DEBATE

A HEALTHY DEBATE: THE CONSTITUTIONALITY OF AN INDIVIDUAL MANDATE

Health care reform has been and continues to be one of the highest priorities in the Obama Administration's domestic agenda. The proposals for reform played a major role in the debates leading up to President Obama's election and currently dominate the Administration's and Congress's domestic activities. While most policymakers seemingly agree that reform is necessary, there is much disagreement about the particulars of the appropriate reform. One of the more contested features is the so-called individual mandate—a federal requirement that every American possess a certain level of health insurance.

In *A Healthy Debate*, David Rivkin and Lee Casey debate Professor Jack Balkin over the constitutionality of such a mandate. In their Opening Statement, Rivkin and Casey argue that if Congress has the power to reform the health care system, it must be found in the Commerce Clause. After examining the Supreme Court's modern Commerce Clause jurisprudence, Rivkin and Casey conclude that the mandate is even less defensible than the laws struck down in *United States v. Morrison* and *United States v. Lopez*. Nor can the mandate be based on the Taxing and Spending Clause because Congress cannot use a tax to regulate conduct that is otherwise indisputably beyond its regulatory power.

In his Rebuttal, Balkin disagrees on both points. Examining the bill passed by the House on November 7, 2009, Balkin argues that, irrespective of the Commerce Clause, the mandate is a bona fide tax that is within Congress's powers to tax and spend for the general welfare. Moreover, Congress could also pass a mandate under the Commerce Clause because the practices of individuals without health insurance—such as substitution of emergency room services and over-the-counter health remedies—cumulatively and substantially affect interstate commerce.

OPENING STATEMENT

Health Care Purchase Mandate: Unconstitutional and Likely to Be Struck Down by the Courts

David B. Rivkin, Jr. & Lee A. Casey†

As the health care reform legislation is making its way through Congress, one of its more controversial and hotly contested features is a new federal requirement that each and every American possess a certain kind of health insurance featuring a comprehensive coverage. This mandate is the only way to ensure that the young and healthy (i.e., those who most often choose to go without insurance) are brought within the overall system so that they can cross-subsidize the elderly and less healthy. Reflecting its centrality, such an individual mandate has been a hardy perennial of proposed health care reforms, including the "Hillarycare" proposal that was considered, but not enacted, during the Clinton Administration. President Obama defended the mandate's merits in his recent address to Congress, claiming that uninsured people still use medical services and those costs are, ultimately, borne by everyone else.

But the reality is far different. While many of the uninsured use emergency rooms in lieu of primary physicians, many others are young people who choose not to buy insurance precisely because they do not expect to use medical care much—and usually they don't. To the extent that they do, they pay full freight, often at rates higher than would have been paid by insurance companies, thereby actually subsidizing the insured Americans. In addition, many Americans choose to self-insure up to a certain amount, purchasing a more affordable "catastrophic" coverage policy rather than opting for a far more expensive comprehensive policy. These people also fully pay for their health care "footprint" and do not inflict any costs on Americans with the more expensive comprehensive-type coverage or the society as a whole.

The mandate's real justifications are far more cynical and political. Making healthy young adults pay billions of dollars in premiums into the national health care market is the only way to fund universal

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† Messrs Rivkin and Casey are partners in the Washington, DC office of Baker & Hostetler LLP and served in the Justice Department during the Administrations of Ronald Reagan and George H.W. Bush. They have published recent op-eds in the *Washington Post* and the *Wall Street Journal* about the constitutional problems associated with the currently pending congressional health care reform proposals.

coverage without raising substantial new taxes beyond the heavy additional levees already featured in the health care reform proposals. In effect, this mandate would be one more giant cross-generational subsidy imposed on generations who will already be stuck with the bill for the federal government's profligate spending sprees.

Politically, the mandate is essential in gaining insurance-industry support to ease the passage of the reform legislation. It would drive millions of new customers into insurance company arms—a key reason why they have been prepared to accept heavy new federal regulations or, at least, have greatly muted their opposition. Indeed, according to media reports, the recent decision by the insurance industry to begin attacking the Obama Administration's health care reform proposals was prompted by the fact that the Finance Committee bill reduced the amount of fines to be paid by those Americans who fail to comply with the insurance-purchase mandate, thereby making it more likely that millions of Americans would prefer to pay the fines—which do not go into the insurance companies' coffers—rather than pay the premiums. Ceci Connolly, *Insurance Dispute Heats Up Before Vote*, WASH. POST, Oct. 13, 2009, at A4. Moreover, without the mandate, the entire thrust of the Obama Administration's proposed regulatory scheme would produce utterly dysfunctional consequences. If, as the legislation requires, insurance companies cannot deny coverage for preexisting conditions and the difference in premiums between the old and the young is greatly reduced, it would make no sense for anyone to buy health coverage before they actually got sick and needed it.

The elephant in the room during all of this, of course, is the Constitution. As every Civics instructor used to teach, the federal government is a government of limited and enumerated powers, with the States retaining far broader regulatory authority. This vertical separation of powers, coupled with the horizontal division of authority among the three branches of the federal government, far from being some archaic eighteenth century whimsy, was intended to act as the principle means of ensuring that no single government entity wields too much power. Indeed, the Framers viewed these structural limitations on governmental power as a far more important source of protection for individual liberty than the nowadays oft-exalted Bill of Rights provisions. *See* Lawrence J. Block & David B. Rivkin Jr., *Auxiliary Precaution: The Bill of Rights Is Not the Constitution's Most Important Safeguard of Liberty*, POL'Y REV., Winter 1990, at 68.

This is not some obsolete proposition but something that is very much *au courant* with today's most progressive constitutional thinking. We were vividly reminded of this fact recently when one of the authors of this Debate was at Yale Law School debating the merits of the *Kiyemba* case in which a district court judge commanded the federal government to bring the Uighur detainees from Guantanamo into the United States and release them. *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 43 (D.D.C. 2008). In preparation for this debate, we reread the Supreme Court's 2008 *Boumediene* decision, which extended habeas corpus to Guantanamo detainees. *Boumediene v. Bush*, No. 06-1195, slip op. at 1 (U.S. June 12, 2008).

