ACLJ
American Center for Law & Justice

INDIVIDUAL MANDATE: IS IT CONSTITUTIONAL?

December 8, 2009

****

BACKGROUND

Congress is currently considering national health care reform legislation that will fundamentally change the health care industry in the United States. Critics have alleged that the reform proposals may be unconstitutional, especially the proposed individual mandate requiring nearly every American to purchase insurance or face a penalty. While an individual mandate has been considered before, no such proposal has ever come so close to being enacted into law. In 1994, during President Clinton's failed push for health reform, the Congressional Budget Office (CBO) was asked to evaluate how such a mandate should be treated for budgetary purposes.[1] The CBO stated, "A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States."[2]

It is unarguable that the Constitution established a federal government with limited powers. David B. Rivkin, Jr., and Lee A. Casey, former Justice Department officials during the Reagan and George H.W. Bush administrations, reiterated in a recent *Wall Street Journal* article the long-established truth that

> the federal government is a government of limited, enumerated powers, with the states retaining broad regulatory authority. . . . Congress, in other words, cannot regulate simply because it sees a problem to be fixed. Federal law must be grounded in one of the specific grants of authority found in the Constitution.[3]

Congress's limited powers are contained in Article 1, Section 8 of the United States Constitution and include both the power to tax and spend and the power to regulate interstate commerce.[4] If Congress possesses the power to impose an individual health insurance mandate on every

[1] Congressional Budget Office, The Budgetary Treatment of an Individual Mandate to Buy Health Insurance (Aug. 1994).
[2] *Id*.
[3] David B. Rivkin, Jr. & Lee A. Casey, *Mandatory Insurance Is Unconstitutional*, WALL STREET JOURNAL, Sept. 18, 2009, *available at* http://online.wsj.com/article/SB10001424052970204518504574416623109362480.html.
[4] U.S. CONST. art. I § 8.

American, that power would be derived from one of these provisions. If Congress lacks power to enact an individual mandate, such mandate would violate the Tenth Amendment. The Tenth Amendment states, "The 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."[5] The Founders viewed the Tenth Amendment as "a rule of construction that warns against interpreting the other amendments in the Bill of Rights to imply powers in the national government that were not granted by the original document."[6] It also served as "a textual reaffirmation of the scheme of enumerated power."[7] However, "[m]odern Supreme Court decisions recognize few limits to the scope of Congress's enumerated powers."[8]

THE COMMERCE POWER

One possible source for the congressional power to enact the unprecedented proposed individual mandate is the Interstate Commerce Clause. Senator Reid's recently introduced health care bill, H.R. 3590, contains several Congressional findings regarding Congress's power to pass an individual mandate under the Commerce Clause.[9] However, after careful examination, it appears that such power is beyond even Congress's broad authority to regulate interstate commerce.

Under Article I, Section 8 of the Constitution, Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[10] The Supreme Court first "defined the nature of Congress' commerce power in *Gibbons v. Ogden*."[11] As explained in *Lopez*, in *Gibbons* Chief Justice Marshall wrote that "[t]he commerce power 'is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent . . . .'"[12] However, he also acknowledged that the commerce power was not unlimited, and the "limitations on the commerce power [we]re inherent in the very language of the Commerce Clause."[13]

> It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.
>
> Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the

[5] U.S. CONST. amend. X.
[6] Charles Cooper, *Reserved Power of the States*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 371 (Meese et al. eds., 2005).
[7] *Id*. at 373.
[8] *Id*.
[9] Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. § 1501 (2009).
[10] U.S. CONST. art. I, § 8, cl. 3.
[11] *United States v. Lopez*, 514 U.S. 549, 553 (1995).
[12] *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 196 (1824)).
[13] *Id.*

> language, or the subject of the sentence, must be the exclusively internal commerce of a State.[14]

During the late 1930s and 1940s, the Court greatly expanded its understanding of Congress's Commerce Clause power.[15] In *Wickard v. Filburn*, the Court "explicitly rejected" earlier Commerce Clause tests that considered whether an intrastate activity's effects on interstate commerce were "direct" or "indirect."[16] Instead, the Court stated:

> "Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"[17]

Nevertheless, the Court still recognized certain limits on Congress's Commerce Power.[18] In *NLRB v. Jones & Laughlin Steel*, the Court said that the Commerce Clause power

> "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[19]

