Congressional Research Service

MEMORANDUM April 29, 2010

To: Hon. Tom Price
Attention: Emily Henehan Murry

From: Jennifer Staman, Edward Liu, Erika Lunder, Kenneth Thomas
Legislative Attorneys

Subject: **Questions Regarding Employer Responsibility Requirements and Section 1312(d)(3)(D) of the Patient Protection and Affordable Care Act**

You have requested a memorandum analyzing whether, in light of § 1312(d)(3)(D) of the Patient Protection and Affordable Care Act (PPACA),[1] whether the federal government is (1) required to pay a portion of the premiums for Members of Congress and congressional staff, similar to the Federal Employees Health Benefits Program (FEHBP),[2] and (2) subject to the employer responsibility requirements under § 1513 of PPACA, as amended. You have also asked whether state and local governments can be subject to the employer responsibility requirements, and whether imposing these requirements on a state and local government would run afoul of the Tenth Amendment.

Implications of § 1312(d)(3)(D) of PPACA

Background

With respect to health insurance for Members of Congress and congressional staff, § 1312(d)(3)(D) of PPACA specifically requires that:

> the only health plans that the Federal Government may make available to Members of Congress and congressional staff with respect to their service as a Member of Congress or congressional staff shall be health plans that are--
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> (I) created under this Act (or an amendment made by this Act); or
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> (II) offered through an Exchange established under this Act (or an amendment made by this Act).[3]

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[1] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, ___ Stat. ____ § 1312(d)(3)(D) (2010) [hereinafter PPACA].

[2] The Federal Employees Health Benefits Act (5 U.S.C. §§ 8901 to 8914) established the FEHB program to provide federal employees and retirees with subsidized health care benefits.

[3] *See id.* at § 1312(d)(3)(D)(i).

Section 1312(d)(3)(D)(ii) of the Act defines the term "Member of Congress" as "any member of the House of Representatives or the Senate."[4] In addition, this section provides a definition for the term "congressional staff," that includes "all full-time and part-time employees employed by the official office of a Member of Congress, whether in Washington, DC or outside of Washington, DC."[5]

As a general rule, when interpreting the meaning of legislative language, courts will often use methods of statutory construction commonly referred to as "canons," or general principles for drawing inferences about language. Perhaps the most common "canon of construction" is the plain meaning rule, which assumes that the legislative body meant what it said when it adopted the language in the statute. Phrased another way, if the meaning of the statutory language is "plain," the court will simply apply that meaning and end its inquiry.[6] As the United States Supreme Court stated in *Connecticut National Bank v. Germain*:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there .... When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.[7]

Does § 1312(d)(3)(D) of PPACA require the federal government to make a contribution to Members of Congress' or congressional staff's health insurance coverage, similar to FEHBP?

Assuming that Members of Congress and congressional staff are ineligible for FEHBP once § 1312(d)(3)(D) becomes effective, one question that arises under this new section is whether an employer contribution may be provided to pay a portion of the premiums for the health coverage of Members of Congress and congressional staff.[8] Based on the language of § 1312(d)(3)(D), while it does not appear that the contribution must be similar to the contribution provided under FEHBP, it seems the section may provide the authority for the federal government to make a contribution to the health insurance premiums of Members of Congress and congressional staff. [9]

Under FEHBP, the federal government and the federal employee or annuitant share the cost of the employee's or annuitant's health insurance premium.[10] The government's share of premiums is set at 72% of the weighted average premium of all plans in the program, not to exceed 75% of any given plan's

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[4] *Id.* at § 1312(d)(3)(D)(ii)(I).

[5] *Id.* at § 1312(d)(3)(D)(ii)(II).

[6] *See Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992); *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 300 (1989).

[7] *Connecticut National Bank*, 503 U.S. at 253–54 (citations and quotation marks omitted).

[8] An analysis of whether Members of Congress and congressional staff maintain their eligibility for FEHBP in light of §1312(d)(3)(D) is addressed in a congressional distribution memo dated April 2, 2010, which CRS has provided to you.

[9] It should be noted that this memorandum only provides an analysis of whether the statutory language of § 1312(d)(3)(D) could permit the federal government to provide a contribution to the health insurance coverage of Members of Congress and congressional staff. All other issues regarding possible implementation of an employer contribution under this section are beyond the scope of this memorandum.

