# USELESS DEPENDENTS: THE FINAL CONSTITUTIONAL CHALLENGE OF THE ACA'S FAMILIAL INTERVENTION THROUGH DIRECT TAXATION

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## I. INTRODUCTION

As written, the Affordable Care Act (ACA) places a mandatory penalty to taxpayers who choose to have adult child dependents or adult dependents–taxpayers must pay for their dependents health care or be fined. Although the Supreme Court has already ruled that the Individual Mandate was a constitutional tax,[1] the question of whether it is constitutional for the federal government to tax adults for the activity or inactivity of their dependents has not been directly challenged by any court. This article will attempt to bring light to the un-constitutionality of the dependent penalty. It will demonstrate that this penalty is an overstep of the federal government into familial affairs. The article will also show that said dependent penalty is a direct tax that requires apportionment. To better explain these constitutional challenges this article will begin by explaining the dependent penalty, and introduce the concept of the "Useless Dependent."

## II. I.R.C. § 5000A(A): THE DEPENDENT PENALTY

Section 5000A requires "applicable individuals" and "any dependent of" the applicable individual to maintain "minimum essential coverage" for each month after the close of 2013.[2] "Minimum essential coverage" includes coverage under Medicare, Medicaid, plans purchased in the individual market, and employer sponsored plans along with other forms of coverage mentioned in § 5000(f).[3] A taxpayer who has dependents is liable for any penalties imposed on those dependents. However, the Internal Revenue Code (IRC) implies that the dependent is not liable to pay his penalty if the taxpayer fails to do so.[4]

There are currently two ways in which a taxpayer can potentially have their tax reduced (or possibly receive money from the Treasury) as a result of having what the government terms, a dependent.[5] The first method is through a tax credit for a child dependent under the age of seventeen.[6] The second method is through a tax deduction for qualifying relatives or qualifying child dependents.[7] The age of the dependent determines whether the

1. *See generally* Nat'l Fed'n of Indep. Buss. v. Sebelius 132 S. Ct. 2566 (2012).
2. 26 U.S.C. § 5000A(a), (d) (2012).
3. 26 U.S.C. § 5000A(f).
4. *Internal Revenue Bulletin: 2013-39,* IRS (Sept. 23, 2013), https://www.irs.gov/irb/2013-39_IRB/ar09.html [http://perma.cc/J5KA-KH37].
5. *See* 26 U.S.C. §§ 24, 151.
6. *See* 26 U.S.C. § 24(c)(1).
7. *See* 26 U.S.C. § 151(c).

taxpayer may deduct from his gross income or deduct and later claim a credit from his taxable income.[8]

### A. *Child Dependents under the Child Tax Credit*

The 1997 Child Tax Credit's main purpose was to lower a taxpayer's federal tax liability when they have children.[9] Although originally set forth as a non-refundable credit that could only reduce an individual's tax obligation to zero, the tax credit today allows low income individuals with a small or no income tax liability to receive a refund in excess of their tax liability.[10] Indeed, over the past fifteen years legislative changes have largely transformed the credit from a non-refundable credit available to middle and upper-middle class families to one that is most often used as a refundable credit to low income families.[11]

Currently, the child tax credit allows a taxpayer to reduce their federal income tax liability, which are the taxes owed before any tax credits are applied.[12] Eligible families can claim a child tax credit and reduce their federal income tax liability by up to $1,000 per qualifying child.[13] If the amount of credit received exceeds the amount a taxpayer owes, the taxpayer may be eligible to receive a full or partial refund of the difference.[14] The total amount of their refund is calculated as fifteen percent of earnings that exceed $3,000, up to the maximum amount of the credit—$1,000 per child.[15] The credit phases out for higher-income taxpayers at a rate of $50 per $1,000 earned over the phase out threshold.[16]

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8. *See* 26 U.S.C. §§ 24, 151.

9. MARGOT L. CRANDALL-HOLLICK, CONG. RESEARCH SERV., R41873, THE CHILD TAX CREDIT: CURRENT LAW AND LEGISLATIVE HISTORY 1 (2016).

10. *Id.* at 3.

11. *Id.* at 1.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. 26 U.S.C. § 24(b)(1)–(2) (2012).

