BALANCING LIBERTY AND HEALTHCARE ACCESS: *SEBELIUS* ON TAXING INACTIVITY

Note

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The Patient Protection and Affordable Care Act[1] (the "Act" or "ACA") was signed into law in an effort to effectuate three main objectives: (1) to increase access to healthcare; (2) to improve healthcare quality; and (3) to decrease the cost of healthcare.[2] To accomplish these objectives, the ACA "requires" individuals to maintain minimum levels of health insurance[3] and "requires" businesses to provide the same minimal levels of coverage for their employees,[4] with some exceptions.[5] This "re-

1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified in scattered sections of 26 U.S.C. and 42 U.S.C.).
2. *See, e.g.*, 42 U.S.C. § 18091 (2012).
3. 26 U.S.C. § 5000A (2012).
4. 26 U.S.C. § 4980H (2012).
5. *See, e.g.*, 26 U.S.C. § 5000A(d)(2)-(4) (2012).

quirement" is enforced via a "tax penalty" that is levied for those individuals and entities that fail to comply with the requirements of the law.[6]

This tax—exercised according to Congress' Taxing Power[7]—arouses some suspicion concerning the taxation of inactivity and blatantly restricts individual liberty in making healthcare decisions. Furthermore, the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*[8] has drastically altered the structure and effects of the ACA. The likely effect of the ACA after *Sebelius* will be to restrict individual liberty in making healthcare financing decisions, while still leaving millions of people uninsured and without access to necessary healthcare.[9] This access gap will also preserve rampant cost-shifting, which is harmful to overall healthcare costs, thus defeating two of the main purposes of the Act. What was once an entirely justifiable use of the taxing power to incentivize individual investment in health insurance has now significantly burdened individual liberty in healthcare consumption decisions without achieving some key objectives of the Act. This article seeks to examine the structure of the ACA, the legal analysis of key portions of the *Sebelius* decision, and the effect of *Sebelius* on the structure of the health care system and on individuals' liberty to make their own healthcare choices.

I. THE STRUCTURE OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

A. The Goals and Purpose of the Act

Perhaps the broadest goal of the Affordable Care Act is to provide access to necessary healthcare for all individuals. Congress planned to obtain this objective by reducing healthcare costs and thus expanding access to individuals who previously could not afford or obtain the healthcare that they needed. Part of the plan to increase access to health care services was to reduce the cost of such services by eliminating existing cost-shifting and adverse selection problems. Under the healthcare system prior to the full implementation of the ACA, insurance companies could legally deny coverage to individuals due to preexisting medical conditions or could terminate coverage because individuals had reached annual or lifetime spending limits.[10] These insurance practices have prevented many

6. *See* 26 U.S.C. § 5000A(c); 26 U.S.C. § 4980H(c).

7. U.S. Const. Art. I, § 8, cl. 1.

8. 132 S. Ct. 2566 (2012).

9. *See* DOUGLAS W. ELMENDORF, CONGRESSIONAL BUDGET OFFICE, ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION (2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/43472-07-24-2012-CoverageEstimates.pdf.

10. *See, e.g.*, Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191. Despite intentions that HIPAA eliminate pre-existing condition barriers as well as annual and lifetime

people from purchasing affordable health insurance to aid in financing the health care that they need. The ACA attempts to remedy these insurance practices by preventing insurers from denying coverage based on preexisting medical conditions or annual and lifetime spending limits.[11] However, these provisions will prove costly to insurers who used preexisting condition limitations and spending limits to manage the amount of risk they bear in providing health insurance coverage.

Furthermore, individuals who seek medical care in hospital emergency rooms must be treated, even if they do not have the means to pay for their treatment.[12] This situation forces hospitals to bear the burden of such patients from whom the hospital cannot collect payment. Hospitals, in turn, are quick to pass that burden to insurers.[13] As the burden is shifted to insurers, insurers shift the cost to their insureds by raising the cost of purchasing health insurance.[14] Congress attempts to remedy these problems of cost and access through several provisions of the ACA.