[10] For additional discussion of requirements under FEHBP, see CRS Report RS21974, *Federal Employees Health Benefits Program: Available Health Insurance Options*, by Hinda Chaikind.

premium.[11] Annuitants and active employees pay the same premium amounts, although active employees have the option of paying premiums on a pre-tax basis. Section 1312(d)(3)(D) of PPACA does not address the availability of an employer contribution, and accordingly, it does not apply the contribution levels of FEHBP to the coverage available to Members of Congress and congressional staff under § 1312(d)(3)(D). Thus, if an employer contribution is offered to Members of Congress and congressional staff, there appears to be no requirement for this contribution to be given at the same levels as the current FEHBP, or at any other specific level.

In evaluating whether the federal government is authorized to make a contribution to the health insurance premiums of Members of Congress and congressional staff under § 1312(d)(3)(D), one may look to the plain language of the provision. This section specifies that the only health plans that the federal government may *make available* to Members of Congress and congressional staff are those plans that are created by PPACA (or an amendment made by PPACA) or a plan offered through an American Health Benefit Exchange ("Exchange"), as set forth in subtitle D of Title I of PPACA.[12] Examining this language, it does not seem clear what it means for the federal government to "make available" specific health plans to Members of Congress and congressional staff. In situations where the plain meaning of statutory language is ambiguous, courts may resort to examining legislative history in order to derive legislative intent. However, CRS is unaware of any legislative history that addresses the provision of an employer contribution under this section. [13]

In interpreting statutory language, courts may also rely on the fact that words that are not terms of art and that are not statutorily defined are customarily given their ordinary meanings, often derived from the dictionary.[14] Based on its ordinary meaning, one could reasonably argue that the term "make available" means to provide,[15] and that, following this line of reasoning, if the federal employer was not financially contributing to the health insurance coverage, it would not be making coverage available. As Members of Congress and congressional staff may be eligible to participate in an Exchange without any assistance from the federal government,[16] the federal government makes this coverage available by paying a portion of the premiums.

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[11] 5 U.S.C. § 8906.

[12] Under subtitle D of Title I of PPACA, no later than January 1, 2014, each state must establish an American Health Benefit Exchange ("Exchange") to provide health coverage to qualified individuals and/or employers. P.L. 111-148, §1301. PPACA also provides that for states that do not elect to establish an Exchange, or if the Secretary determines that a state will not have an operational Exchange by January 1, 2014 or has not taken certain actions, the Secretary must establish and operate an Exchange within the state. However, while the federal government may "make available" health plans that are offered through a state exchange, §1312(f)(2) of PPACA provides that large employers of over 101 individuals may not be able to participate in a state's exchange until 2017.

[13] While CRS was not able to find much discussion surrounding the intent of the provision, as noted by Senator Grassley, the idea behind offering a similar amendment that limited the health coverage available to Members and staff was "to require that Members of Congress and congressional staff get their employer-based health insurance through the same exchanges as … constituents." 156 CONG. REC. S1821 (Mar. 23, 2010).

[14] *See* FDIC v. Meyer, 510 U.S. 471, 476 (1994)(Supreme Court notes that in the absence of a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning.")

[15] Webster's Ninth New Collegiate Dictionary 948 (11th ed. 2003). *See also* Chesapeake Ranch Water Co. v. Bd. of Comm'rs, 401 F.3d 274 (4th Cir. 2005) ("To "'make available" ordinarily means to "render" "suitable or ready for use.'").

[16] Under PPACA, the definition of the individuals who are eligible to participate in Exchanges is fairly broad. Under § 1311 of PPACA, Exchanges must make available qualified health plans to "qualified individuals" and "qualified employers. A ''qualified individual'' means, with respect to an Exchange, an individual who is seeking to enroll in a plan in the individual market offered through the Exchange, and resides in the state that established the Exchange. P.L. 111-148, § 1312(f). However, individuals who are incarcerated or are unlawful residents of the U.S. cannot be qualified individuals. *Id.*

On the other hand, it may be possible that the federal government could make coverage available in other ways besides providing a financial contribution, perhaps in terms of expanding eligibility, or implementing a health plan created by PPACA in such a way that grants access to Members of Congress and congressional staff. Because it is unclear which health plans, aside from Exchanges, are available under § 1312(d)(3)(D), it is difficult to analyze other ways that coverage could be made available to Members of Congress and staff. It seems that implementing authority could clarify issues surrounding an employer contribution under § 1312(d)(3)(D), and Congress could pass legislation to insure that contributions are provided, and at a particular level.