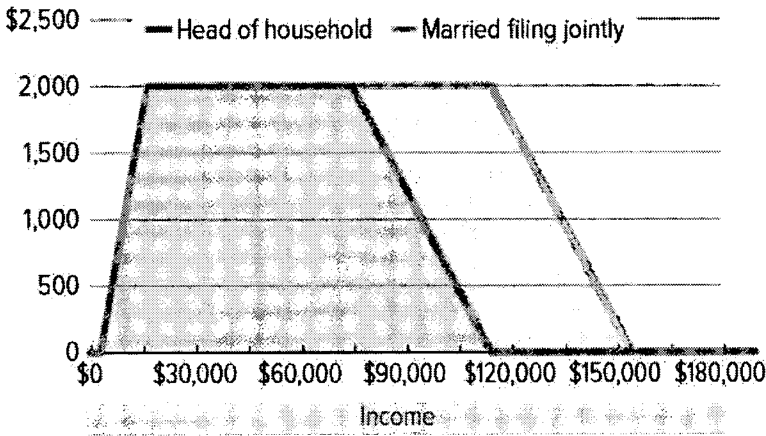


Figure 1: Child Tax Credit benefit in 2015.
Source: Internal Revenue Service

The maximum credit a family can receive is equal to the number of qualifying children a taxpayer has, multiplied by $1,000.[17] For example, a family with two qualifying children may be eligible for a $2,000 credit.[18] Families may receive the child tax credit as a reduction in tax liability (the non-refundable portion of the credit), a refundable credit, or a combination of both.[19]

The child tax credit applies only for qualifying children dependents under the age of seventeen.[20] A qualifying child means an individual who bears a relationship to the taxpayer such as a child, grandchild, brother, or sister.[21] The qualifying child must have the same principle place of abode as the taxpayer.[22] The qualifying child must receive over fifty percent of their financial support from the taxpayer.[23] Finally, the qualifying child must meet the age requirement of § 152(c)(3).[24] In general, the qualifying child dependent meets § 152(c)(3) if the child is younger than the taxpayer claiming such an individual as a qualifying

17. 26 U.S.C. § 24(a); CRANDALL-HOLLICK, *supra* note 9, at 2.
18. *See* 26 U.S.C. § 24(a); CRANDALL-HOLLICK, *supra* note 9, at 2.
19. CRANDALL-HOLLICK, *supra* note 9, at 2.
20. 26 U.S.C. § 24(c)(1).
21. 26 U.S.C. § 152(c)(1)–(2).
22. 26 U.S.C. § 152(c)(1)(B).
23. 26 U.S.C. § 152(c)(1)(D).
24. 26 U.S.C. § 152(c)(1)(C).

child, and the child has not attained the age of seventeen as of the close of the calendar year.[25]

Additionally, children over the age of seventeen can still be considered qualifying children, however, they invoke no tax credit benefit.[26] A qualifying child over seventeen may continue to be categorized as a dependent with non-child tax credit benefit up to the age of twenty-four if the child is a full-time student, who is living with the taxpayer, and is receiving fifty percent of his living expenses from the taxpayer.[27] The potential benefit to continue to declare the dependents comes from a $4,050 deduction.[28]

Alternatively, a qualifying relative has no age requirement, and is similar in many respects to the qualifying child.[29] However, the relationship requirement of a qualifying relative is broader.[30] A child or descendant of the taxpayers child, siblings or stepsibling, parents and stepparent, grandparents, immediate family in-laws, or any non-spousal individual that has the same abode as the taxpayer.[31] Like a qualifying child dependent, the qualifying relative invokes a deduction of $4,050 for the taxable year.[32]

B. *Adult Dependents*

As stated above, once a taxpayer's children reach seventeen years-of-age they no longer are considered qualifying children for purposes of the 26 U.S.C. § 24 child tax credit.[33] As such, the taxpayer can no longer claim the automatic $1,000 per child relief from tax liability or refund in excess of the liability.[34] Instead, any tax benefit a parent can subsequently receive comes in the form of a 26 U.S.C. § 151(a) deduction,[35] which provides a tax incentive for declaring a child as a dependent from birth until they reach the age of twenty-four.[36] Under §§ 151 and 152 a taxpayer can claim

25. *See* 26 U.S.C. § 152(c).

26. *See* 26 U.S.C. §§ 24(c)(1), 151(a).

27. 26 U.S.C. § 152(c)(1)–(3).

28. Kay Bell, *New Tax Exemption Amounts for 2016 Tax Returns*, BANKRATE, http://www.bankrate.com/finance/taxes/tax-exemption-amounts.aspx (last updated Jan. 9, 2017) [http://perma.cc/7TAN-RCMN].

29. *See* 26 U.S.C. § 152 (c)–(d).

30. *See* 26 U.S.C. § 152(d)(1)(A)–(D).

31. *Id.*

32. 26 U.S.C. § 152(c)(1)–(3).

33. 26 U.S.C. § 24(c)(1).

