intended (or so it seems) to make one simple point but raised all sorts of other issues, none of them addressed. The chief justice hypothesized a \$50 per residence "penalty" imposed on persons who own houses that do not have energy-efficient windows, with an exemption for taxpayers below a specified income level, with the precise amount to be paid "adjusted based on factors such as taxable income and joint filing status," and with the payment to be made "along with the taxpayer's income tax return."<sup>52</sup>

The chief justice's point with the hypothetical was that this charge, regardless of what Congress called it, would be a tax — an exercise of the taxing power — not a penalty, and maybe that's right. But a lot of other issues needed unpacking, and they stayed fully packed.

If this would be a tax, it almost certainly would be a direct tax, a tax on property.<sup>53</sup> As a result, if it's not apportioned and not a tax on incomes, it would be invalid. Did the chief justice expect us to be thinking about these issues, about which he makes no mention? Was he sending hidden messages, or, in his haste to finish the opinion, was he just not paying attention?

Hiding the ball should not be the function of Supreme Court opinions. I suppose the chief justice might have been implicitly warning about the potentially negative consequences of relying on the

<sup>48</sup>See Jensen, *The Taxing Power*, ch. 6 (2005).

<sup>49</sup>See James R. Campbell, "Dispelling the Fog About Direct Taxation," 1 *Brit. J. Am. Legal Stud.* 109 (2012). Adam Smith wasn't a founder, but some founders were aware of his work, and his understanding of capitations was far broader than Roberts's (the term would have included, for example, an income tax).

The founders may not have understood "capitation" to include only lump-sum head taxes, but such a tax was thought to be a capitation. Some critics of *NFIB* have focused on what they consider to be a perverse inconsistency in the Roberts opinion: that even though Congress cannot force the economically inactive to become active under the authority of the commerce clause, it can impose a tax on inactivity. There's nothing necessarily perverse about that distinction. Maybe there should be some constitutional problem with taxes on particular instances of inactivity (not recycling, for example), as some critics of *NFIB* have suggested. See *supra* note 8 (noting written statements of Casey and Severino). But Roberts was right that the specific reference to "Capitation" in U.S. Const. Art. I, sec. 9, cl. 4, supports the idea that Congress can impose at least one type of tax without regard to activity. *NFIB*, 132 S. Ct. at 2599.

<sup>50</sup>I've done that in more detail in Jensen, *supra* note 11.

<sup>51</sup>To make the numbers work, wealth would have to be taxed at higher rates in poorer states than in richer ones. Cf. *supra* note 41 (making a similar point about an apportioned income tax).

<sup>52</sup>*NFIB*, 132 S. Ct. at 2598.

<sup>53</sup>That would be true under *Hylton*, and it would fit the chief justice's narrow definition of what can be a direct tax today. See *supra* text accompanying notes 43-44. Maybe there's an argument that this tax wouldn't be on property, but even if so, it's one that needs to be made, not taken for granted.

taxing power: Doing so can bring constitutional limitations into play and thus can limit congressional power. But if that was his intent, which I doubt, why not make the point explicitly?

Or maybe his brief description of income levels affecting the amount of the tax was meant to suggest that the tax, even if direct, might be an income tax not subject to apportionment. (Take a step back and think about what we're doing here. Not only might a penalty be recharacterized as a tax. The penalty might be a direct tax that is, however, also a tax on incomes. Wow!) That possibility makes more sense because otherwise the income details the chief justice used in the hypothetical seem totally irrelevant. But if that was his point, why didn't he say so and do the appropriate analysis?<sup>54</sup> Just because an income calculation is associated with a tax doesn't make the tax into one "on incomes."<sup>55</sup> Nor is a tax "on incomes" simply because payment is made with an income tax return.

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<sup>54</sup>The chief justice's description is so cursory that I suspect we would need to know a lot more before we could determine whether this would be a tax on incomes.

<sup>55</sup>I've made the argument that a tax isn't one on incomes simply because some computations are income-based or simply because low-income people are exempted from the tax. (If exempting the poor from a tax makes the tax one on incomes, almost all taxes are taxes on incomes.) See Jensen, *supra* note 6, at 117-119.

Finally, I suspect some will want to interpret what the chief justice said about direct taxation as a repudiation of *Pollock*, a case he discussed but gave limited scope to.<sup>56</sup> That interpretation seems unlikely, however. If the chief justice meant to do that, the income stuff in his hypothetical really was superfluous.<sup>57</sup>

This is all very puzzling. What was Roberts thinking? It's impossible to know for sure, but at least it's nice to have something new to write about in the direct-tax area.

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The chief justice's opinion in *NFIB* comes to some surprising conclusions about aspects of the taxing power. I disagree with much of what he wrote, but, despite a detour or two along the way, my main purpose in this article is to suggest that those who see *NFIB* as a disastrous expansion of the congressional taxing power have gone overboard. It's not, and they should pull back on their sky-is-falling commentary. (If they do so, I promise to pull back on my mixed metaphors.)

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<sup>56</sup>See *supra* text accompanying notes 38-41.

<sup>57</sup>If *Pollock* was wrong and a tax on income from property is not direct, that tax need not be apportioned, whether or not the tax is "on incomes" within the meaning of the 16th Amendment.