In light of § 1312(d)(3)(D) of PPACA, would the federal government be subject to the shared responsibility requirements under § 1513 of the Act?

Under § 1513 of PPACA, as amended, if an "applicable large employer"[17] fails to offer "minimum essential" health coverage[18] to its full-time employees (and their dependents) under an eligible employer-sponsored plan, and at least one of these employees enrolls in a qualified health plan under which a premium tax credit or cost-sharing reduction is allowed or paid for the employee, the employer can be subject to an assessable payment. Similarly, applicable large employers that offer minimum essential coverage but still have at least one employee who enrolls in a qualified health plan under which the premium tax credit or cost-sharing reduction is allowed or paid for the employee can also be subject to an assessable payment. The calculation for the assessable payments differs for employers that provide coverage, and employers that do not.[19] Thus, assuming that an individual subject to § 1312(d)(3)(D) would be eligible for a premium credit or cost-sharing reduction,[20] the question arises whether the federal government could be an employer for purposes of the shared responsibility requirements.[21]

In examining this issue, who is an "employer" and what is an "eligible employer-sponsored plan" in PPACA become important questions in evaluating whether the federal government may be subject to these employer responsibility requirements. While § 1513 of PPACA, as amended, generally defines an "applicable large employer" as an employer with an average of at least 50 full-time employees, the Act

[17] An "applicable large employer" as an employer who employed an average of at least 50 full-time employees on business days during the preceding year. See P.L. 111-148, §1513(a).

[18] "Minimum essential coverage," as defined in newly created section 5000A(f)(1) of the Internal Revenue Code, includes coverage under offered under an "eligible employer-sponsored plan." An eligible employer-sponsored plan means a group health plan or group health insurance coverage offered by an employer to the employee which is a governmental plan, or any other plan or coverage offered in the small or large group market within a state, including a grandfathered health plan offered in a group market. For general discussion of grandfathered health plans, see CRS Report R41166, *Grandfathered Health Plans Under PPACA (P.L. 111-148)*, by Bernadette Fernandez.

[19] For a general discussion of the employer responsibility requirements, see CRS Report R41159, *Summary of Potential Employer Penalties Under PPACA (P.L. 111-148)*, by Hinda Chaikind and Chris L. Peterson.

[20] In general, a premium tax credit is available for individuals with household incomes between 100 and 400 percent of the federal poverty level ("FPL") for the particular family size, and who do not received health insurance through an employer or a spouse's employer, subject to exceptions. Premium tax credits are only available for health coverage purchased through an Exchange. For a description of the premium credits, see CRS Report R41137, *Health Insurance Premium Credits Under PPACA (P.L. 111-148)*, by Chris L. Peterson and Thomas Gabe. It should also be noted that cost-sharing reductions, as provided in § 1402 of PPACA, are only available for the months in which an individual receives a premium tax credit.

[21] It should be noted that Members of Congress are not generally considered employed by Congress or the federal government. 2 U.S.C. § 60-1 (defining "Officer of the Congress" as distinct from "employee"). This memorandum does not address any potential issues surrounding how this status could affect the application of the employer responsibility requirements. Further, this memorandum only addresses whether the federal government could be subject to the employer responsibility requirements under §1513 of PPACA. Whether another entity (e.g., Congress, a particular Member's office) could be considered an employer for purposes of §1513 is beyond the scope of this memorandum.

provides no specific definition of the term "employer." However, § 1551 of PPACA, included within Title I of PPACA, generally provides that [u]nless specifically provided for otherwise, definitions contained in § 2791 of the Public Health Service Act (PHSA)[22] apply with respect to this title. The PHSA defines "employer," in relevant part, similarly to the Employee Retirement Income Security Act (ERISA) as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan."[23] An employee benefit plan, as defined by ERISA, includes welfare benefit plans, which are plans that, among other things, are "established or maintained by an employer … to the extent that such plan …provid[es] for its participants or their beneficiaries, through the purchase of insurance or otherwise … medical, surgical, or hospital care or benefits…." Accordingly, there appears to be nothing in these definitions that precludes the federal government from being considered an employer for purposes of the employer responsibility requirement.