There are many economic rationales to support the various provisions of the Act which intend to reduce cost and thus increase access. To expand access to necessary health care services to more individuals, Congress implemented provisions preventing health insurance companies from denying coverage based on preexisting conditions as well as annual or lifetime spending limits.[15] To counterbalance the strain this prohibition will put on the insurance industry, the Act requires some form of health insurance for all individuals through various programs in an effort to prevent individuals from engaging in opportunistic behavior and adverse selection.[16]

The ACA implements a comprehensive structure where almost all Americans are covered by one form of insurance or another, whether provided by private insurance companies, by employers, or by the federal government through programs such as Medicare and Medicaid.[17] By requiring some form of insurance for all Americans, the Act seeks to significantly reduce the cost of health care to hospitals, insurers, and ultimately, to individuals.[18] However, to accomplish this great feat, Congress chose to require individuals to purchase health insurance at the risk of having to pay a penalty tax for failing to fulfill their obligations under the

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spending limits, Congress failed to give the law any teeth that would make enforcement of the provisions possible.

11. 42 U.S.C. § 18001 (2012).
12. 42 U.S.C. § 1395dd (2012).
13. *See* 42 U.S.C. § 18091(F) (2012).
14. *Id.*
15. 42 U.S.C. § 1804.
16. 42 U.S.C. § 18091(I).
17. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified in scattered sections of 26 U.S.C. and 42 U.S.C.).
18. *See, e.g.*, 42 U.S.C. § 18091.

Act.[19] It is this restraint on individual liberty that caused an uproar among Americans and led many to wonder how Congress may balance the competing interests of economic liberty and universal access to healthcare.

B. The Key Provisions of the ACA

The following key provisions of the Affordable Care Act, when examined in conjunction with one another, are intended not only to guarantee virtually universal health insurance coverage in the United States, but also to reduce the cost of insurance coverage and other healthcare services.

1. Guaranteed Issue and Renewability[20]

One of the first steps Congress took in its sweeping healthcare reform efforts was to make it easier for individuals with preexisting conditions to obtain health insurance. By requiring insurance companies to guarantee issue and renewability of health insurance coverage,[21] the ACA partially achieves this objective. Preexisting condition limitations and yearly or lifetime spending limits used in the past by health insurance companies have significantly reduced access to health insurance coverage, and consequently access to health care services. By proscribing such behaviors by insurance companies, the ACA has expanded access to many individuals who previously lacked such access.

However, at the same time, the proscription of such behaviors puts an enormous strain on insurance companies because individuals, knowing that they are guaranteed coverage at any time, could wait to obtain insurance until they are confronted with a medical emergency.[22] To remedy this "adverse selection"[23] problem for the insurance companies and reduce such disadvantageous cost-shifting actions, further provisions in the ACA were required. Thus, the "Individual Mandate"[24] and other key provisions were enacted to require individuals to obtain health insurance before they are confronted with medical emergencies, the overall goal being to promote ready access to health insurance without driving insurance companies out of business.

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19. 26 U.S.C. § 5000A (2012); 26 U.S.C. § 4980H (2012).
20. 42 U.S.C. § 18001 (2012).
21. *Id.*
22. 42 U.S.C. § 18091(I).
23. *Id.*
24. 26 U.S.C. § 5000A (2012).