This decision, which is widely hailed by legal progressives, is replete with paeans to the separation of powers and lamentations that any undue concentration of power in the hands of a single branch is a dire threat to liberty. Significantly, because the *Boumediene* decision struck down the key provision of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 [hereinafter MCA], which was brought into existence by the two political branches, the Court in that case was not only lamenting Executive Branch power aggrandizement but was commenting generally on the liberty-threatening implications of the unconstitutional power aggrandizement by both political branches.

While we strongly disagree with the *Boumediene* decision because the MCA does not effect an unconstitutional suspension of habeas corpus, *see* David B. Rivkin, Jr. & Lee A. Casey, *McCain Is Right, High Court Was Wrong*, WASH. TIMES, June 26, 2008, at A25, *available at* 2008 WLNR 12029292, the notion that the judiciary needs to scrutinize congressional enactments to ensure that they do not exceed Congress's enumerated powers is both legitimate and venerable. Indeed, even a casual perusal of the Federalist Papers and the constitutional convention debates demonstrates beyond peradventure that the Framers considered Congress to be the most dangerous branch of government and were most concerned about congressional power aggrandizement.

Accordingly, James Madison emphasized the importance of limiting the lawmaking powers of the federal government in the Federalist Papers: "In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects . . . ." THE FEDERALIST NO. 14, at 97 (James Madison) (Clinton Rossiter ed., 1999). Congress, in other words, cannot regulate simply because it sees a problem to be fixed. Each and every federal law, whether reforming health care or building a new interstate highway, must be grounded in one of the specific grants of authority found in the Constitution.

These are mostly found in Article I, Section 8, which gives Congress—among other things—the power to lay and collect taxes, coin, borrow and spend money, raise and support armies, declare war, punish counterfeiting, establish federal courts and post offices, and to regulate interstate commerce. Over the years, it is this last authority that has been used—in one way or another—to support most features of the elaborate federal regulatory system. If the federal government has any right to reform, revise, or remake the American health care system (without simply paying for it out of the federal treasury), it must be found in this all important provision, and this is especially true of any mandate that every American obtain health care insurance or face a penalty.

Congress's commerce power has had its ups and downs. For much of the nineteenth and early twentieth centuries, the Supreme Court interpreted this clause narrowly to encompass economic activities that entailed crossing state lines or involved the "instrumentalities" of interstate commerce, such as railroads. *See The Shreveport Rate Cases*, 234 U.S. 342 (1914); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). However, as the federal regulatory state grew in the 1930s and 1940s and as the American economy became more and more integrated and complex, the Court construed this power more broadly so that Congress could regulate even entirely local economic activities that "substantial[ly]" affect interstate commerce.

This was the teaching of *Wickard v. Filburn*, in which the Supreme Court upheld a federal law regulating the national wheat markets. 317 U.S. 111, 125 (1942). The law was drawn so broadly that wheat grown for consumption on individual farms (primarily by livestock) was also regulated. Even though this rule reached purely local (rather than interstate) economic activity, the Court reasoned that the consumption of homegrown wheat by individual farms would, in the aggregate, have a substantial economic effect on interstate commerce and was therefore within Congress's reach.

As the Justices explained in *Gonzales v. Raich*, the most recent Commerce Clause case, federal regulation is permissible so long as there is a rational basis to believe that "activities, taken in the aggregate, substantially affect interstate commerce." 545 U.S. 1, 22 (2005). To summarize, under the current, most cutting-edge Commerce Clause jurisprudence, Congress can regulate a virtually infinite variety of inter- and intrastate economic activities, particularly if the latter are being reached as part of a comprehensive regulatory scheme directed at the regulation of interstate commerce or instrumentalities thereof.

This proposition is well articulated in Justice Scalia's concurring opinion in *Gonzales v. Raich*, where he noted that

> the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

Id. at 34-35 (Scalia, J., concurring in the judgment).

But even the Commerce Clause has limits and these continue to be policed by the Supreme Court. In *United States v. Lopez*, for example, the Court invalidated the Gun-Free School Zones Act of 1990 because that law simply made it a crime to possess a gun near a school. 514 U.S. 549, 567-68 (1995). As explained by the *Raich* Court, it did not "regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity." *Raich*, 545 U.S. at 23. Five years later, in *United States v. Morrison*, the Supreme Court struck down on the same grounds a portion of the Violence Against Women Act of 1994, which established at the federal level a civil liability scheme for gender-based violent crimes. 529 U.S. 598, 602 (2000).

The proponents of the individual-purchase mandate try to minimize the significance of *Lopez* and *Morrison* by arguing that "[e]ach of these limiting cases, though, is restricted to criminal laws that address noneconomic activity." MARK A. HALL, O'NEILL INST. FOR NAT'L AND GLOBAL HEALTH LAW AT GEORGETOWN UNIV., LEGAL SOLUTIONS IN HEALTH REFORM: THE CONSTITUTIONALITY OF MANDATES TO PURCHASE HEALTH INSURANCE 5 (2009), *available at* http://www.law.georgetown.edu/oneillinstitute/projects/reform/Papers/Individual_Mandates.pdf. This claim, however, is totally at odds with both the details and the broad thrust of the Court's *Lopez* and *Morrison* opinions. With regard to the former, the real reason the majorities in *Lopez* and *Morrison* struck down the congressional enactments at issue is because Congress sought to regulate certain types of activities—carrying guns near schools or committing gender-based violent crimes—that were inherently noneconomic in nature but, through a chain of predicted consequences, could be argued to have an impact on commerce.

In this regard, it is useful to reflect on the fact that in *Raich*, the congressional mandate was also enforced through a criminal statute. This did not bother the Court at all, since the underlying conduct—

growing, storing and consuming marijuana—was a quintessentially economic activity (no different from growing any other crop), albeit local in nature, and Congress had legitimately sought to regulate the interstate market in certain substances (of which marijuana was one).