34. *See id.*

35. 26 U.S.C. § 151(a).

36. 26 U.S.C. § 152(a).

up to $4,050 deduction per "qualifying child" dependents if they meet all of five requirements of the qualifying child.[37]

To be considered as a qualifying child for purposes of § 151 dependency deduction, the child must first, be the taxpayer's son, daughter, stepchild, eligible foster child, brother, sister, half-brother, half-sister, stepbrother, stepsister, adopted child, or an offspring of any of them.[38] Second, the child must be under the age of nineteen.[39] However, if over the age of nineteen but under the age of twenty-four, a child may still qualify as a dependent if they are a full-time student, are currently living with the taxpayer and is being provided by the taxpayer with over fifty percent of their living expenses.[40] There is no age limit if the child is permanently and totally disabled.[41]

## III. USELESS DEPENDENTS

The tax code creates a situation in which additional dependents may provide no tax benefit. If, for example, a low-income individual with multiple adult dependent has had all taxes owed reduced to zero, additional adult tax dependents provide no tax benefit. To fully understand this concept please consider the following.

A taxpayer arrives at "taxable income" by forgoing itemize deductions, and thus is allowed to subtract, from their gross income, standard deductions, and deductions for personal exemptions provided in § 151.[42] The standard deduction for 2016 will be $12,600 and any § 151 deductions will be $4,050 per dependent that the taxpayer declares.[43]

| If your filing status is... | Your standard deduction is: |
|---|---|
| Single or Married filing separately | $ 6,300 |
| Married filing jointly or Qualifying widow(er) with dependent child | 12,600 |
| Head of household | 9,250 |
| *Don't use this chart if you were born before January 2, 1951, are blind, or if someone else can claim you (or your spouse if filing jointly) as a dependent. Use Table 20-2 or 20-3 instead. | |

Figure 2: Standard deduction amounts for most people in 2015.
Source: IRS.gov

37. *See* 26 U.S.C. § 152(d)(1)(A)–(D).
38. 26 U.S.C. § 152(c)(2)(A)–(B).
39. 26 U.S.C. § 152(c)(3)(A)(i).
40. *See* 26 U.S.C. § 152(c)(3)(A)(ii).
41. 26 U.S.C. § 152(c)(3)(B).
42. 26 U.S.C. § 63(b)(1)–(2).
43. *Id.*; *See* 26 U.S.C. § 152(d)(1)(A)–(D).

a tax determined in accordance with the following table:

| If taxable income is: | The tax is: |
|---|---|
| Not over $36,900 .............. | 15% of taxable income. |
| Over $36,900 but not over $89,150 | $5,535, plus 28% of the excess over $36,900. |
| Over $89,150 but not over $140,000 | $20,165, plus 31% of the excess over $89,150. |
| Over $140,000 but not over $250,000 | $35,928.50, plus 36% of the excess over $140,000. |
| Over $250,000 ................ | $75,528.50, plus 39.6% of the excess over $250,000. |

Figure 3: Showing progressive tax rate for married individuals filing jointly. Source: 26 U.S.C. § 1(a)(2).

Low income individuals are taxed at a fifteen percent tax rate if they make under $36,900, if they are filing jointly or under $29,600 if they are filing alone.[44] In both cases their tax obligation for the given tax year would be $5,535 and $4,440, respectively—assuming no deductions are claimed.[45] Consider the following examples.

A married couple filing jointly have a gross income of $21,000, which places them over the filing threshold.[46] The couple has four identical children (quadruplets) who are twenty-one years-of-age, full time students, and meet the statutory definition of qualifying children.[47] As such, the couple can receive a personal exemption of $12,600 for themselves as husband and wife, and a deduction of $4,050 for each of their four children.[48] Three children are all that is needed to reduce their tax obligation to zero. The fourth child would be the useless dependent because to declare him would serve the couple with no tax benefit. Indeed, declaring him would only announce to the IRS that they are obligated to provide the useless dependent with minimum essential coverage or otherwise pay the penalty for failure to do so.[49]

***$ 21,000 (Gross Income) – $ 12,600 (standard deduction) – $ 4,050 (§ 151 deduction) X n***

Figure 4: Showing the formulation of a "useless dependent" where n is equal to the number of dependents a taxpayer has.

44. 26 U.S.C. § 1(a)(b).

45. *See id.*

46. The filing threshold for 2015 for a single individual under 65 was 10,300. The threshold for a married couple was 20,600.; *See Individual Shared Responsibility Provision – Reporting and Calculating the Payment*, IRS, (May 10, 2016), https://www.irs.gov/Affordable-Care-Act/Individuals-and-Families/ACA-Individual-Shared-Responsibility-Provision-Calculating-the-Payment [http://perma.cc/7GTB-VUDZ].