2. *The "Individual Mandate"*[25]

Perhaps the most known and controversial provision of the ACA is the so-called "Individual Mandate."[26] The Individual Mandate requires all persons above a certain income level either to purchase a minimum level of health insurance or to pay a penalty tax. This particular statutory requirement applies to all "applicable individuals"[27] and requires such individuals to maintain the minimum essential health insurance coverage for their dependents as well.[28] The Act defines "applicable individual" as any individual that does not fit into one of the statutory exemptions.[29] The exemptions to the requirement include religious conscientious exemptions, incarcerated individuals, and any person who is not lawfully a citizen or national of the United States.[30]

For those applicable individuals who fail to maintain minimum coverage, a penalty tax must be paid to the Internal Revenue Service (the "IRS") for each month that the individual fails to maintain coverage.[31] Without delving into too much detail, the method for computing the tax penalty is the lesser of (1) an amount determined by statute that is either a flat rate for each individual or is tied to the income of the individual, or (2) the average cost of acquiring health insurance for the applicable individuals.[32] At any rate, the statute is designed in a way that many individuals would often elect to incur the tax penalty in lieu of paying costly amounts to obtain health insurance through the private market. Already, the structure and incentives of the Individual Mandate indicate that the objectives of this overly coercive measure may be ineffective.

3. *The Employer's Shared Responsibility of Coverage Provision*[33]

Because of the large number of individuals who obtain insurance through their employers, the Act requires employers to "share responsibility" for part of the cost and implementation of universal insurance coverage. In essence, large employers, as defined by the Act,[34] must provide an employer-sponsored insurance plan for all full-time employees,[35] or otherwise pay a penalty amount when employees enroll in health insurance

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25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. 26 U.S.C. § 5000A(d).
30. *Id.*
31. 26 U.S.C. § 5000A(a).
32. 26 U.S.C. § 5000A(c).
33. 26 U.S.C. § 4980H (2012).
34. 26 U.S.C. § 4980H(c)(2).
35. 26 U.S.C. § 4980H.

plans through the Insurance Exchange and qualify for premium assistance tax credits or cost-sharing reductions.[36] This penalty may be levied either where the employer offers no employer-sponsored insurance plan or where the employer offers an inadequate plan that causes employees to obtain insurance coverage through the Insurance Exchange.[37] The Shared Responsibility payment incentivizes employers to offer attractive health insurance plans to full-time employees, thus serving a purpose similar to that of the Individual Mandate.

4. Medicaid Expansion[38]

In addition, the Act, as written, requires States to expand their Medicaid programs to cover previously uncovered individuals that are childless adults with incomes up to 138% of the Federal Poverty Line ("the FPL").[39] This provision expanded Medicaid coverage to individuals considered to be outside of the category of the "worthy poor" that traditionally received healthcare services through the Medicaid program. The additional cost of covering a larger group of beneficiaries would initially be covered entirely by the federal government, with a ten-year phase-in of state matching to a point where states would pay ten percent of the cost of the expansion, with the federal government paying the remaining ninety percent.[40]

The Department of Health and Human Services ("HHS") interpreted the Act to condition a state's federal funding for the entire Medicaid program upon that state's implementation of the Medicaid Expansion.[41] As a result, HHS could withdraw a state's existing Medicaid funding if the state refused to expand Medicaid to cover childless adults with incomes up to 138% of the FPL.[42] However, the *Sebelius* decision would prove fatal to the mandatory expansion requirement.

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36. *Id.*
37. *Id.*
38. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2012).
39. *Id.* The Act provides a five percent disregard that effectively provides Medicaid Expansion coverage for childless adults with incomes up to 138% of the Federal Poverty Line. *Id.*
40. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (codified in scattered sections of 26 U.S.C. and 42 U.S.C.).
41. Transcript of Oral Argument, Nat'l Fed'n of Indep. Bus.v. Sebelius, 132 S. Ct. 2566 (2012).
42. *Id.*; Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601 (2012).