Further, "eligible employer sponsored plan" is defined under §5000A(f)(2) of PPACA to mean a group health plan or group health insurance coverage offered by an employer to an employee and includes a governmental plan, as defined by the PHSA. Under the PHSA, a governmental plan includes a "federal governmental plan," one that is "established or maintained for its employees by the Government of the United States or by any agency or instrumentality of such Government." Assuming that whatever program or mechanism is established to provide health benefits under § 1312(d)(3)(D) is a governmental plan, the existence of this plan could bolster the argument that the federal government ought to be subject to the employer responsibility requirements.

On the other hand, it might be questioned whether the employer responsibility requirements would be interpreted to apply to the federal government since the effect of this provision would be the federal government taxing itself. Given this outcome, it is not clear that a court or agency examining the provision would interpret it to apply to the federal government as some might question the reasonableness of an interpretation that leads to the federal government taxing itself.[24] Except for employment taxes, we have found no example where an analogous federal tax has been imposed on the federal government.[25]

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[22] 42 U.S.C. § 300gg-91.

[23] An employee benefit plan, as defined under ERISA, means, in relevant part, an "employee welfare benefit plan." An employee welfare benefit plan means "any plan, fund, or program … established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise … medical, surgical, or hospital care or benefits [and other types of benefits]…." 29 U.S.C. § 1002(1).

[24] *See, .e.g.*, THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION, INCLUDES THE LAW OF LOCAL ASSESSMENTS, 130-31 (Callaghan and Co. 1876):

> Some things are always presumptively exempted from the operation of general tax laws, because it is reasonable to suppose they were not within the intent of the legislature in adopting them. A state may, if the legislature see fit, tax all the property owned by its municipal divisions; but to do so, would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed. It is always to be assumed that the general language of statues is made use of with reference to taxable subjects, and the property of municipalities is not in any proper sense taxable. It is therefore, by clear implication excluded. It is not, like government agencies, excluded from the power of tax laws, but it is beyond the grasp of their intent. [internal citations omitted].

[25] *Compare* Appeal of New York, Ontario & Western Railway Co., 1 B.T.A. 1172, 1182-83 (Board of Tax Appeals, May 21, 1925) (finding that while "it may be true" the federal government would not impose a tax on a government agency, that argument was irrelevant in interpreting a federal statute imposing an income tax on railway operating revenue received during the period the federal government controlled private railroads; the court found the statute did not actually impose a tax liability on the government agency, but rather was a "convenient method" to absolve the railroad companies from such tax liability as part of the compensation received for the government's taking of their property).

Furthermore, it should be noted that even if the federal government is found to be subject to the employer responsibility requirements, assessable payments may be avoided if no employees qualify for premium credits. Section 1401(c)(2)(C) of PPACA provides that an individual is ineligible for a premium assistance credit if the individual receives health insurance through an employer or a spouse's employer. However, an individual eligible for, but not enrolled in an employer-sponsored plan may still be eligible for premium credits if the employee's contribution to premiums exceed 9.5% of household income, or if the plan's payments cover less than 60% of total allowed costs of benefits provided under the plan, subject to additional exceptions.[26] Accordingly, even if the employer responsibility requirements apply to the federal government, no assessable payment would apply if, for example, pursuant to § 1312(d)(3)(D) of PPACA, a contribution is offered that exceeds 60% of the allowed costs for plan benefits.

Employer Responsibility Requirements of PPACA and State/Local Governments: Constitutional Issues

Some may also ask whether § 1513 of PPACA would apply to state and local governments with respect to the employment of state or local employees. As discussed above, with respect to application of the provision to the federal government in its capacity as an employer, the definitions of "employer," "eligible employer-sponsored plan," and "applicable large employer" do not expressly exclude state and local governments or health plans offered by those entities. Additionally, PPACA includes no specific definition of the term "employer" other than § 1551, which states that "[u]nless specifically provided for otherwise, definitions contained in the Public Health Service Act (PHSA) apply with respect to this title." In turn, the PHSA defines "employer" similarly to the Employee Retirement Income Security Act (ERISA) as any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan;[27] and includes a group or association of employers acting for an employer in such capacity, and includes only employers of two or more employees.

Furthermore, for purposes of the individual mandate, PPACA includes governmental plans, as defined under the PHSA, in its definition of an "eligible employer-sponsored plan." Under the PHSA, governmental plans include "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."[28] Therefore, as with the federal government, there appears to be nothing in the language of PPACA that precludes state or local governments from being considered employers for purposes of § 1513.