At the more fundamental level, the *Lopez* and *Morrison* decisions were driven by the Court's powerfully articulated concern that there must be a meaningful limiting factor associated with Congress's utilization of the Commerce Clause. Otherwise, the whole concept of the federal government being a government of enumerated and limited powers goes out the window. Justice Kennedy's concurring opinion in *Lopez* was particularly emphatic about the need to preserve our vertical separation of powers scheme, in which States were meant to possess a set of distinctive and viable powers that could not be trampled by the federal government. *See Lopez*, 514 U.S. at 568 (Kennedy, J., concurring). To the extent that an infinitely elastic Commerce Clause would serve as the font of unlimited federal authority, when coupled with the Supremacy Clause, it would rob States of any independent power and turn them into mere agents of the federal government.

Of course, what Congress is contemplating with regard to a health care mandate is even less defensible under a Commerce Clause analysis than what it sought to do in the Gun-Free School Zones Act of 1990 or the Violence Against Women Act of 1994, both of which, after all, purported to regulate noneconomic activities that were nevertheless freely engaged in by individuals. By contrast, the health care mandate would not regulate any "activity" at all. Rather, it features an affirmative federal command that parties engage in a particular commercial activity—i.e., a purchase of insurance. It is imposed not because an individual engaged in any particular profession or employment, even so much as growing pot in the bathroom. This regulation would apply to every American simply because they exist.

Significantly, even the Congressional Research Service (CRS), an entity that traditionally and institutionally takes the most permissive view of Article I powers, when asked by the Senate Finance Committee to opine on whether the Constitution allows Congress to impose this type of a mandate, came up with the most lukewarm of answers, indicating that "[w]hether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service." CONG. RESEARCH SERV., REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS 3 (2009), *available at* http://assets.opencrs.com/rpts/R40725_20090724.pdf. While we have never worked for the CRS, we know from experience in the Executive Branch, both at the Department of Justice (DOJ) and the White House Counsel's Office, that when the Office of Legal Counsel, a highly respected DOJ component, in response to the question of whether or not a given approach is constitutional, tells you that it is a novel issue, it sure is not a green light.

Of course, like Lewis Carroll's Red Queen insisting that some hills could be valleys, Congress has attempted to avoid this inevitable conclusion by framing its mandate as a "tax," such that anyone who is not enrolled in an acceptable insurance plan must pay a penalty to the IRS. One amusing detail is worth mentioning here—President Obama, in a recent interview with George Stephanopoulos, heatedly denied that the healthcare mandate is enforced through a tax mechanism, calling it merely a "fine." In any case, whether one calls the payment mechanism contained in the Finance Committee bill a tax or a fine, Congress cannot so simply avoid the constitutional proscriptions on its power. Otherwise, it could evade all of the constitutional limits on its authority by simply imposing "taxes" whenever any individual or entity fails to follow a prescribed course of action.

Significantly, the Supreme Court has rejected such bald-face congressional expedients in the past. In one early leading case, *Bailey v. Drexel Furniture Co.* (*Child Labor Tax Case*), 259 U.S. 20 (1922), the Supreme Court ruled that Congress could not impose a "tax" in order to penalize conduct (the utilization of child labor) that it could not regulate under the Commerce Clause. Although the Court's interpretation of the Commerce Clause's breadth certainly has changed since that time, it has not repudiated the fundamental principle that Congress cannot use a tax to regulate conduct that is otherwise indisputably beyond its regulatory power.

It is worth reemphasizing that the problem with basing the mandate on Congress's taxing power is not that such power cannot be used in a regulatory fashion; indeed, the Court has specifically authorized taxing schemes with regulatory effects. *See, e.g.*, *Sonzinsky v. United States*, 300 U.S. 506 (1937). The problem is that this particular regulatory scheme—the health insurance-purchase mandate—exceeds Congress's regulatory power. The view expressed by Mark Hall that "challenges to tax laws succeed only when taxes directly or intentionally burden the exercise of fundamental rights," HALL, *supra*, at 7, reveals the same inability to comprehend that the Constitution inherently limits the reach of the Taxing and Spending Clause, just as it does the Commerce Clause, and that exertions of congressional power that exceed the proper scope of these clauses are void. The fact that they may not violate any provisions of the Bill of Rights is irrelevant.

As important as some type of health care "reform" may be, this type of congressional trickery is bad for our democracy's health, with implications far transcending the health care system. If Congress can mandate the purchase of health care insurance, it can similarly impose, under the Commerce Clause guise, an infinite array of other mandates, ranging from health club memberships to a requirement to consume a given quantity of fruits and vegetables annually. This power to direct the use of people's resources, combined with the fact that the government's taxing and spending powers already transfer a large amount of resources away from the private sector and into the public channels, would turn everybody into a ward of the state, unable to exercise individual choices. It would also turn the federal government into a sovereign exercising general police powers and deprive the States of any independent sovereign authority. This arrangement would completely warp our constitutional system.

REBUTTAL

The Constitutionality of an Individual Mandate for Health Insurance

Jack M. Balkin[†]

Can the American people, acting through their democratically elected representatives, require adults to purchase health insurance for themselves and their families as part of a comprehensive health care program?

Yes, we can.

Both House and Senate proposals for health care reform contain versions of an individual mandate. In this discussion, I will use the version that the House passed on November 7, 2009.

House Bill 3296 imposes an individual mandate through the exercise of Congress's taxing and spending powers. Section 501 imposes a tax of 2.5% on income if a taxpayer is not part of a qualified health insurance program. Affordable Health Care for America, H.R. 3296, 111th Cong. § 501 (2009). The bill exempts many categories of people from the tax, including Medicare and Medicaid recipients, members of the armed forces who receive medical benefits, and persons already insured by their employers. *Id.* § 501(a). There is even an exemption for religious objectors. *Id.*

Section 501 is a constitutional exercise of Congress's power to tax and spend for the general welfare. Congress acts within its constitutional powers when it raises revenue through taxation and redistributes it to serve the general welfare, and Congress has wide discretion to decide which taxes and expenditures serve the general welfare. *See Helvering v. Davis*, 301 U.S. 619, 640 (1937). There can be no doubt that House Bill 3296 is within Congress's powers under the General Welfare Clause. Promoting a healthy populace, expanding access to health insurance, and preventing members of the public from being driven into poverty by medical costs surely count as contributions to the general welfare.