47. *See* 26 U.S.C. § 152(c)(3)(A)(ii).

48. *See* 26 U.S.C. § 63(b)(1)–(2).

49. *See* 26 U.S.C. § 5000A(a).

Additionally, useless dependents may also appear outside of the parent child relationship. For example, consider a married tax payer filling jointly making $21,000 in gross income. The couple has no children, but they do have four dependents that meet the § 152 standard for qualifying relatives.[50] After subtracting the standard deduction of $12,600 and $4,050 per dependent, the fourth dependent would not serve as a tax benefit, and would be labeled the useless dependent.

### A. *Mandatory Dependent Status*

Prior to the ACA, having additional adult children dependents never did any harm—other than providing at least half of their support.[51] With the ACA, such additional dependents become a health insurance burdens.[52] One might think that a simple solution is to simply not declare the dependent on his or her tax return. However, the IRS has been clear that for purposes of the Shared Responsibility penalty for failure to insure dependents, whether one declares a dependent on their return has no bearing on § 5000(A) liability.[53] This was addressed in Internal Revenue Bulletin: 2013-39 which states that, "[w]hether the taxpayer actually claims the individual as a dependent for the taxable year does not affect the taxpayer's liability for the shared responsibility payment for the individual."[54] In other words, any Adult Child dependent whether useless or not will be counted as a potential liability for the ACA penalty.[55]

## IV. CONSTITUTIONAL ARGUMENT 1: FAMILY AFFAIRS BELONGS TO THE STATES

The ACA penalty, for parents that continue to provide assistance to their adult children, effectively extends the age of majority from eighteen, which is applied in forty-eight states, to twenty-four.[56] Because adult children, who live as dependents, are

50. 26 U.S.C. §152(d)(1)(A)–(D).

51. *See Young Adults and the Affordable Care Act: Protecting Young Adults and Eliminating Burdens on Businesses and Families*, CENTERS FOR MEDICARE & MEDICAID SERVICES, https://www.cms.gov/CCIIO/Resources/Files/adult_child_faq.html (last visited Mar. 4, 2017) [http://perma.cc/6ZN4-RPMJ].

52. *See id.*

53. 26 U.S.C. §5000(A)(b).

54. *Id.*

55. *Id.*

56. *See Determining the Legal Age to Consent to Research. It's not always 18!*, WASH. U. IN ST. LOUIS, (Jul. 26, 2012) http://hrpo.wustl.edu/wp-content/uploads/2015/01/5-Determining-Legal-Age-to-Consent.pdf [http://perma.cc/HLD8-LJ92]; Alaska and Nebraska set their ages of consent at 19; 26 U.S.C. § 5000A(a), 152(c) (2012).

not responsible for maintaining their own coverage, their legal liability under the ACA is delayed.[57] Additionally, parents are now liable for their children up to the age of twenty-four if they continue to provide them with a home and living expenses while they attend school.[58] In essence, the ACA penalty for adult child dependents creates a new age of majority while holding parents liable for their children longer; both of which are familial affairs that congress is not empowered to interfere with.

Since the adoption of the U.S. Constitution, one of the few ways the federal government has been able to set ages that endow a legal right was by virtue of an enumerated power.[59] The first enumerated power that would permit setting a legal age right came from Article I § 8 cl. 14.[60] Under clause 14, the federal government has the power "[t]o make Rules for the Government and Regulation of the land and naval Forces."[61] As such, the federal government is able to set minimum and maximum ages for military service enlistment.[62] The second enumerated power that permits the federal government to set a legal age stems from Article I § 8 cl. 4, which governs naturalization.[63] Consequently, the federal government can set ages for naturalization citizenship purposes,[64] such as the under eighteen years of age requirement to gain citizenship through naturalization—if your parents are United States citizens.[65]

The only other instances where the federal government has been allowed to set ages has come through Constitutional Amendment.[66] Under the Tenth Amendment, "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."[67] It need not be assumed that

57. *See* 26 U.S.C § 5000(A)(a).

58. 26 U.S.C. § 152(c).

59. *See generally* U.S. CONST. art. I, § 8.

60. U.S. CONST. art. I, § 8 cl. 14.

61. *Id.*

62. *See id.*

63. U.S. CONST. art. I, § 8 cl. 4.

64. *See id.*

65. *Citizenship Through Naturalization*, U.S.C.I.S., https://www.uscis.gov/us-citizenship/citizenship-through-naturalization (last visited May 10, 2016) [http://perma.cc/Y7HX-KMHL].