In light of the employer requirements created in § 1513 and the potential federal taxation of non-compliant employers, application of the employer mandate to state and local governments may face challenges alleging violations of the principle of federalism embodied in the Tenth Amendment and the doctrine of intergovernmental tax immunity. This section of the memorandum will first examine the

[26] P.L. 111-152, § 1001(a)(2), amending § 36B(c)(2)(C) of the Internal Revenue Code as created by § 1401 of PPACA. In years after 2014, the percentage of household income would be adjusted to reflect any percentage by which premium growth exceeded income growth.

[27] An employee benefit plan, as defined under ERISA, means, in relevant part, an "employee welfare benefit plan." An employee welfare benefit plan means "any plan, fund, or program … established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise … medical, surgical, or hospital care or benefits [and other types of benefits]…." 29 U.S.C. § 1002(1).

[28] 42 U.S.C. § 300gg-91(d)(8) (citing 29 U.S.C. § 1002(32)).

Court's history and jurisprudence related to these claims before providing an analysis of whether applying § 1513 to state and local governments would be unconstitutional.

Tenth Amendment

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[29] While this language would appear to represent one of the clearest examples of a federalist principle in the Constitution, the Supreme Court has been inconsistent in deciding how the Amendment limits Congress' ability, through the regulation of interstate commerce,[30] to influence the states' exercise of their own powers.

Following Congress' expansion of federal minimum wage and overtime standards to public employees in the latter half of the twentieth century, the Court initially declined to "carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens." But, beginning with its decision in *National League of Cities v. Usery*, the Court indicated that Congress could exceed its authority over interstate commerce if: (1) it regulated the "States as States;" (2) it "address[ed] matters that are indisputably attributes of state sovereignty;" (3) it directly impaired a state's ability "to structure integral operations in areas of traditional governmental functions;" and (4) the nature of the federal interest advanced did not justify the regulation.[31] However, the courts encountered difficulty defining "traditional governmental functions," resulting in inconsistent results.[32]

Within a decade, the Court's recognition of the Tenth Amendment as a judicially enforceable limit on Congress' power under the Commerce Clause had been significantly abrogated by the Court's subsequent decision in *Garcia v. San Antonio Metropolitan Transit Authority*.[33] In *Garcia*, a municipality-owned mass transit system challenged the application of federal minimum wage and overtime laws to itself. Overruling the Tenth Amendment's substantive limitation embodied in *National League of Cities v. Usery*, the Court held:

> the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy." ... [W]e perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision.[34]

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[29] U.S. CONST. Amend. X.

[30] U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[31] Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 287-88 and n. 29 (1981) (internal quotations omitted) (describing the holding in National League of Cities v. Usery, 426 U.S. 833 (1976), where the Court had struck down the application of the Fair Labor Standards Act to state and local public employees).

[32] *Compare* Amersbach v. City of Cleveland, 598 F.2d 1033, 1037-38 (6th Cir. 1979) (operating municipal airport is not a traditional government function) *with* Hughes Air Corp. v. Public Utilities Comm'n of Cal., 644 F.2d 1334, 1340-41 (9th Cir. 1981) (regulation of air transportation is a traditional governmental function).

[33] 469 U.S. 528 (1985) (concluding that the *National League of Cities* test for "integral operations" in areas of traditional governmental functions had proven impractical and the Court had "tried to repair what did not need repair").

[34] *Id.* at 554.

Consequently, in the absence of "possible failings in the national political process," the Court's decision in *Garcia* required states and local governments to look for relief from federal regulation under the Commerce Clause through the mechanics of the political process.

Commandeering

The Court's holding in *Garcia* indicates that for many challenges to federal regulation of state entities, the states' relief is to be sought in the political process. Nevertheless, the Court's decisions post-Garcia have recognized certain constitutional limits on the manner in which the federal government may influence the states' activities. Specifically, the Court has not looked favorably upon Congress's efforts to "commandeer" state legislative or executive branch powers to serve federal ends.[35] However, commandeering may not be present where federal law "does not require the States in their sovereign capacity to regulate their own citizens."[36]

At the same time, the Court has indicated that situations where "a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect."[37] Thus, in *South Carolina v. Baker*, the Court upheld a federal law requiring that state and local bonds be issued in a specific manner in order for the interest to be exempt from federal tax, reasoning it was indistinguishable from the type of federal regulation accorded deference under *Garcia*.[38]