Similarly, in *Maryland v. Wirtz*, the Court said

> "neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. . . . [T]he Court has said only that where *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence."[20]

In 1995, the Court resumed enforcing Commerce Clause limitations on Congress when it held that Congress exceeded its power under the Commerce Clause by enacting the Gun Free School Zones Act (GFSZA). The *Lopez* Court set out "three broad categories of activity that Congress may regulate under its commerce power:"[21] (1) the "channels of interstate commerce;" (2) the "instrumentalities of interstate commerce, or persons or things in interstate commerce;"

---

[14] *Id*. (quoting *Gibbons*, at 194-95).
[15] *Id*. at 555-56.
[16] *Id*.
[17] *Id*. (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)).
[18] *Id*. at 556-57.
[19] *Id*. at 557 (quoting *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)).
[20] *Id*. at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n. 27 (1968))(emphasis in *Lopez*).
[21] *Id*.

and (3) "those activities having a substantial relation to interstate commerce" or "those activities that *substantially affect* interstate commerce."[22] The Court stated that the statute at issue in *Lopez*

> is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. [It] . . . is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.[23]

The statute also lacked a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce,"[24] and legislative findings regarding interstate commerce.[25] Although the Government tried to argue that gun violence is a problem that negatively affects school learning, which then affects commerce by resulting in a "less productive citizenry," the majority rejected that view, stating that such a view could allow Congress to regulate "any activity that it found was related to the economic productivity of individual citizens" even if the activity was related to an area in which states "historically have been sovereign."[26] Thus, while the commerce power is indeed broad, according to *Lopez*, "even [] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."[27]

Later, in *United States v. Morrison*, the Court held that Congress lacked power under the Commerce Clause to enact a statute providing civil remedies for "victims of gender-motivated crimes,"[28] noting that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[29] Unlike with the GFSZA in *Lopez*, Congress tried to establish an interstate connection by including legislative findings that gender-motivated violence affected interstate commerce by

> "deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products."[30]

Nevertheless, the Court rejected that argument, stating:

---

[22] *Id*. at 558-59 (emphasis added).
[23] *Id*. at 561.
[24] *Id*.
[25] *Id*. at 562.
[26] *Id*. at 564.
[27] *Id*. at 556-57.
[28] 529 U.S. 598, 602 (2000).
[29] *Id*. at 613.
[30] *Id*. at 615 (quoting H. R. Conf. Rep. No. 103-711, at 385).

> The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.[31]

In *Gonzales v. Raich*, however, the Court upheld Congress's power under the Commerce Clause and the Necessary and Proper Clause to "prohibit the local cultivation and use of marijuana in compliance with California law."[32] The majority noted that *Wickard* "establishe[d] that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[33] While the Court acknowledged that determining the scope of Congress' Commerce Clause authority is not a "modest" task, it found that Congress possessed a rational basis for regulating even intrastate cultivation of marijuana because of the difficulty in making the distinction between local or foreign marijuana and use of "illicit channels" of distribution.[34]

The Court distinguished *Lopez* and *Morrison* by stating that in those cases the "parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety," where in *Raich* the parties challenged "individual applications of a concededly valid statutory scheme."[35] The Court also pointed out that "[u]nlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA [Controlled Substance Act] are quintessentially economic."[36] The Court proceeded to offer a broad definition of "economic," stating that it

> refers to "the production, distribution, and consumption of commodities." The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.[37]

Justice Scalia wrote a lengthy concurrence in the case in which he pointed out that "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."[38] Under this power, "[w]here necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce."[39] He explained that

---

[31] *Id*. at 615.
[32] 545 U.S. 1, 5 (2005).
[33] *Id*. at 18.
[34] *Id*. at 22 (footnote and citation omitted).
[35] *Id*. at 23.
[36] *Id*. at 25.
[37] *Id*. at 25-26 (citation omitted).
[38] *Id*. at 34 (Scalia, J. concurring) (citation omitted).
[39] *Id*. at 35 (Scalia, J. concurring).