66. U.S. CONST. amend. XXVI.

67. *Id.*

such a designation of "eighteen years of age" could not have been achieved through statute.[68]

Indeed, prior to passage of the Twenty-Sixth Amendment the State of Oregon challenged a statute that made it a federal mandate to register voters who were eighteen to twenty-one years of age.[69] In *Or. v. Mitchell*, Oregon challenged the Voting Rights Act Amendments of 1970, by claiming that the Act, by setting eighteen as the legal voting age, took away constitutionally reserved powers of the states.[70] Partly agreeing with Oregon, the Supreme Court held that the federal government did have the power to set the voting age at eighteen for federal elections, but that the power to set the voting age at the state and local level was reserved to the states.[71] Consequently, the Tenth Amendment was the only way the federal government would be constitutionally empowered to set a voting age for all purposes.[72] To better elaborate, we will next consider what an age of majority is, and how states have historically defined its legal obligation to parents.

### A. *The Age of Majority and Parental Responsibility Laws*

Presently, the age of majority is considered the threshold of adulthood and the beginning of personal accountability.[73] After a person reaches the age of majority, they are considered personally responsible for their action and decisions.[74] Additionally, the legal control and legal responsibilities of the parents or guardians terminate once an individual reaches the age of majority.[75]

In the United States, the age of majority has been held to be a right of the states to set.[76] To that end, each state has the inherent right to decide what the age of majority is. Every state has statutes to that effect and with the exception of Nebraska and Alabama, who set the age at nineteen, the remaining forty-eight states have placed the age of majority at eighteen.[77] In Texas,

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68. *See* Or. v. Mitchell, 400 U.S. 112, 117 (1970) (holding that Congress may set age requirements for voting in federal elections, but is prohibited from setting age requirements in state and local elections).

69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.* at 265.

73. *See Age of Majority*, U.S. LEGAL, http://minors.uslegal.com/age-of-majority/ (last visited May 10, 2016) [http://perma.cc/YDA9-UQCG].

74. *Id.*

75. *Id.*

76. *See generally id.*

77. *See Determining the Legal Age to Consent to Research*, *supra* note 56 (showing that Alabama and Nebraska set their ages of consent at 19).

according to their Civil Practice and Remedies Code, "[t]he age of majority . . . is 18 years of age."[78]

State created parental responsibility laws impose some form of legal liability whether civil, criminal or quasi-criminal upon the parent or guardian of the offending child.[79] The law's explicit premise is that much of teenage lawbreaking and troublemaking can be attributed to parents' neglect or failure to perform as a reasonable parent would.[80] These laws presume that an appropriate way to motivate the parent to perform is to define what reasonable parenting is and then impose sanctions on parents who fail to meet that standard.[81] A legislator for the State of Oregon once said that the law is "for parents who obviously don't take seriously their role in raising their children. 'As a society, we have the right to tell parents, you have responsibility to properly supervise your child.'"[82]

### B. *How ACA increases the Age of Majority and is a Parental Responsibility Law*

In effect the ACA has increased the age of majority to twenty-four.[83] It defers release of legal responsibility for the child until the age of nineteen regardless of whether the child is going to school and defers it to twenty-four if they are going to school.[84] It is also a form of tax on half way measures—if the parent provides no support, the child is not a dependent under § 151 and the parent owes no penalty;[85] however, once the parent agrees to provide the child with half support, federal law leaps in, and makes the parent responsible for also providing health insurance.[86]

This is why the ACA dependent coverage law is a parental responsibility law. Indeed, it is the first federal parental responsibility law.[87] As mentioned at the top of this Section,

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78. TEX. CIV. PRAC. & REM. CODE ANN. § 129.001 (West 2011).

79. *See* TEX. FAM. CODE ANN. § 41.001 (West 2014) (showing that Texas makes parents and guardians liable for the property damage caused by negligence or willful conduct of a minor).

80. *Id.*

81. Leslie Joan Harris, *An Empirical Study of Parental Responsibility Laws: Sending Messages, but What Kind and To Whom*, 5 UTAH L. REV. 5, 11 (2006).

82. *Id.* at 8 (quoting Julie G. Shoop, *Oregon Law Cites Parents for Kids' Bad Behavior*, 31 TRIAL 11, 95 (1995)).

83. *See* 26 U.S.C. §§ 5000(A)(a); 152(c)(3)(A)(ii).

84. 26 U.S.C. § 152(c)(3)(A)(i)–(ii).

85. *See* 26 U.S.C. § 151(d)(2).