Intergovernmental Tax Immunity

Furthermore, the Court has held that, implicit in the federalist structure provided under the Constitution, as represented by the Tenth Amendment, is the concept that the federal government is restricted in its ability to tax the states.[39] This principle is part of what is known as the intergovernmental tax immunity doctrine. The doctrine's other side, which is rooted primarily in the Supremacy Clause,[40] is that the states cannot tax the federal government.[41] Under the Supreme Court's modern jurisprudence interpreting the doctrine, the Constitution's restriction on the ability of the states to tax the federal government is stricter than that on the ability of the federal government to tax the states.[42] While the states are generally

[35] *See* New York v. United States, 505 U.S. 144 (1992) (striking down a federal law, which had required states to develop legislation on disposal of low-level radioactive waste generated within state or be forced to take title to it, because Congress had sought to "commandeer" the legislative process of the states in violation of the Tenth Amendment); Printz v. United States, 521 U.S. 898 (1997) (striking down a provision in the Brady Handgun Act requiring state and local law enforcement officers to conduct timely background checks on prospective handgun purchasers).

[36] Reno v. Condon, 528 U.S. 141, 151 (2000) (upholding generally applicable federal privacy law as applied to state motor vehicle databases).

[37] South Carolina v. Baker, 485 U.S. 505, 514-15 (1988).

[38] *See id.* at 513-15 (in upholding the federal bond registration requirement, the Court treated it as prohibiting the issuance of state bearer bonds even though the provision at issue only withdrew preferential tax treatment for bearer bonds).

[39] *See* New York v. United States, 326 U.S. 572, 575 (1946).

[40] U.S. CONST. Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[41] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

[42] *See Baker*, 485 U.S. at 523 and n.14.

prohibited from taxing the federal government without Congress' consent, the federal government may tax the states, within certain limits.[43]

The Court has not precisely enunciated the boundaries of these limits. Initially, the Court permitted the federal government to tax state activities that were "proprietary," but shielded those that were "governmental.[44] However, the Court subsequently moved away from this theory, describing it as "untenable."[45] The current standard used by the Court to determine constitutional limits on federal taxation of the states is not clear.

At a minimum, the federal tax must be nondiscriminatory. Whether there are additional limitations is uncertain. In *New York v. United States*, the seminal case in this area and decided in 1946, the Court upheld the imposition of a generally applicable federal tax on the sale of mineral spring water by the state. While six Justices upheld the nondiscriminatory tax, no opinion garnered a majority of the Justices' support. Two Justices seemed to suggest that a nondiscriminatory tax would generally be permissible,[46] while four Justices appeared to recognize a further limitation, stating that a nondiscriminatory tax could be unconstitutional if it "interfere[s] unduly with the State's performance of its sovereign functions of government."[47] These four Justices found the tax at issue to be constitutional because holding it to be immune would "accomplish a withdrawal from the taxing power of the nation a subject of taxation of a nature which has been traditionally within that power from the beginning." Since *New York*, it does not appear the Court has provided meaningful clarification with respect to the limits on direct federal taxation of the states.[48]

Analysis

Based on the Supreme Court's jurisprudence regarding the application of federal taxes and regulation to state interests, one may infer the following propositions. As described in *Garcia*, states must generally seek relief from federal regulation of state activities through the political process. However, this general rule might not apply to situations where a state has been singled out or politically isolated; where the federal government is attempting to commandeer the state's authority in order to regulate third persons; or where application of a federal tax to the states violates the doctrine of intergovernmental tax immunity.

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[43] In a now discredited line of cases, the Court early on had found the Constitution significantly restricted the federal government's ability to tax the states, even when the tax only indirectly fell on them. *See, e.g.*, Collector v. Day, 78 U.S. 113 (1871) (striking down a federal tax on the salary of state judicial officer*), overruled by* Graves v. O'Keefe, 306 U.S. 466 (1939).

[44] *See* Helvering v. Powers, 293 U.S. 214 (1934); South Carolina v. United States, 199 U.S. 437 (1905).

[45] *See* Baker, 485 U.S. at 523, n. 14 (explaining that all eight justices participating in *New York v. United States*, 326 U.S. 572 (1946), found the governmental/proprietary distinction to be "untenable").

[46] *See* New York, at 579-81, 583 (opinion of Frankfurter, J., joined by Rutledge, J.) ("There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State.").

[47] *See id.* at 587 (opinion of Stone, C.J., concurring, joined by Reed, Murphy, and Burton, JJ.).