The individual mandate is part of a comprehensive health care reform proposal that includes employer mandates for coverage, offers numerous tax credits and tax deductions to small businesses and indi-

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[†] Knight Professor of Constitutional Law and the First Amendment, Yale Law School.

viduals to allow them to purchase health insurance, expands Medicaid to include more Americans who cannot afford insurance, and reforms insurance practices such as denials of insurance for preexisting conditions. Each of these reforms costs the government money either in extra expenditures or in foregone tax revenues.

House Bill 3296's tax on uninsured persons helps recoup some of these costs and raises revenues for the government to pay for its new programs. Conversely, it releases uninsured persons from the obligation to pay the tax if they purchase health insurance because doing so lowers the government's costs and imposes fewer social costs that must be paid for through other government programs.

Individuals who fail to insure (for example, because they are young or healthy) raise the costs of the proposed government program and impose costs on the health care system in several different ways. First, by removing themselves from the risk pool, they raise premium rates for others in the pool. Their absence increases the costs of premiums for employers under the employer mandate. These costs are either absorbed by employers, thereby reducing profits, or are passed on to their employees. Either result may reduce total income and produce lower tax revenues for the government.

Second, uninsured persons tend to wait until their health problems are severe and then use emergency services. Uninsured persons who fail to seek regular medical treatment may also contract communicable diseases (which they may give to others) or become disabled. All of these costs are either passed along to others—in the form of higher premiums and higher costs for hospitals and insurers—or absorbed by federal and state governments through programs for the poor or the disabled.

Congress may tax cigarettes or alcohol to raise revenue for public highway construction, and it may tax income from all sources in order to raise money for national defense. A fortiori, Congress is entitled to raise revenues from persons whose actions specifically contribute to a social problem that Congress seeks to remedy through new government programs. That is why, for example, Congress may raise revenues for environmental programs by taxing polluters or persons who fail to invest in pollution control equipment.

One might object that Congress lacks the power to tax where the tax is not a genuine device for raising revenue but merely an attempt to regulate conduct that Congress is otherwise forbidden from regulating under the Constitution.

This argument fails for two reasons. First, as noted above, the tax on uninsured persons *is* a genuine revenue-raising device. It helps to pay some of the costs of comprehensive public health reform that includes an expansion of Medicaid, reform of insurance practices, and an employer mandate.

Second, the Supreme Court has made clear that a tax with regulatory purposes will not be held unconstitutional when the tax on its face seeks to raise revenue:

> Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect, and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed.

Sonzinsky v. United States, 300 U.S. 506, 513 (1937) (citations omitted). The point was made even more forcefully in *United States v. Sanchez*:

> It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. The principle applies even though the revenue obtained is obviously negligible, or the revenue purpose of the tax may be secondary. Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate.

340 U.S. 42, 44 (1950) (citations omitted). Given long-settled legal principles, House Bill 3296 is clearly constitutional.

To avoid the force of several decades of precedents, David Rivkin and Lee Casey cite *Bailey v. Drexel Furniture Co.* (*Child Labor Tax Case*), 259 U.S. 20 (1922), a decision from the *Lochner* Era in which the Court struck down a tax on goods manufactured using child labor. The tax was passed after the Court had held in *Hammer v. Dagenhart* that Congress could not regulate child labor under its commerce power. 247 U.S. 251, 276-77 (1918). (*Hammer v. Dagenhart*, a symbol of the discredited *Lochner*-era jurisprudence, was explicitly overturned in 1941 in *United States v. Darby*, 312 U.S. 100, 116 (1941)).

Although *Bailey* itself has never been formally overruled, the same is true of many *Lochner*-era precedents. Since 1937, however, the Supreme Court has repeatedly refused to invalidate taxes on the grounds that Congress has used the taxing power to regulate conduct. *See, e.g.*, *United States v. Kahriger*, 345 U.S. 22, 30-32 (1953), *overruled on other grounds by Marchetti v. United States*, 390 U.S. 39, 41-42 (1968); *Sanchez*, 340 U.S. at 44; *Sonzinsky*, 300 U.S. at 513; *see also Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974) (recognizing the abandonment of the pre-1937 jurisprudence that sought to distinguish between "regulatory and revenue-raising taxes"). If there is anything left of *Bailey* today, it now stands for the unremarkable proposition that Congress may not use the taxing power for punitive purposes and may not impose taxes that are criminal punishments by another name, *see, e.g.*, *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 779 (1994), or taxes that violate the Bill of Rights, *see, e.g.*, *Marchetti*, 390 U.S. at 44 (constitutional prohibition against self-incrimination).

The individual mandate, however, is not a punishment. It is an incentive to purchase health insurance; the obligation to pay the tax dissolves when the formerly uninsured person purchases insurance, which helps lower the total cost of the program. If taxes that act as incentives to engage in socially desirable behavior and reduce the costs of government programs are unconstitutional, much of our tax system would be constitutionally suspect.

The individual mandate, in short, is but one in a long line of government programs that simultaneously raise revenue and serve a regulatory purpose by deterring conduct that Congress thinks is socially undesirable or creates negative externalities. If Rivkin and Casey would like to argue for a radical restructuring of our post-1937 taxing jurisprudence, they are certainly welcome to try. If they wish to contend that the mandate is unconstitutional under existing law, however, their arguments will likely prove unavailing.

The arguments for Congress's power to pass health insurance reform under the General Welfare Clause are conclusive. However, because Rivkin and Casey devote most of their discussion to the commerce power, I will discuss these issues as well.