II. A HISTORY OF THE TAXING AND SPENDING POWERS; THE *SEBELIUS* DECISION

A. Upholding the Individual Mandate Under the Taxing Power

The Court's decision in *Sebelius* has expanded and consequently muddled the definition of a tax. Though the penalty tax for not maintaining minimum coverage was labeled a "penalty" throughout the Act,[43] it has warranted questionable status as a tax by a majority of the Supreme Court.[44] In fact, though Chief Justice Roberts saw fit to deem the provision a penalty for purposes of the Anti-Injunction Act,[45] he nevertheless found the provision a tax for the purposes of the Taxing and Spending power, thus saving the Individual Mandate from unconstitutionality.[46] Though many people expected the Individual Mandate either to be upheld or to be struck down according to the Supreme Court's Commerce Clause jurisprudence, the Taxing Power became the saving grace of the Individual Mandate.[47] In addition, the Medicaid Expansion provision, largely out of the news media's focus, was found to be optional under the Spending Power.[48] A brief history of the Supreme Court's analysis of the Taxing and Spending powers may prove illustrative in examining the Court's decision to uphold the Individual Mandate under the Taxing Power.

As Chief Justice Roberts recognized in the majority opinion in *Sebelius*, the essential feature of a tax is its power to produce revenue for the Government.[49] After all, what is a tax if not the levying of a collection upon individuals to raise revenue for the general fund or the United States Treasury? Once the tax is collected and the revenues received, the Government may use the revenues for any purpose it so desires, willing that the purpose is within its Constitutional bounds.[50] A majority of the Court in *Sebelius* found that the "penalty tax" ensconced in the Individual Mandate and other provisions of the ACA was in fact a revenue-raising meas-

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43. *See Sebelius*, 132 S. Ct. at 2653 (Scalia, J., dissenting); *See also* 26 U.S.C. § 5000A (2012) (describing the penalty tax as a "penalty" eighteen times in a single section of the ACA).

44. *Sebelius*, 132 S. Ct. at 2584 (majority opinion).

45. *Sebelius*, 132 S. Ct. at 2584. Anti-Injunction Act, 26 U.S.C § 7421(a) (2012). The Anti-Injunction Act prohibits the filing of a lawsuit "for the purpose of restraining the assessment or collection of any tax." 26 U.S.C § 7421(a). This prohibition has been interpreted to preclude individuals from contesting the legality or constitutionality of a tax before it has been levied or collected. *See* Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 7 (1962). Under precedent set by *Enoch*, if the Court found that the penalty provisions of the ACA constituted a tax according to the Anti-Injunction Act, the Court would be without authority to hear the case until a tax had been levied for noncompliance with the Act. *Sebelius*, 132 S. Ct. at 2582.

46. *Id.* at 2600.

47. Id.

48. U.S. CONST. art. I, § 8, cl. 1.

49. *Sebelius*, 132 S. Ct. at 2594 (citing U.S. v. Kahringer, 345 U.S. 22, 28 n.4 (1953)).

50. The purpose must be within the enumerated powers granted to Congress, or within Congress's powers as expanded by the Necessary and Proper Clause, U.S. CONST art. 1, § 8 cl. 18.

ure and thus satisfied the essential requirement of the Taxing and Spending Power, despite obviously serving to regulate consumer health care decisions.[51]

However, Congress's Taxing and Spending power has not only been afforded to collections that look and act like a tax, but also to statutory provisions that essentially serve to regulate, while raising revenue as an incident of regulation.[52] In fact, in *United States v. Butler*,[53] the Supreme noted that a tax is constitutional so long as it serves the essential function of raising revenue, even if the tax's primary purpose seems to be regulatory.[54] Under this framework, though it is abundantly clear that the "penalty tax" essentially regulates health care financing decisions, the Supreme Court upheld the provision because it was found to be a revenue-raising provision as well.[55]