[48] Since *New York*, the Court has upheld the power of Congress to indirectly tax the states and to require states to pay user fees. *See* South Carolina v. Baker, 485 U.S. 505, 523 (1988) (upholding a law requiring state and local bonds be issued in a certain manner in order to be exempt from federal tax, reasoning that the modern interpretation of the intergovernmental tax immunity doctrine permits such indirect taxation even if some financial burden falls on the state unless the tax is discriminatory); Massachusetts v. United States, 435 U.S. 444, 466-67 (1978) (upholding a federal charge imposed on a state when "the charges do not discriminate against state functions, are based on a fair approximation of the use of the system, and are structured to produce revenues that will not exceed the total cost to the Federal government of the benefits to be supplied …").

The Court has not explicated what it meant when it spoke of political isolation or a defective political process. Therefore, it may be difficult to determine whether those state and local governments that are subject to the employer mandate have been politically isolated or singled out in the manner referenced by the Court in *Garcia* and *Baker*.[49] Nonetheless, there is also nothing to suggest that this is a situation where "the national political process" is operating "in a defective manner" that would implicate the Tenth Amendment.[50]

Application of the employer mandate to state and local governments may face a challenge based on the Court's anti-commandeering jurisprudence.[51] One might make the argument that a state might be coerced into modifying the health insurance offered to its employees in order to avoid the employer mandate penalty. However, the Court in *Baker* expressly considered this type of commandeering to be indistinguishable from the type of federal regulation governed by the deference to the political process under *Garcia*.[52] If states have to modify or avoid transactions because of the provision, it would appear that relief for this would need to be sought through the political process, not the courts. Therefore, it seems unlikely that a court would find that the employer mandate presented a clear case of unconstitutional commandeering.

Finally, because the employer mandate is enforced through the Internal Revenue Code, issues of state immunity to federal taxation may also be raised by the employer mandate. Initially, it is worth noting that the employer mandate would not apply exclusively to state and local governments. A recurrent theme which one sees in the Tenth Amendment and intergovernmental tax immunity contexts is a disfavor of laws that specifically discriminate against states. In keeping with this theme, a court presented with this provision might rely upon its nondiscriminatory nature to find that it is constitutional.[53]

However, the Court's recent references to the *New York* case might suggest that some nondiscriminatory federal taxes which are collected directly from the states may still raise concerns about state immunity from federal taxation. The Court has not clearly enunciated a standard to answer this question. A court might potentially follow the lead of the four Justices in *New York* and find that taxation of states was allowed because to find otherwise would deny the federal government a "traditional" subject of federal taxation. In this case, determining whether the employer mandate penalty applies to a "traditional" subject of taxation would depend on how a court views Congress' power to regulate compensation in the employment context. However, it is not clear how this would be applied, as the Court provided no standards for making that determination other than noting without analysis that taxation of income derived from natural resources fell within that power, nor is it clear that a court would use this analysis.

Alternatively, a court might rely on the portion of the four-justice opinion in *New York* which stated that a nondiscriminatory federal tax may still be unconstitutional if it interfered with "the State's performance of

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[49] The precise extent to which the political process must fail in order to implicate the Tenth Amendment has not been fully delineated. As the Court noted in *Baker*, "*Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, [but] the Court in *Garcia* had no occasion to identify or define the defects that might lead to such invalidation. ... Nor do we attempt any definitive articulation here." *Baker*, 485 U.S. at 512.

[50] *Id.* at 513.

[51] *See* New York v. United States, 505 U.S. at 144; Printz v. United States, 521 U.S. at 898.

[52] *Baker*, 485 U.S. at 514-515 ("That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.").

[53] *See* Michigan v. United States, 40 F.3d 817, 823 (6th Cir. 1994) ("[W]e are confident that today's Supreme Court would say that Congress is free to impose a non-discriminatory tax on the investment income [of a state education trust] if it wants to.").

its sovereign functions." But, again, that opinion did not set forth a clear standard under which any such interference could be evaluated. Nevertheless, based on lower courts' use of this test, it is possible that a court would look at the extent to which the employer mandate imposes a burden upon a state's finances.[54] This analysis is necessarily a fact-specific inquiry, and without the ability to identify which states would be impacted, nor what the extent of that impact would be, any conclusions as to the unconstitutionality of the employer mandate under this standard would be premature.

[54] *See, e.g.*, California v. United States, 441 F. Supp. 21, 24 (E.D. Cal. 1977) (upholding a federal excise tax on all persons engaging in air travel, as applied to state officials and employees).