> The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself "substantially affect" interstate commerce. Moreover, . . . Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.[40]

Justice Scalia did note, however, in discussing the scope of Congress's Necessary and Proper Clause authority, that "a law is not '*proper* for carrying into execution the *Commerce Clause*' '[w]hen [it] violates [a constitutional] principle of state sovereignty.'"[41] The dissent criticized the majority's definition of economic activity, noting that it "threatens to sweep all of productive human activity into federal regulatory reach."[42]

As previously mentioned, the history of Commerce Clause jurisprudence demonstrates that, while this is arguably one of the broadest powers granted to the federal government, it is not without limitation. Under the Commerce Clause, Congress may regulate *activity* which involves the "channels of interstate commerce;" the "instrumentalities of interstate commerce, or persons or things in interstate commerce;" and "those activities having a substantial relation to interstate commerce" or "those activities that *substantially affect* interstate commerce."[43] They may also, under *Raich*, regulate intrastate activity that it is necessary and proper to regulate to effectuate the general regulation of interstate commerce.

However, it is the limit specifically recognized by *Lopez* that renders the individual healthcare mandate beyond congressional commerce power. As Rivkin and Casey phrase it, the law in *Lopez* was invalid because

> 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." Of course, a health-care mandate would not regulate any "activity," such as employment or growing pot in the bathroom, at all. Simply being an American would trigger it.[44]

Moreover, in an article for the Federalist Society, Peter Urbanowicz and Dennis G. Smith also argue that an individual mandate may exceed Congress's Commerce Clause power.[45] According to Urbanowicz and Smith,

---

[40] *Id.* at 37 (Scalia, J., concurring).
[41] *Id*. at 39 (Scalia, J., concurring) (quoting *Printz v. United States*, 521 U.S. 898, 923-24 (1997)) (alteration in *Raich*).
[42] *Id*. at 49 (O'Connor, J., dissenting).
[43] Lopez, 514 U.S. at 558-59 (emphasis added).
[44] David B. Rivkin, Jr. & Lee A. Casey, *Mandatory Insurance is Unconstitutional*, THE WALL STREET JOURNAL, Sept. 18, 2009, *available at* http://online.wsj.com/article/SB10001424052970204518504574416623109362480.html.
[45] Peter Urbanowicz & Dennis G. Smith, *Constitutional Implications of an "Individual Mandate" in Health Care Reform*, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES, *available at* http://www.fed-soc.org/doclib/20090710_Individual_Mandates.pdf.

> If Congress were to invoke its Commerce Clause authority to support legislation mandating individual health insurance coverage, such an action would have to contend with recent Supreme Court precedent limiting unfettered use of Commerce Clause authority to police individual behavior. . . . In the case of a mandate to purchase health insurance or face a tax or penalty, Congress would have to explain how not doing something—not buying insurance and not seeking health care services—implicated interstate commerce.
>
> While most health care insurers and health care providers may engage in interstate commerce and may be regulated accordingly under the Commerce Clause, it is a different matter to find a basis for imposing Commerce Clause related regulation on an individual who chooses not to undertake a commercial transaction. The decision not to engage in affirmative conduct is arguably distinguishable from cases in which Commerce Clause regulatory authority was recognized over intra-state activity: growing wheat (*Wickard v. Filmore*) or, more recently, growing marijuana (*Gonzales v. Raich*).[46]

However, some have disagreed with the assertion that an individual mandate would violate the Commerce Clause authority. Professor Jonathan Adler rejected such an argument. According to Adler,

> While I agree that the recent commerce clause cases hold that Congress may not regulate noneconomic activity, as such, they also state that Congress may reach otherwise unregulable conduct as part of an overarching regulatory scheme, where the regulation of such conduct is necessary and proper to the success of such scheme. In this case, the overall scheme would involve the regulation of "commerce" as the Supreme Court has defined it for several decades, as it would involve the regulation of health care markets. And the success of such a regulatory scheme would depend upon requiring all to participate.[47]

Professor Mark Hall also has argued that the very effect an individual mandate would have in reducing health insurance premiums effectively places such a mandate within Congress's Commerce Clause powers.[48] However, these arguments suffer from a fatal defect. They assume that by requiring every individual American to purchase health insurance that Congress is simply regulating conduct, behavior, or activity affecting interstate commerce, as it has always done. This is simply not the case.