The Court, however, has placed some limits on the use of regulatory taxes. Notably, a tax may not serve simply as penalty under the guise of tax.[56]Analogizing to *Bailey v. Drexel Furniture Co.*,[57] the Chief Justice noted in *Sebelius* that a tax may be a penalty if it "impose[s] an exceedingly heavy burden,"[58] imposes an exaction under some scienter requirement that is "typical of punitive statutes,"[59] and if it is enforced or collected by a department or agency that is not concerned with the collection of revenue.[60] There is some suggestion that the "penalty tax" in fact punishes unlawful conduct by causing those who fail to obtain health insurance to pay the tax. It is this notion that Justice Scalia emphasizes in his dissent.[61] Justice Scalia argues that the language of the ACA places a mandate on individuals to purchase health insurance, thus making the failure to purchase health insurance an unlawful act that is punishable by monetary penalties.[62] However, Chief Justice Roberts notes that individuals are not violating the law by failing to obtain the minimum essential level of health insurance.[63] Rather, they are simply required to pay the "penalty tax" in lieu of obtaining adequate health insurance.[64] The Chief Justice recognizes that individuals are technically not in violation of the

51. *Sebelius*, 132 S. Ct. at 2596, 2600.
52. *Id.* at 2596 n.28 (noting taxes on items such as cigarettes, marijuana, and sawed-off shotguns that are clearly regulatory in nature and seek to incentivize or disincentivize certain behaviors).
53. 297 U.S. 1, 61 (1936).
54. *Id.*
55. *Sebelius*, 132 S. Ct. at 2596, 2600.
56. Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).
57. *Id.*
58. *Sebelius*, 132 S. Ct. at 2595.
59. *Id.*
60. *Id.*
61. *Id.* at 2651 (Scalia, J., dissenting).
62. *Id.* at 2652.
63. *Id.* at 2597 (majority opinion).
64. *Id.*

law unless they fail to obtain health insurance and also refuse to pay the applicable amount under the penalty tax provisions.[65] Furthermore, there is no scienter requirement that triggers the "penalty tax," and the tax itself is collected by the Internal Revenue Service. Both of these characteristics of the "penalty tax" indicate a traditional exercise of the Taxing Power.

Perhaps the most concerning aspect of the classification of the "penalty tax" as a constitutional tax is the recognition of Congress's power to regulate inactivity through the Taxing and Spending power where it could not through the Commerce Clause powers.[66] Chief Justice Roberts takes great pains to allay concerns about the constitutionality of the tax by taking three things into consideration: (1) "it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity;"[67] (2) "Congress's ability to use its taxing power to influence conduct is not without limits,"[68] and (3) Congress's broader taxing authority is counterbalanced by a smaller "degree of control over individual behavior" than Congress may exert over individuals under its Commerce Clause powers.[69]

The Chief Justice points out—and rightly so—that while the Constitution does prevent Commerce Clause regulation where individuals abstain from regulated commercial activity, there is no such guarantee that individuals, by virtue of their inactivity, will be exempt from regulation with respect to taxes.[70] Chief Justice Roberts further recognizes that, since Congress has long used the Taxing Clause to incentivize other behaviors, its exercise of the Taxing Power in this case is of little concern.[71] Furthermore, the stated limits on the Taxing Power regarding punitive taxes ensure that there are meaningful limits on Congress's power under the Taxing Clause.[72]

Finally, the Chief Justice seeks to distinguish between mandating certain behavior under the Commerce Clause and creating incentives for individuals to engage in that same behavior under the Taxing Clause.[73] Importantly, Chief Justice Roberts notes that Congress has broader regulatory power under the Taxing Clause, but is more limited in the influence it may assert over individuals than it is under the Commerce Clause.[74] In fact, the majority notes that "[o]nce we recognize that Congress may regu-

65. *Id.*
66. *Id.* at 2593 (holding that the Individual Mandate could not be supported under Congress's Commerce Clause or Necessary and Proper powers).
67. Id. at 2599.
68. *Id.*
69. Sebelius at 2600.
70. *Id.* at 2599.
71. *Id.* at 2594.
72. *Id.* at 2599.
73. *Id.* at 2600.
74. *Id.*

late a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear."[75] In essence, Congress "may simply command individuals to do as it directs" under the Commerce Clause.[76] Conversely, when exercising the Taxing Power, Congress may only incentivize certain behaviors by requiring individuals to pay money into the Treasury if they do not engage in the behavior prescribed.[77] Whatever limits the Chief Justice placed on the Taxing Power, the Act nonetheless approaches a slippery slope of taxing innumerable inactivities in the name of incentivizing behavior.

