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The Taxing Power of Obamacare

It is unconstitutional for the federal government to force people to buy a private product.

The litigation battle has begun. While the legal arguments are technical, the basic issue is straightforward: Can the federal government force people to buy a product — in this instance, health insurance — from a private company?

Advocates of Obamacare claim that the mandate to purchase health insurance is authorized under the Commerce Clause. But constitutional experts note that this expansion of power is unprecedented. The only way for the Supreme Court to find Obamacare constitutional via the Commerce Clause would be for it to announce, for the first time in 221 years, that there are essentially no structural limits on the federal government's power to regulate interstate commerce.

That's why the administration had to devise a fallback position: that the penalty for not buying health insurance is authorized under Congress's power "to lay and collect Taxes." But that argument fails on three counts.

First, the penalty is not a tax; it's a fine. The president said as much when confronted with the argument that it violated his promise not to raise taxes on the middle class.

"For an exaction to be a true tax," writes the Institute for Justice, "it has to be a genuine revenue-raising measure." IJ attorneys Jeff Rowes and Robert McNamara looked at 95 categories of state and federal taxes. Each of them had an obvious revenue-generating purpose. While some taxes also have a regulatory purpose — such as the cigarette tax, which is meant in part to discourage smoking — the courts have upheld them only because revenue generation is still a key objective. By contrast, Rowes and McNamara point out, the individual mandate "exists solely to coerce people into acquiring healthcare coverage. If the mandate were to work perfectly, it would raise literally no revenue." The individual mandate is a civil regulation with a civil fine for noncompliance. Thus, the taxing power is irrelevant.

Second, even if the penalty for noncompliance is deemed to be a tax rather than a fine, it does not meet the constitutional requirements for income, excise, or direct taxes. The type of tax is determined by the event that triggers its incidence. In this case, the trigger is the non-purchase of health insurance.

Although the *amount* of the tax depends on income, it also depends on age, family size, geographic location, and smoking status. The penalty is no more an income tax than it is a smoking tax. In fact, higher income sometimes results in a lower penalty.

Certain taxes, such as the Social Security payroll tax, have been classified as excises, which are levied on the performance of an act or the enjoyment of a privilege. In current usage, "excise" covers virtually every internal revenue tax except the income tax. Maybe, in principle, the insurance penalty — imposed on the non-performance of an act — qualifies. But if so, the Constitution requires that "excises shall be uniform throughout the United States," whereas the insurance penalty varies with location: Households in some areas are taxed while identical households in other areas are exempt.

The penalty may be closest to a direct tax, which can be either a capitation (imposed on each person) or an assessment on property. Arguably, the penalty is a negative tax on property — i.e., the non-ownership of the property (health insurance) triggers the tax. Yet it fails to satisfy the constitutional command that "direct Taxes shall be apportioned among the several States" by population.

The apportionment provision means that Congress must: first, decide the total revenue to be raised; second, allocate that amount among the states according to population; and third, divide each state's allocation by its tax base to compute the rate. The insurance penalty is not apportioned. Indeed, because the purpose is not to raise revenue (the desired revenue is zero) and the tax base depends on how many residents of each state fail to purchase health insurance in a given year, the penalty *cannot* be apportioned.

In 1796, the Supreme Court ruled that a tax incapable of apportionment cannot be a direct tax — a ruling that made little sense. Suppose Congress taxed, for example, all private land containing recoverable oil. Because many states have no such land, the tax could not be apportioned. It would still be a direct tax on property, however — by any definition but the Court's. Nonetheless, if today's Court accepts the flawed logic of the 1796 case, that will serve to clarify that the penalty

is not a tax at all, but a civil fine.

The third reason the power to tax cannot justify an insurance mandate is that, even if the penalty is considered a tax and somehow survives the test for apportionment or uniformity, Congress cannot use the taxing power as a backdoor means of regulating an activity, unless the regulation is authorized elsewhere in the Constitution. That’s what the Supreme Court held in *Bailey v. Drexel Furniture Co.* (1922). The IRS had penalized Drexel for employing an underage worker. The company asserted, successfully, that the penalty was actually a regulation of child labor, which at that time was considered to be an exclusive state prerogative. The law’s “prohibitory and regulatory effect and purpose are palpable,” wrote the Court. Ditto for the insurance mandate, a regulatory scheme explicitly designed to compel the purchase of health insurance.

Here’s the counterargument from the administration: Penalties are merely the flip side of credits, which are sprinkled throughout the tax code. If it’s constitutional to offer a tax credit for those who have health insurance, how could it be unconstitutional to impose a penalty on those who don’t? In both instances, insured persons pay less tax than uninsured persons.

That may sound plausible on its face, but there’s a big difference between credits and penalties. When Congress enacts a credit, it reduces the impact of a pre-existing, legitimate tax. Judicial scrutiny is then limited to ensuring that the rights of disfavored parties are adequately protected. In contrast, tax penalties imposed for a regulatory purpose must be authorized under an enumerated power independent of the taxing power. When Congress regulates, as in *Drexel Furniture*, the Constitution is implicated both to ensure that rights are protected and that Congress has not exceeded its authority.

To put it bluntly, the taxing power will not help the government defend the insurance mandate. Only the Commerce Clause remains as a potential source of authority, and this argument too is under vigorous attack in pending lawsuits.

Legal refinements aside, the insurance mandate is an affront to personal liberty that will exacerbate our health-care problems. For those who care, it’s unconstitutional as well.

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