A recent report from the Congressional Research Service stated that "it is unclear whether the [Commerce] [C]lause would provide a solid constitutional foundation for . . . a requirement to have health insurance" and "it is a novel issue whether Congress may use this

---

[46] *Id*. at 5 (footnotes omitted).
[47] Jonathan Adler, *Is ObamaCare Unconstitutional?*, THE VOLOKH CONSPIRACY, Aug. 22, 2009, *available at* http://www.volokh.com/posts/1250981450.shtml.
[48] Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, GEORGETOWN UNIVERSITY, O'NEILL INSTITUTE, at 6, *available at* http://www.law.georgetown.edu/oneillinstitute/projects/reform/Papers/Individual_Mandates.pdf.

clause to require an individual to purchase a good or a service."[49] Furthermore, the report recognized that despite the likely economic nature of general regulation of the healthcare system, whether an individual mandate could properly be characterized as economic activity is an open question. The report recalls that, as *Lopez* stated, "'[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'"[50] For instance, the *Morrison* Court determined that, despite congressional findings demonstrating "the effects of gender-motivated violence on the national economy and interstate commerce," the Act at issue still exceeded Congress's commerce authority.[51] Additionally, in *Lopez*, despite a large firearms market, the Court found that to allow Congress to regulate the mere possession of a firearm, without an association with a particular qualifying economic transaction, would make it difficult "'to posit any activity by an individual that Congress is without power to regulate.'"[52]

Perhaps even more problematic than the lack of sufficient economic activity is the lack of any voluntary activity at all. This lack of any voluntary activity also negates the possibility of regulating otherwise unregulatable activity as a necessary part of a broader regulatory scheme as contemplated in *Raich*. The CRS report states, "it may be argued that the mandate goes beyond the bounds of the Commerce Clause."[53] Specifically, while the Commerce Clause has been used to regulate individual activity such as growing wheat and marijuana for personal use, these individuals "were acting of their own volition, and this activity was determined to be economic in nature and affected interstate commerce."[54] By contrast, the individual health insurance mandate would attempt to regulate individuals who had not voluntarily engaged in any conduct. As the report states, "[t]his is a novel issue: whether Congress can use its Commerce Clause authority to require a person to buy a good or a service and whether this type of required participation can be considered economic activity." In other words, the proposed mandate would compel nearly every American to enter the market by purchasing insurance and then using this forced economic transaction as a basis for regulating behavior under the guise of interstate commerce. [55] Congress's authority to enact an individual mandate may rest on stronger grounds if it attempts to characterize the relevant activity as participating in the insurance market for health care services.

Mr. Rivkin first recognized this difficulty in regards to the individual mandate proposed during the failed attempt at health care reform in the 1990s:

> In the new health-care system, individuals will not be forced to belong because of their occupation, employment, or business activities—as in the case of Social Security. They will be dragooned into the system for no other reason than that they are people who are here. If the courts uphold Congress's authority to impose this system, they must once and for all draw the curtain on the Constitution of 1787 and admit that there is *nothing* that Congress cannot do under the Commerce

[49] Jennifer Staman & Cynthia Brougher, *Requiring Individuals to Obtain Heathl Insurance: A Constitutional Analysis*, CRS Report, July 24, 2009, pg 3.
[50] *Id*. at 5 (quoting *Lopez*)
[51] *Id.*
[52] *Id.* at 4 (quoting *Lopez*, 514 U.S. at 664).
[53] *Id.* at 6.
[54] *Id.*
[55] *Id.*

> Clause. The polite fiction that we live under a government of limited powers must be discarded. . . .
>
> The implications of this final extension of the commerce power are frightening. If Congress can regulate you because you *are*, then it can do anything to you not forbidden by the handful of restraints contained in the Bill of Rights. For example, if Congress thinks Americans are too fat—many are—and this somehow will affect interstate commerce—who's to say it doesn't?—can it not decree that Americans shall lose weight? Indeed, under the new system, any activity that might increase the costs of health care might be regulatable.[56]

In sum, despite arguments to the contrary, it appears from the text of the Commerce Clause that an individual mandate requiring every American to purchase health insurance falls outside Congress's commerce authority. The real question is whether the commerce power, which has been historically used only to regulate voluntary conduct, entitles Congress to force nearly all Americans to engage in a commercial transaction simply because they exist and then regulate them based on this compelled conduct. For the Constitution to survive, the answer must be "no," because if the federal government is endowed with such a power, then, as *Lopez* cautioned, it would be impossible "to posit any activity by an individual that Congress is without power to regulate."[57]