Rivkin and Casey emphasize the Commerce Clause because they appear to believe that Congress may not tax activity that it cannot regulate under its commerce power. This is incorrect. Congress's powers to regulate conduct through taxation and spending under the General Welfare Clause are not limited to those forms of regulation otherwise permissible under the Commerce Clause, as long as the taxation raises revenue and the spending is for the promotion of the general welfare. *See, e.g.*, *Sanchez*, 340 U.S. at 44 (stating that a tax does not become unconstitutional "because it touches on activities which Congress might not otherwise regulate"); *Helvering*, 301 U.S. at 640 (noting acceptance of Hamiltonian theory of General Welfare Clause) .

Congress can often do through taxation or conditional spending what it cannot do directly under the commerce power. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 167-78 (1992) (upholding regulation of states through conditional spending while striking down regulations purportedly passed under the commerce power). Whether or not the commerce power reaches "traditionally" local subjects like family law, *see United States v. Morrison*, 529 U.S. 598, 615-16 (2000); *United States v. Lopez*, 514 U.S. 549, 564-65 (1995), Congress routinely regulates family life and family formation through tax law, welfare law, and Social Security law. Despite *Lopez*, Congress could withhold federal subsidies or offer tax advantages to schools—and businesses within 1000 feet of schools—that agree to ban possession of guns; and it could give federal dollars to states and local governments that agree to pass laws identical to the law struck down in *Morrison*.

In any case, although Congress has chosen to use its powers under the General Welfare Clause, Congress could also pass an individual mandate through its powers under the Commerce Clause.

Congress may regulate economic activity that has a cumulative and substantial effect on interstate commerce. *See Wickard v. Filburn*, 317 U.S. 111, 117 (1942); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 121-22 (1942); *Darby*, 312 U.S. at 118-24. Congress may also regulate local behavior when doing so is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gonzales v. Raich*, 545 U.S. 1, 23-24 (2005) (quoting *Lopez*, 514 U.S. at 561). Indeed, as Justice Scalia has explained, "Congress may regulate even *noneconomic local activity* if that regulation is a necessary part of a more general regulation of interstate commerce." *Gonzales v. Raich*, 545 U.S. at 37 (Scalia, J., concurring in the judgment) (emphasis added).

The individual mandate in House Bill 3296 does not require all Americans to purchase insurance. It exempts persons who are dependents, persons who live overseas, and persons who already have health insurance (purchased by themselves or through their employer) that meets the government's requirements. H.R. 3296 § 501(a). It further exempts persons who are already receiving government-subsidized insurance or government-provided health care because they are poor, disabled, unemployed, or are members of military families. *Id.* Thus, the question is whether Congress, acting under its commerce power, may require the remainder of the adult population to purchase health insurance.

This remainder includes three classes of persons. The first class consists of adults who are employed or self-employed. The second class consists of persons who are not currently employed but have purchased inadequate health insurance, including insurance for catastrophic injury. The third class consists of persons who are unemployed adults, who are not the dependents of any other person, who are not receiving subsidies because of disability, who are not old enough to be eligible for Medicare, who have sufficient financial resources that they are not eligible for Medicaid, and who have purchased no health insurance at all.

Congress can clearly require employed and self-employed persons to purchase health insurance because their employment constitutes economic activity that is either interstate commerce or cumulatively has a substantial effect on interstate commerce. *See Raich*, 545 U.S. at 23-24; *Wickard*, 317 U.S. at 117; *Darby*, 312 U.S. at 118-24.

Congress can also require persons who have elected to purchase health insurance or catastrophic injury insurance to purchase insurance that is adequate by government standards. Insurance contracts are articles of commerce and affect interstate commerce. *See United States v. S.E. Underwriters Ass'n*, 322 U.S. 533, 553 (1944). The purchase of inadequate health insurance affects interstate commerce because it adversely impacts the risk pools for insurance, driving up costs and premiums for insurers and insureds nationwide. Moreover, under its powers to tax and spend for the general welfare, Congress can also require any person who accepts any government subsidy for health insurance or any related form of insurance—including a direct grant, a tax credit, or a tax deduction—to purchase a government-approved health insurance policy. Such conditional spending requirements are familiar and constitutionally unremarkable, particularly where there is a close nexus between the purpose of the requirement and the purpose of the government subsidy.

The remaining persons have attempted to save money by refusing to purchase any health insurance at all, presumably to conserve their income for savings or for other expenditures. Either their behavior is economic activity or it is noneconomic activity. If it is economic activity, it clearly affects risk pools nationwide, drives up costs for insurers and insureds, and has a substantial cumulative effect on interstate commerce. Therefore, Congress may reach it under the Commerce Clause. If it is labeled noneconomic activity, it still has the same powerful economic effects. Indeed, without an individual mandate that pushes uninsured persons into the risk pool, health insurance reform may not succeed, as Rivkin and Casey themselves point out. Therefore, Congress may regulate this purportedly noneconomic behavior as part of a comprehensive scheme of health insurance reform because doing so is "'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Raich,* at 545 U.S. at 23-24 (quoting *Lopez*, 514 U.S. at 561); see also *id.* at 36-37 (Scalia, J., concurring in the judgment).

From an economic standpoint, the failure to purchase health insurance is a method of self-insurance. Although, as noted above, Congress may regulate it whether we label it economic or noneconomic activity, there is a strong argument that it is economic activity, for two reasons. First, the decision to self-insure (i.e., not to purchase insurance) is part of a larger set of individual budgetary calculations about consumption and employment choices. Second, uninsured persons substitute the purchase and use of emergency medical services and over-the-counter health remedies, which is clearly economic activity under *Raich* and cumulatively affects interstate commerce. (Moreover, these services and remedies use or consist of goods and services that travel interstate.) Congress can surely regulate persons who use and purchase emergency services and over-the-counter health remedies because of their cumulative effects on interstate commerce; therefore, if it chooses, it may also require them to purchase health insurance, especially as part of a comprehensive regulatory scheme.

In sum, Congress can create an individual mandate under either its powers to tax and spend for the general welfare or its powers to regulate commerce among the several states. Whether or not such a law is wise, the people's representatives have the constitutional authority to enact it. What was said during the constitutional struggle over the New Deal is still true today: for objectionable social and economic legislation, however ill-considered, "appeal lies not to the courts but to the ballot and to the processes of democratic government." *United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J., dissenting).