The Act restrains individual liberty in making health care financing decisions and actively coerces individuals to purchase costly insurance that they may not want or need. While this restraint on individual liberty may have been justifiable as the Act was originally written, the Supreme Court's decision regarding Medicaid Expansion changed the efficaciousness of the Individual Mandate and other provisions of the Act.

B. Mandatory Medicaid is Overly Coercive

While expanding Congress's Taxing Power to new limits, the Court at the same time managed to limit Congress's Spending Power by striking down the mandatory Medicaid Expansion.[78] The Supreme Court struck down mandatory Medicaid Expansion in favor of a state option to expand Medicaid Programs to include childless adults with incomes up to 133% of the federal poverty level.[79] In analyzing Medicaid Expansion largely according to *South Dakota v. Dole*,[80] the Supreme Court found mandatory expansion to be "so coercive as to pass the point where 'pressure turns into compulsion.'"[81] Chief Justice Roberts found for the majority that, though there were previous minor expansions to the Medicaid Program that attached various conditional spending requirements, the Medicaid Expansion provisions of the ACA enacted what is essentially "an entirely new program."[82] To blindside the States with a decision between adopting a new program or losing funding for existing programs, Congress had exceeded its limits under the Spending Power[83] and had essentially created a decision for States that was a "loaded gun to the head."[84]

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75. *Id.*
76. *Id.*
77. *Id.*
78. *Sebelius*, 132 S. Ct. at 2607 (finding that Congress may not "penalize States that choose not to participate in that new program by taking away their existing Medicaid funding").
79. *Id.*
80. 483 U.S. 203 (1987).
81. *Sebelius*, 132 S. Ct. at 2604 (Roberts, C.J.) (quoting *Dole*, 483 U.S. at 211).
82. *Id.* at 2065, n.13.
83. *Id.* at 2068.
84. *Id.*at 2604.

III. THE RAMIFICATIONS OF *SEBELIUS*

While the ACA once guaranteed insurance coverage for all individuals through certain incentives, the Act now fails to achieve one of its objectives. The ACA relied heavily upon the Individual Mandate,[85] the Employer Shared Responsibility Payment,[86] and mandatory Medicaid Expansion[87] to ensure virtually universal health care coverage when applied with the Guaranteed Issue and Renewability provisions.[88] After the *Sebelius* decision, the federal government may not strong-arm states into expanding their Medicaid programs to cover childless adults with incomes up to 138% of the FPL,[89] and many will remain uncovered by any form of insurance.

The Congressional Budget Office (the "CBO") has already estimated the potential effects of the *Sebelius* decision on the American health care system. The CBO estimates that, because state Medicaid Expansion is optional, approximately six million people will not be insured under state Medicaid programs.[90] Of those six million people, the CBO estimates that about half (three million) will fail to obtain any form of insurance.[91] The Act originally sought to provide health insurance and health care to some thirty million people that were without health insurance or access to health care prior to the Act.[92] Now, with six million people left potentially uncovered by the Medicaid Expansion and an estimated three million of those people left without any insurance coverage, anywhere from ten to twenty percent of the people originally intended to be regulated by the Act and to benefit from the Act are no longer covered.[93]

The Act, as gutted to some extent by the Supreme Court's ruling in *Sebelius*, will likely find that many who are currently uninsured will remain uninsured, even after full implementation of the Act.[94] Furthermore, most of those who will remain uninsured are the very people who contributed most to the cost-shifting problem that the Act so hopes to remedy. Because the Medicaid Expansion is now optional, many low-income individuals will now remain without insurance, or they will take advantage of the guaranteed issue and renewability provisions to obtain health insurance only when a medical emergency arises, thus shifting their actuarial risk to hospitals and insurers. This may have the effect of harming the insurance