TAX AND SPEND POWER

As, Rivkin and Casey pointed out, the lack of Commerce Clause power has caused Congress to explore other methods by which to enact an individual mandate. One option would be Congress's power to tax. The recently passed House health care bill, H.R. 3962, taxes individuals who fail to maintain "acceptable" health care coverage.[58] Senator Reid's bill adds the "Requirement to Maintain Minimum Essential Coverage" to the Internal Revenue Code.[59] The Congressional Research Service has opined that some individual mandate proposals could pass constitutional muster under Congress's power to tax and spend:

> [I]f Congress chose to require individuals to have health insurance by levying a tax, then using the revenue for funding health benefits, this could be viewed as an appropriate use of Congress's taxing and spending power. Or, if Congress were to require individuals to purchase health insurance, and then enforce this requirement by conditioning receipt of a tax benefit (e.g., a tax credit) on compliance, this also could be seen as a legitimate exercise of Congress's taxing authority. Similarly, if Congress were to enact a proposal under which individuals who did not purchase health insurance were subject to a tax penalty (e.g., a loss of

[56] David B. Rivkin, Jr., *Health Care Reform vs. the Founders*, FREEDOM DAILY, Feb. 1994, *available at* http://www.fff.org/freedom/0294f.asp.
[57] *Lopez*, 514 U.S. at 564.
[58] H.R. 3962, 111th Cong., § 501 (2009).
[59] Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. § 1501 (2009).

> a tax deduction), this also could be seen as valid under this clause of the Constitution.[60]

In using its tax authority, however, Congress must consider two issues. Article I, Section 2 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers. . . .") and Article I, Section 9 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.") could pose a problem if the tax is deemed to be a direct tax.[61] The federal income tax, authorized by the Sixteenth Amendment, is the only exception to this constitutional requirement.[62] Although the individual mandate has been touted in some of the bills as an indirect excise tax, as will be explored below, that label seems incorrect. The tax would be on people, not things, "[a]nd the tax is imposed directly on them in exactly the same way as a direct income tax, except that in this instance, the tax amount does not depend on the size of the person's income."[63]

The tax could avoid the constitutional problems if it is deemed an excise tax,[64] which is what it was considered under Senator Baucus's bill.[65] Rivkin and Casey posited that this change in terminology does nothing to remedy the constitutional defects. They wrote,

> Taxation can favor one industry or course of action over another, but a "tax" that falls exclusively on anyone who is uninsured is a penalty beyond Congress's authority. If the rule were otherwise, Congress could evade all constitutional limits by "taxing" anyone who doesn't follow an order of any kind—whether to obtain health-care insurance, or to join a health club, or exercise regularly, or even eat your vegetables.[66]

Although Congress's taxing power might be the "best congressional authority argument," "[i]mposing an excise tax on conduct—or the absence of certain conduct, such as failing to obtain health insurance—would be a novel use of the excise tax authority."[67] Excise taxes are on "a 'thing' (such as a commodity or a license). . . . People who choose not to buy insurance are not things."[68] However,

---

[60] Jennifer Staman & Cynthia Brougher, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, CRS Report, July 24, 2009, pg 2.
[61] Ernest S. Christian & Betty Jo Christian, *Is Obama's Tax on Health Care Constitutional?*, TAX.COM, *available at* http://www.tax.com/taxcom/features.nsf/Articles/5B9094E6AED5EF718525764900822CC8?OpenDocument.
[62] *Id*.
[63] *Id*.
[64] Black's Law Dictionary defines "excise" as "A tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)." BLACK'S LAW DICTIONARY 585 (7th ed. 1999).
[65] David B. Rivkin, Jr. & Lee A. Casey, *Mandatory Insurance Is Unconstitutional*, WALL STREET JOURNAL, Sept. 18, 2009, *available at* http://online.wsj.com/article/SB10001424052970204518504574416623109362480.html.
[66] *Id*.
[67] Peter Urbanowicz & Dennis G. Smith, *Constitutional Implications of an "Individual Mandate" in Health Care Reform*, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES 5-6, *available at* http://www.fed-soc.org/doclib/20090710_Individual_Mandates.pdf.
[68] Ernest S. Christian & Betty Jo Christian, *Is Obama's Tax on Health Care Constitutional?*, TAX.COM, *available at* http://www.tax.com/taxcom/features.nsf/Articles/5B9094E6AED5EF718525764900822CC8?OpenDocument.