CLOSING STATEMENT

Heath Insurance Purchase Tax: A Mandate by Any Other Name Is Still a Mandate

David B. Rivkin, Jr. & Lee A. Casey

Professor Balkin and we obviously disagree about some fundamental constitutional issues. To help illuminate these disagreements, it would be useful to clarify a couple of points. First, the fact that the health care legislation would be enacted through the normal workings of our political system—a point that Professor Balkin highlights in his Rebuttal—is of no special constitutional significance. Indeed, the whole point of the Constitution is that it limits what can be done by the democratically elected representatives of the American people.

Second, Professor Balkin focused on the provisions of House Bill 3296, Affordable Health Care for America Act, H.R. 3296, 111th Cong. (2009), the bill passed by the House, while we were focused on aspects of the key Senate proposal, Senate Bill 1796, America's Healthy Future Act of 2009, S. 1796, 111th Cong. (2009), passed by the Senate Finance Committee. We did so because Senate passage of any health care reform is a much more difficult undertaking than House passage; accordingly, it is the Senate's policy preferences that are likely to shape the final bill. The Senate bill features an *explicit* mandate, directing individuals to purchase insurance (it also has a tax-penalty provision for individuals who do not comply with the mandate), S. 1796 § 1301; House Bill 3296 does not contain such a mandate requirement and uses what purports to be a tax mechanism to force individuals to purchase insurance, H.R. 3296 § 501.

Focusing on the Senate approach, our Opening Statement considered first and foremost the constitutionality of such a mandate, which can only be rooted in the Commerce Clause. In this regard, we would hope that Professor Balkin can agree with us that any legislative language that directly mandates health insurance purchase by individuals can be supported, if at all, only by the Commerce Clause. Stated differently, even if the taxing mechanism, which purports to enforce such a mandate, is found to be constitutional (and, as described below, we do not believe this to be the case), it does not remedy the constitutional defects of the mandate itself. With these points in mind, we can now respond to Professor Balkin's constitutional arguments.

As far as Professor Balkin's tax-and-spend argument is concerned, the problem is not that section 501 seeks to effect a regulatory scheme—this by itself is not necessarily troubling—or that forcing individuals to purchase government-proscribed insurance coverage would not be beneficial to the cause of "health care reform" that the Obama Administration favors. To be sure, while this point is not critical to our constitutional arguments, we find jarring (to put it mildly) Professor Balkin's claim that the absence of young and healthy individuals from the insurance pool imposes costs on persons who choose to be insured. There are, of course, many cases where conduct by one party imposes costs on others. For example, when a manufacturing operation produces pollution but does not pay for it, the costs thereof are borne by society as a whole. Economists describe these imposed costs as externalities.

In an insurance pool in which young and healthy people are underrepresented, however, the premiums paid by the participating parties accurately reflect the underlying costs and risks. The uninsured, unlike the case with the pollution-producing manufacturing operation, do not impose any extra costs on the members of the pool. They simply refuse to subsidize the pool members. Equating a failure to subsidize with the imposition of a cost is illegitimate. It is essentially akin to claiming that a healthy person who refuses to donate one of his kidneys to a person dying of kidney failure is breaching some legal duty to that person. The reluctant kidney donor may be selfish, even churlish, but no more.

Our concern with section 501 of House Bill 3296 is that it is not a valid exercise of Congress's Article I, Section 8, Clause 1 authority. In this regard, while subsection (a) purports to impose a 2.5% tax on a baseline, derived from a taxpayer's income, it also states that "[t]he tax imposed under subsection (a) with respect to any taxpayer for any taxable year shall not exceed the applicable national average premium for such taxable year." H.R. 3296 § 501(a). For many taxpayers, the tax bite imposed by section 501 would be measured by the annual cost of a qualifying health insurance plan and would have absolutely nothing to do with their incomes. Since the real goal here is to force the uninsured to pony up a certain amount of money comparable to the cost of purchasing a government-favored insurance package, this is not particularly surprising.

This scheme, however, runs afoul of Article I, Section 9, Clause 4 of the Constitution, which bars the imposition of direct taxes by the federal government unless apportioned among the States. It bears emphasizing that the Supreme Court has consistently taken a broad view of what constitutes "direct taxes," holding that they encompass many different types of levies. For example, in *Pollock v. Farmers' Loan & Trust Co.*, the Court struck down an unapportioned federal income tax as a direct tax. 158 U.S. 601, 635 (1895). In the 1934 case *Helvering v. Independent Life Insurance Co.*, the Court indicated that a tax on the value of real estate is properly classifiable as a direct tax and, hence, is unconstitutional. 292 U.S. 371, 381 (1934). While these are admittedly old cases, there are no superseding judicial doctrines that would cast doubt on their continued validity. Indeed, it took the passage of the Sixteenth Amendment to cure this problem, but that amendment only allows the federal government to levy unapportioned direct taxes on *income*. U.S. CONST. amend. XVI.

Accordingly, any nonincome tax imposed by the federal government on individuals is a direct tax that violates Article I, Section 9, Clause 4. And, as described above, section 501 of House Bill 3296 does not impose a tax on income, but rather establishes a surcharge. An example might be helpful to illustrate this point: given the language of Article I, Section 9, Clause 4, as modified by the Sixteenth Amendment, the federal government cannot impose an annual one-hundred-dollar surcharge on all Americans, since such a fee would not be a tax on income. Imposing a surcharge, measured by the average annual cost of a qualifying insurance package, would not fare any better constitutionally.

We suspect that the Senate, which as an institution is generally more sensitive to constitutional concerns, is well aware of this problem. It is for this reason that, in the last several weeks, the individual-insurance-mandate-related tax provisions contained in the Senate Finance Committee health care bill were renamed as an "excise tax on individuals without essential health benefits coverage". S. 1796 § 1301. But excise taxes are imposed on transactions; to call a tax imposed on individuals an excise tax is intellectually incoherent. In our view, this clever nomenclature would not help the tax provisions pass constitutional muster.