85. 26 U.S.C. § 5000A (2012).
86. 26 U.S.C. § 4980H (2012).
87. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2012).
88. 42 U.S.C. § 18001 (2012); 42 U.S.C. § 18091 (2012).
89. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607 (2012).
90. ELMENDORF, *supra* note 9, at 3.
91. *Id.*
92. 42 U.S.C. § 18091(C); ELMENDORF, *supra* note 9, at 1.
93. *See* ELMENDORF, *supra* note 9.
94. *Id.* at 15.

and healthcare industries that were meant to be protected to some extent from such adverse selection problems through various provisions such as the Individual Mandate and the Employer Shared Responsibility Payment. More importantly, the individuals who are required to purchase insurance as "applicable individuals" are left with no redress for rising health insurance costs because they must either buy health insurance at increasing costs or pay the penalty tax.

The Individual Mandate and the Employer Shared Responsibility Payment provisions, though certainly controversial, could at least be justified in some legal or moral sense before the Supreme Court rendered Medicaid Expansion optional. While many Americans may be upset about being told how to spend their hard-earned money, there was a conceivable goal of reduced health care costs that could be achieved by increasing insurance coverage and thus reducing cost-shifting that causes higher health care costs and more costly health insurance coverage. Congress was required to balance the essential interest of individual liberty against the crucial issue of cost and accessibility in the healthcare market. While there were probably several less restrictive alternatives to the penalty tax, Congress exercised its discretion arguably within constitutional bounds in choosing the penalty tax as its vehicle for achieving cost control and accessibility in healthcare. After *Sebelius*, however, the Act requires individuals to purchase health insurance and still has not eliminated the cost shifting and adverse selection problems that spurred insurance and healthcare reform in the first instance.

Furthermore, judicial wrangling regarding the inapplicability of the Anti-Injunction Act to what was still determined to be a valid exercise of Congress's Taxing Power stirs some apprehension because the "penalty tax" was not a tax and was a tax at the same time for the purposes of Congress and the Supreme Court. Justice Scalia would certainly caution against such judicial legislating to uphold the constitutionality of the "penalty tax."[95] Perhaps the *Sebelius* decision was a result of judicial angst to resolve the nation's pressing health care issues before the 2012 general elections and before insurance companies, businesses small and large, and health care providers undertook further expenses to prepare for the full effects of the ACA. Perhaps the Chief Justice should have refrained from deciding on the constitutionality of the ACA at such an early date while disregarding the Anti-Injunction Act as inapplicable in this case. Whatever the reason for the Court's ruling, Congress's Taxing Power has been extended to historical new bounds.

95. *See, e.g.*, *Sebelius*, 132 S. Ct. at 2651 (Scalia, J., dissenting).

IV. CONCLUSION

There are certainly no grounds to argue that healthcare and insurance reform are not necessary measures at this time to curb growth in an increasingly costly portion of the nation's gross domestic product. It would also be difficult to deny that the humanitarian interest of providing greater access to healthcare is integral to the structure of the ACA. However, significant liberty interests are at stake regarding the healthcare reform law. Undoubtedly, Congress has diligently balanced these concerns and has likely reached an appropriate result in this case. However, the disturbing proposition of taxing inactivity in numerous other cases looms heavily over the *Sebelius* decision, and the decision preserves only portions of the ACA, leaving some key objectives of the Act unaccomplished.

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The date following the title indicates the year of first appointment to the Faculty of Law.

William L. Andreen, B.A. (College of Wooster), J.D. (Columbia); Edgar L. Clarkson Professor of Law, 1983.

Carol Rice Andrews, B.S., J.D. (Illinois); Douglas Arant Professor of Law, 1995.

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William S. Brewbaker III, B.A. (Vanderbilt), J.D. (Virginia), LL.M. (Duke); Interim Dean. William Alfred Rose Professor of Law, 1993.

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