> [t]he Congressional Budget Office has previously opined that an individual mandate [to purchase insurance] coupled with an excise tax would not be a "tax" so long as people have "choice" as to what health care coverage to purchase. If that CBO position is maintained, the individual mandate might not have to be treated as a "tax" for House and Senate parliamentary procedure purposes. But it is potentially problematic to use the taxing power as the Constitutional authority to enact an individual mandate, but not call it or its enforcement mechanism a "tax" for purposes of budget scoring rules.[69]

Finally, if Congress lacks authority under its Commerce power to pass an individual mandate, they could face problems if the individual mandate tax is deemed to be regulatory. In another article, Rivkin and Casey stated that in *Bailey v. Drexel Furniture*,

> the Supreme Court ruled that Congress could not impose a "tax" to penalize conduct (the utilization of child labor) it could not also regulate under the commerce clause. Although the court's interpretation of the commerce power's breadth 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.[70]

In *United States v. Kahriger*, the Supreme Court upheld a tax on bookies, even though part of Congress's purpose, or even perhaps its sole purpose, was to "suppress wagering."[71] The Court said that because the tax raised revenue, even a negligible amount, it was valid despite its regulatory effect.[72] The Court did say, however, that

> [p]enalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this Court to declare the enactments invalid. Unless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power. All the provisions of this excise are adapted to the collection of a valid tax.[73]

In his treatise, *American Constitutional Law*, Professor Laurence Tribe explained that Congress's tax power "is an independent source of federal authority: Congress may tax subjects that it may not be authorized to regulate directly under any of its enumerated regulatory powers."[74] Regulatory taxes, however, can be subject to constitutional scrutiny. As Tribe explained,

---

[69] Peter Urbanowicz & Dennis G. Smith, *Constitutional Implications of an "Individual Mandate" in Health Care Reform*, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES 6, *available at* http://www.fed-soc.org/doclib/20090710_Individual_Mandates.pdf.
[70] David B. Rivkin, Jr. & Lee A. Casey, *Illegal Health Reform*, WASHINGTON POST, Aug. 22, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/08/21/AR2009082103033.html?sub=AR.
[71] *United States v. Kahriger*, 345 U.S. 22, 27 (1953).
[72] *Id*. at 28.
[73] *Id*. at 31 (footnotes omitted).
[74] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 318 (The Foundation Press 2d ed. 1988).

> [a]lmost any tax will achieve an ancillary regulatory effect by increasing the costs of the taxed *activities* for individuals or corporations. If Congress has authority independent of its taxing power to regulate the taxed subject, this regulatory effect is not constitutionally troublesome. In such cases, even if the tax is plainly regulatory in purpose and effect, it may be upheld under the necessary and proper clause as a means of regulating an *activity* properly the subject of congressional regulation. . . .
>
> However, if no independent source of federal regulatory authority justifies a congressional tax, classification of the tax as a regulatory or revenue measure may be determinative of its constitutionality. The classification rules on which the Supreme Court has traditionally relied can be briefly summarized: (1) A tax is a valid revenue measure if it achieves its regulatory effect through its rate structure or if its regulatory provisions bear a "reasonable relation" to its enforcement. (2) A tax is a regulatory tax—and hence invalid if not otherwise authorized—if its very application presupposes taxpayer violation of a series of specified conditions promulgated along with the tax.[75]

While the revenue from the individual mandate may be used to offset the costs of the entire bill, the mandate also appears to fall under the second classification, in that it would be applied to those who violated the specific requirements for maintaining insurance as set forth in whatever final health care bill passes Congress, unless such persons were excepted from the requirement by other parts of the bill. Tribe does caution, however, that

> [t]he present relevance of the distinction between revenue and regulatory taxes is not clear. The Supreme Court, in more recent decisions, has given a broad reading to the "revenue" standards, and has refused to supplement these standards by inquiries into congressional motive. Moreover, the Court's expansive modern interpretation of the Commerce Clause substantially reduces the likelihood that a tax, even if found to be regulatory, would be held to be beyond congressional power.[76]

CONCLUSION

Whether Congress rests on its commerce or tax power, the ultimate question that the Supreme Court will have to face is—can Congress regulate a person simply for existing—absent some other activity? An answer in the affirmative would have reaching and lasting consequences and effect a significant change on the structure of our nation. It would also be an unprecedented action. Congress should seriously consider its constitutional authority (or lack thereof) to mandate persons purchase health insurance before proceeding any further on this legislation.

[75] *Id*. at 319-20 (emphasis added).
[76] *Id*. at 320.