With regard to Professor Balkin's rejoinder to our Commerce Clause argument, we do not find it particularly persuasive. Indeed, perhaps recognizing the weakness of his position, Professor Balkin does not even try very hard. To illustrate this point, let us stipulate where Professor Balkin and we agree. Congress can certainly regulate a myriad of economic transactions and activities that have an effect on interstate commerce. This is particularly the case when the regulation of local economic activities is a component of a broader regulation of interstate commerce.

We also do not dispute that "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Gonzalez v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring in the judgment). To be sure, we construe Justice Scalia's language more modestly than does Professor Balkin. We believe that it refers only to noneconomic local activity—e.g., growing marijuana for personal consumption—that, nevertheless, can be properly described as an aspect of a broad underlying economic activity—e.g., growing marijuana to be sold for profit in intra- and interstate markets. By contrast, a *purely noneconomic activity*, like engaging in gender-motivated violent crimes or carrying guns near schools, cannot be regulated by Congress under the Commerce Clause. *See United States v. Morrison*, 529 U.S. 598, 602 (2000); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).

Apropos of Professor Balkin's discussion of the three classes of uninsured persons—employed or self-employed adults, unemployed adults who have purchased no health insurance, and unemployed adults who have purchased some health insurance but not a comprehensive package—the Commerce Clause cannot support the imposition of a mandate on any of them. Under the teaching of *Heart of Atlanta Motel, Inc. v. United States*, Congress can certainly regulate both the economic transactions which commercial establishments engage in and the refusal to engage in such transactions. 379 U.S. 241, 258 (1964). But they cannot impose similar requirements on a private party choosing whom she does and does not wish to entertain in her home, no matter how invidious her motives. Similarly, Congress can certainly impose all sorts of requirements on employers as well as on employees, but only to the extent that these requirements proximately relate to their employment. Thus, worker safety or wages can be regulated by the federal government.

What Congress cannot do is to require people, merely because they work, to purchase what it deems to be adequate health care insurance. Were it otherwise, the government could regulate all aspects of life for people who participate in economic activities. Or, to put it more trenchantly, the government can regulate the maximum permissible number of hours an individual can put in at work; it cannot regulate the number of hours the same individual can spend watching television at home.

The biggest problem with Professor Balkin's rejoinder to our Commerce Clause argument, however, is his conspicuous failure to address the absence of any viable limiting factor to a congressional power that can impose an insurance-purchase mandate on individuals. In our Opening Statement, we argued that the vertical separation of powers, featuring a dual sovereignty system, is a key element of our constitutional architecture and that it was designed by the Framers to ensure that no single governmental entity could amass too much power. These are not particularly novel observations. We do not know any constitutional scholars who would dispute this proposition, or its key corollary—that the federal government is a government of limited and enumerated powers.

Moreover, as the Supreme Court has indicated in both *Morrison* and *Lopez*, an infinitely capacious Commerce Clause would endow the federal government with general police powers and render States its wards. *See Morrison*, 529 U.S. at 615; *Lopez*, 514 U.S. at 564. Such a result would be profoundly unconstitutional and could not be sustained. Yet, the insurance-purchase mandate can be predicated only upon a reading of the Commerce Clause that is even more capacious than the one that Congress used to justify the Violence Against Women Act and the Gun-Free School Zones Act at issue in *Morrison* and *Lopez*. This version of the Commerce Clause would enable Congress to mandate any kind of spending by private individuals—e.g., buying new cars every few years—subject only to the limitations contained in the Bill of Rights. If Professor Balkin believes otherwise, we would appreciate having him describe what kind of purchase and other mandates directing private people how to behave would be beyond the reach of this Commerce Clause on steroids.

CLOSING STATEMENT

The Constitutionality of an Individual Mandate for Health Insurance, Part II

Jack M. Balkin

In their Closing Statement, David Rivkin and Lee Casey appear to have moved on from their initial theory based on *Bailey v. Drexel Furniture Co.* (*Child Labor Tax Case*), 259 U.S. 20 (1922). Their latest argument is based on *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), the case that struck down the federal income tax and was overturned by the Sixteenth Amendment. Attempting to navigate around that minor difficulty, they argue that the individual mandate violates *Pollock* because it is not a tax on income but a direct tax. Hence, it is forbidden by Article I, Section 9, Clause 4 unless it is apportioned among the States.

Rivkin and Casey casually assert that "the Supreme Court has consistently taken a broad view of what constitutes 'direct taxes.'" This is false. Beginning with one of the earliest Supreme Court decisions, *Hylton v. United States*, the Court has generally treated the prohibitions of Article I, Section 9, Clause 4 quite narrowly. 3 U.S. (3 Dall.) 171, 177 (1796) (Patterson, J.) (construing the rule requiring apportionment narrowly); *see also Springer v. United States*, 102 U.S. 586, 602 (1882) (upholding earlier version of federal income tax and stating that "only capitation taxes . . . and taxes on real estate" are direct taxes); *Bromley v. McCaughn*, 280 U.S. 124, 136 (1929) ("While taxes . . . [on] general ownership of property [are direct, taxes on] . . . a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned."). *See generally* Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 4-6, 25 & n.90 (1999) (noting the long history of narrow construction).

The major exception, of course, is the 5-4 decision in *Pollock*, which held that taxing income derived from real or personal property (such as rent, interest or dividends) was also a direct tax, but did not disturb prior decisions that held that income taxes on wages and business profits were indirect. *Pollock*, 158 U.S. at 635. The result in *Pollock* was specifically overturned by the Sixteenth Amendment in 1913. Even before the ratification of the Sixteenth Amendment, the Court quickly backtracked on *Pollock*, unanimously holding that a federal estate tax and a federal corporate income tax were not direct taxes. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 177 (1911) (corporate income tax); *Knowlton v. Moore*, 178 U.S. 41, 110 (1900) (federal estate tax).

In any case, by its own terms, Article I, Section 9, Clause 4 does not forbid all direct taxes, only those that are not apportioned among the states based on the census: it states that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken." The Sixteenth Amendment modifies this rule: it states that "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." Thus, the Sixteenth Amendment says that if a tax is on income, there is no requirement of apportionment, even if it taxes real or personal property or income derived from them.