86. *See* 26 U.S.C. §§ 5000(A)(a), 152(c)(3)(A)(ii).

87. *Cf.* Jason Emilios Dimitris, *Parental Responsibility Statutes – And The Programs That Must Accompany Them*, 27 STETSON L. REV. 655 (1997-1998) (explaining the evolution of parental responsibility laws but never mentioning them existing at the federal level);

Article I § 8 does not give the federal government the right to define family affairs nor does any other provision of the Constitution.[88]

Additionally, if found to be a parental responsibility law, the ACA will have been the most enforced parental responsibility law in American history.[89] To date, very few parental responsibility claims are ultimately brought to trial,[90] while nearly all child dependents that lack "minimum essential coverage" are being forced to pay the tax penalty,[91] thus providing standing. Moreover, it will also be a very effective parental responsibility law as it has successfully forced millions of parents to provide healthcare to their children.[92] Finally, it will be the longest serving parental responsibility law as all other laws have ended when the child reaches the age of majority, while ACA tax liability can continue to twenty-four.[93]

## V. CONSTITUTIONAL ARGUMENT 2: THE SHARED RESPONSIBILITY TAX IS A DIRECT TAX NOT BASED ON INCOME THAT WOULD REQUIRE APPORTIONMENT

The dependent penalty functions as a direct tax based on a parental status or alternatively as a direct tax based on having dependents. While the individual mandate penalty was held to be, a permissible tax triggered by income,[94] income alone does not trigger the dependent penalty.[95] As such, it is a direct tax on the individual that is triggered by taking care of a dependent, whether they be a qualifying child or relative.[96]

Article I, § 9, cl. 4 provides that "[n]o capitation, or other direct tax shall be laid, unless in proportion to the census or

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*Parental Responsibility Laws In All 50* States, MATTHIESEN, WICKERT & LEHRER, S.C., https://www.mwl-law.com/wp-content/uploads/2013/03/parental-responsibility-in-all-50-states.pdf (last updated Jun. 6, 2016) (detailing all the parental responsibility laws in the United States but never mentioning a federal law and explicitly stating that there is no such law in common law) [http://perma.cc/4BGF-GZ5S].

88. U.S. CONST. art I, § 8.

89. The Affordable Care Act is employed against every qualified individual in the United States. While state parental responsibility laws are limited within their respective states, and are further limited to parental guardians. Therefore, it is clearly the most widely enforced parental responsibility law in American history.

90. *See* Harris, *supra* note 81, at 23 (showing how few police departments cite violations of parental responsibility laws and how even fewer are prosecuted in court).

91. *See* 26 U.S.C. § 5000(A)(a).

92. *See id.*

93. *See* 26 U.S.C. § 152(c)(3)(A)(ii).

94. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2598 (2012).

95. *See* 26 U.S.C. § 5000A(a).

96. 26 U.S.C. § 152(a)(1)–(2).

enumeration herein before directed to be taken."[97] A capitation is a tax paid by every person without regard to profession, property or other circumstance.[98] In essence it is a "head tax."[99] A "direct tax," however, is a tax imposed upon an individual person or upon real or personal property.[100] Alternatively, an "indirect tax," sometimes referred to as an "excise tax" when applied to goods and services, is a tax imposed on "duties, imposts and excises," or, in other words, an activity or the exercise of a privilege.[101] The proportionality requirement applies to "direct taxes" that are not imposed on the basis of income, and on capitation taxes.[102] This requirement means that the state-by-state revenue generated by either a direct tax or capitation tax must be apportioned among the states according to the population of each state.[103] For the purposes of this article we will focus exclusively on the direct tax.

The Founders defined direct taxes broadly but its application of the proportionality requirement had a tendency to bring about "absurd and inequitable results."[104] Indeed, in *Pollock v. Famers' Loan & Tr. Co.*, the Supreme Court held that tax on income was a direct tax subject to the proportionality requirement.[105] Resolution came from the adoption of the Sixteenth Amendment in 1913.[106]

The Sixteenth Amendment provides the United States government with the 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."[107] Indeed, the Constitution apportionment requirement was removed for the limited circumstances of taxing

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97. U.S. CONST. art. I, § 9, cl. 4.

98. *See* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 565 (1895) (holding that un-apportioned income taxes on interest, dividends and rents imposed by the Income Tax Act of 1894 were, direct taxes, and were unconstitutional because they violated the rule that direct taxes be apportioned).

99. *See id.*

100. *See id.* at 557.

101. *See id.*

102. *Id.*

103. U.S. CONST. art 1, § 2 (requiring the apportionment of both direct taxes and representatives in the U.S. House of Representatives among the states according to their numbers, counting all free persons as one, counting slaves as three-fifths of a person and excluding Native Americans).

104. *See* Hylton v. United States, 3 U.S. 171, 179 (1796) (holding that a tax on the possession of goods is not a direct tax, which must be apportioned under Article I of the Constitution).

105. 15 S. Ct. 673, 699–700 (1895).

106. U.S. CONST. amend. XVI.

107. *Id.*

based on income, thus allowing for taxation to be based on income without the apportionment requirement.[108]

Only taxes that are susceptible to apportionment can be considered direct taxes.[109] The earliest precedent on the meaning of the term direct tax comes from *Hylton v. United States* which rejected the argument that a tax on carriages was a direct tax.[110] In *Hylton*, a tax on carriage ownership was questioned as to the effect apportionment would have on the states.[111] The proportionality requirement meant taxing carriage owners at dramatically different rates depending on how many carriages were in their home state.[112] The Supreme Court held that only taxes reasonably susceptible to apportionment can be direct taxes.[113] Consequently, since the tax on carriages, could not have been easily apportioned then it could not be a direct tax.[114] It was this definition of direct tax that the Supreme Court would later apply in *NFIB*.[115]

In *NFIB*, the Supreme Court held that the individual mandate was neither capitation nor a direct tax.[116] The Court reasoned that the individual mandate was not capitulation for it was not imposed on everyone, but rather only those who made a certain amount of income.[117] Additionally, the mandate was not a direct tax since it was not imposed on the ownership of land or personal property, but was rather imposed on the basis of income.[118] As such, it would not require the apportionment needed in the definition of direct tax because the Sixteenth Amendment protects taxes based on income.[119] However, the Supreme Court in *NFIB* did not address the shared responsibility payment imposed on taxpayers who have qualifying dependents under § 5000(A)(a).[120]

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108. *Id.*

109. *Hylton*, 3 U.S. at 173.

110. *Id.* at 175.

111. *Id.* at 174.

112. *Id.*

113. *Id.* ("If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule.").

114. *Id.* at 174–75.

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

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *See generally id.* (addressing only the shared responsibility payment in relation to IRS Code § 5000A(e)(2)).

Although the Sixteenth Amendment later removed the apportionment requirement for taxes based on income, it did not otherwise undo the *Pollock* decision that a "direct tax" must be apportioned.[121] *NFIB* only briefly mentioned *Pollock* when they declared that, "[i]n 1895, we expanded our interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax . . . . That result was overturned by the Sixteenth Amendment, although we continued to consider taxes."[122]

The shared responsibility payment imposed on taxpayers with dependents is a direct tax that should be subject to apportionment as it does not fall under the income exemption under the Sixteenth Amendment.[123] Unlike the tax for failing to buy insurance under the individual mandate, which is activated upon reaching a certain income threshold,[124] this dependent mandate is activated upon claiming a dependent or by having a child.[125] It is not a tax on income that would garner protection under the Sixteenth Amendment, and it is not an indirect tax as it does not tax a purchase or activity but is taxed directly on the person. Consequently, the liability of a taxpayer with dependents is a direct tax on the individual for choosing to care for a dependent.

As a direct tax not activated upon income it is subject to the apportionment requirement; the question under *Hylton* is whether apportionment is possible?[126] Since its implementation the ACA has been capable of apportionment. A simple census would reveal state populations, and the number of individuals claiming dependents could be received by the IRS. Indeed, Article 1 § 2 provides for a census to be held every ten years.[127] Consequently, the Shared Responsibility Payment as applied to dependents would have to increase in proportion to the population of a given State's taxpayers with dependents.

121. Brushaber v. Union P. R. Co., 240 U.S. 1, 10–11 (1916).

122. *NFIB*, 132 S. Ct. at 2598.

123. *See* U.S. CONST. amend. XVI.

124. In 2016 the income tax threshold for a married couple filing jointly will be $20,700; *See Do I Need to File a Tax Return?* eFile.com, http://www.efile.com/tax/do-i-need-to-file-a-tax-return/ (last visited May 10, 2016) [http://perma.cc/AH77-NC8M].

125. 26 U.S.C. § 151(c) (2012).

126. *Hylton*, 3 U.S. at 171–73.