Section 501 of House Bill 3296 is clearly a tax on income. It imposes "a tax equal to 2.5 percent of the excess of . . . the taxpayer's modified adjusted gross income for the taxable year," over the exemption "specified in [62 U.S.C. §] 6012(a)(1) with respect to the taxpayer." Affordable Health Care for America Act, H.R. 3296, 111th Cong. § 501(a) (2009). The amount of the tax is capped at "the applicable national average premium for such taxable year" as determined by the Secretary of Health and Human Services. *Id.*

Thus, the tax imposed varies with the adjusted gross income of each individual up to a maximum amount. The fact that the tax is capped is irrelevant to its status as an income tax. A graduated tax on income that rises to a maximum amount is a familiar feature of tax policy. For example, the maximum earnings subject to Social Security taxes are currently $106,800 for tax year 2009, but this does not mean that it is not a tax on income. OFFICE OF RESEARCH, EVALUATION & STATISTICS, SOC. SEC. ADMIN., FAST FACTS & FIGURES ABOUT SOCIAL SECURITY 2009, at 1 (2009).

The maximum tax in the health care reform bill is determined by the amount that Congress judges would give most people sufficient incentives to purchase health insurance. This too does not prevent it from being a tax on income. It means only that it is an income tax rationally related to the incentives Congress wishes to create, a function that is perfectly constitutional. *See United States v. Sanchez*, 340 U.S. 42, 44 (1950); *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937).

Nor is the Senate's latest version of the individual mandate a direct tax. Section 1501 of the Senate bill establishes an excise tax levied on a particular event: the failure to pay premiums into a qualified health care plan in a given month. Patient Protection and Affordable Care Act, Amendment in the Nature of a Substitute to H.R. 3590, 111th Cong. § 1501 (2009). This excise is not a tax on the ownership of real or personal property; it is a tax on the decision not to purchase insurance. *See Bromley*, 280 U.S. at 136 (holding that, unlike taxes on general ownership of property, "a tax imposed upon a particular use of property" is not direct). Finally, Section 1501 is not a capitation tax because it is not a general tax on individuals unrelated to their activities; it is a penalty imposed on persons who fail to make specific expenditures in a given month. *See Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.) (noting that "a capitation, or poll tax, simply, [is a tax] without regard to property, profession, or any other circumstances.").

Turning next to the Commerce Clause, Rivkin and Casey agree that Congress may regulate terms of employment under the Commerce Clause—including, for example, wages, hours, and workplace safety conditions when they "proximately relate to their employment." Nevertheless, they insist that Congress may not require employees to obtain adequate health insurance as part of their employment contracts because health insurance coverage is not "proximately relate[d] to their employment." This would come as a surprise to the large number of Americans who choose their employment based on fringe benefits like health insurance. The irony of this argument is that what has differentiated America's solution to health care from that in many other countries is that America has tied health insurance and other social welfare benefits closely to employment while in many other countries these benefits are connected to citizenship and managed by the state.

If one took seriously Rivkin and Casey's argument that provision of health benefits is not proximate to the employment relationship, the employer mandate would also be beyond Congress's powers under the Commerce Clause. Indeed, it is not clear why ERISA would be constitutional, since it establishes minimum requirements for pensions and other fringe benefits. Perhaps Rivkin and Casey believe that pension benefits but not health benefits are proximately related to employment, but if so, the reasons are obscure.

The individual mandate also applies to unemployed persons. In their Opening Statement, Rivkin and Casey argued that Congress could not reach unemployed, uninsured persons under the Commerce Clause because these persons do not engage in economic activity as required by *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). In their Closing Statement, Rivkin and Casey now concede that Congress may reach even noneconomic local activity if it is a necessary part of a more general regulation of interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 23-24 (2005); *id.* at 37 (Scalia, J., concurring in the judgment). However, they offer a new subdistinction between "purely" noneconomic activities that Congress may not reach and others that are presumably "impure."

Using the example of *Raich*, Rivkin and Casey argue that growing marijuana at home (instead of purchasing it) is not purely noneconomic because it is "part of a broad underlying economic activity" and therefore Congress may regulate it. However, they maintain that Congress may not reach "purely" noneconomic activities like the failure to purchase health insurance (i.e., self-insurance) because they are not "part of a broad underlying economic activity."

The Supreme Court has not recognized a distinction between purely and impurely noneconomic activities. The point of current doctrine, rather, is that "where Congress has the authority to enact a regulation of interstate commerce, 'it possesses every power needed to make that regulation effective.'" *Id.* at 36 (Scalia, J., concurring in the judgment) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942)). Thus, if intrastate activity would interfere with the effectiveness of Congress's regulatory scheme, Congress can reach it whether we label it "economic" or "noneconomic," "pure" or "impure."

In this case, Congress may surely take notice of the fact that uninsured persons actually self-insure by relying on family support and by substituting visits to emergency rooms and the purchase of over-the-counter health remedies for the purchase of health insurance. Doing so increases costs for health insurers and for persons already in health insurance risk pools, making health insurance reform more difficult and more costly. Congress may therefore require uninsured persons to join health insurance risk pools to make its regulation of health insurance more effective.

Even if one accepted Rivkin and Casey's new distinction, their argument would still fail. Uninsured persons who self-insure and who substitute emergency services and over-the-counter remedies for other health care services are like persons who substitute home-grown wheat for purchased wheat in *Wickard*, or home-grown marijuana for black-market marijuana in *Raich*. They also participate in "a broad underlying economic activity"—i.e., the purchase and consumption of health care services. The Commerce Clause gives Congress ample power to reach this activity.

Rivkin and Casey worry that if this is so, there is no limit to the modern Court's Commerce Clause jurisprudence. The limit, however, is stated by the Court in *Lopez* and *Raich*: Congress must be able to show that the activity it regulates is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 23-24 (majority opinion) (quoting *Lopez*, 514 U.S. at 561). When it cannot do so, as it could not in *Lopez*, the regulation is beyond Congress's powers.

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