127. U.S. CONST. art I, § 2. cl. 3.

### A. *Children Can Be Considered Property for Tax Purposes*

The Supreme Court has held that direct taxes can only be laid on property and appurtenances.[128] Indeed in 1798, 1813, 1815, 1816, direct taxes were laid on lands, improvements, dwelling-houses, and slaves; and in 1861 on lands, improvements, and dwelling-houses only.[129] By 1868, the Supreme Court noted that personal property, contracts, occupations, and the like, have never been regarded by Congress as proper subjects of direct tax.[130] Although, for purposes of direct tax apportionment, slaves were held to be realty for purposes of the census; they were held to be 3/5th a person.[131] As such, persons under the taxpayer's control have been held proper subjects of taxation as long as they are not violating the Thirteenth Amendment's ban on slavery.[132] Ultimately, dependents are not slaves, and as such they are not barred from being the basis of a direct taxation.

Alternatively, *Veazie Bank v. Fenno* mentioned that appurtenances were appropriate subjects of a direct tax.[133] The dictionary definition of appurtenances as it applied in 1869 is "that which applies to something else."[134] It was from this standard that the *Fenno* Court concluded that slaves were appurtenances that belonged to their master's estate.[135] Thus, people can be considered appurtenances. Thankfully, the Thirteenth amendment has abolished slavery as a form of addition to anyone's estate.[136] However, by the § 152 definition, dependents reside in the household and provide benefits to the estate of the taxpayer in the form of deductions.[137] As such, dependents are appurtenances for purposes of a direct tax.

In 1881, the Supreme Court revisited what was subject to a direct tax.[138] In *Springer v. United States*, the Court noted that direct taxes were only ever imposed upon real estate and slaves.[139]

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128. Veazie Bank v. Fenno, 75 U.S. 533, 544 (1869) (holding that direct taxes are limited to taxes on land and appurtenances, and taxes on polls or capitation taxes).

129. *Id.* at 543.

130. *Id.*

131. U.S. CONST. art 1, § 2, cl. 3.

132. U.S. CONST. amend. XIII.

133. *Fenno*, 75 U.S. at 543.

134. "Appurtenances." Webster's Dictionary 1828. 2016. http://webstersdictionary1828.com/Dictionary/Appurtenance (May 10, 2016) [http://perma.cc/SV5Y-9DM4].

135. *Fenno*, 75 U.S. at 543–44.

136. U.S. CONST. amend. XIII.

137. 26 U.S.C. §§ 151,152.

138. *Springer v. United States*, 102 U.S. 586, 599 (1880).

139. *Id.*

The Court noted that slaves could be a basis for a direct tax because "in some of the States slaves were regarded as real estate . . . and, such an extension of the tax lessened the burden upon the real estate where slavery existed."[140]

Similar to the *Springer* decision, dependents lessen the tax burden on taxpayers.[141] With the exception of useless dependents, dependents reduce the gross income generated from real estate generated income.[142] Although certainly not slaves, dependents have the same effect that would necessitate categorizing them as the subject of direct taxation.

What greater inherent right exists than the right to care for children, parents, siblings and other dependents? The Supreme Court defined direct taxes as bearing "immediately upon persons, upon the possession and enjoyments of rights."[143]

Prior to 1874, children were considered the property of their parents.[144] Indeed, as the framers of the constitution would have envisioned, children possessed no independent rights. Although Child Labor Laws and other juvenile protection laws gave children stronger legal freedom during the twentieth century, the original definition of direct tax was meant to apply to taxes based on property. As children were property at the time of the Constitution's founding, any tax activated on the basis of possessing children (property) is a direct tax.

## VI. CONCLUSION

The ACA dependent penalty is based on the mistaken notion that there are no useless dependents—that there is always a benefit to declaring a dependent—and as such, there is no unjust reason to tax those individuals receiving the deduction benefit. However, as we have seen, there are those who do not benefit from their dependents, and those individuals are being penalized with a tax that is unconstitutional. The tax is unconstitutional because it is an intrusion into familial affairs—it is an attempt to increase the age of majority past what the states have deemed appropriate. It is also unconstitutional because it is a direct tax that requires apportionment.

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140. *Id.*

141. *See id.*; 26 U.S.C. § 151(c).

142. 26 U.S.C. § 151(c).

143. *Knowlton v. Moore*, 178 U.S. 41, 47 (1900) (holding that the estate tax was a tax on the transfer of property as a result of a death and not a tax on the property itself).

144. Parent and Child, THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/Parent+and+Child (last visited May 10, 2016) [http://perma.cc/WKS9-35SM].

As I write this, Republicans have control of both houses of Congress, they have the Presidency, and soon, a strong repeal effort will forever change or replace the Affordable Care Act. This article is intended to serve as guidance to the new administration in their efforts to replace the Affordable Care Act or to serve as a warning to others who might one day attempt to implement a similar dependent penalty.

*Pedro Chavez*