

JUDICIAL ENGAGEMENT WITH THE
AFFORDABLE CARE ACT: WHY RATIONAL BASIS
ANALYSIS FALLS SHORT

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INTRODUCTION: JUDICIAL ENGAGEMENT AND THE STANDARD OF
CONSTITUTIONAL REVIEW

Let me start this Essay with a large proposition that goes against the grain of much of modern constitutional law. There is no place for rational basis review in evaluating any challenge to any government tax or regulation. In all cases, the specific guarantees of the Constitution are written in categorical form, such that the rational basis test inverts the proper assumption behind our whole system of limited government under a strong constitution, motivated by a strong presumption of distrust of government actors at all levels.¹

This proposition is not quite as broad as it sounds, because it does not cover those decisions in which the government runs or manages programs on its own. In those cases, the appropriate standard lies much closer to the business judgment rule that protects the directors and officers of corporations and other voluntary associations from being constantly second-guessed regarding the way they manage the institutions put in their charge.²

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¹ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75-77 (1980). Note that Ely was selective in his invocation of that principle insofar as he gave weight to Footnote Four of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), which tended to limit that protection to suspect classes and “discrete and insular minorities.” *Id.* at 152 n.4. The difficulty with this formulation goes back to Madison’s original work on faction, which contained no such limitation, see THE FEDERALIST NO. 10 (James Madison), and was in fact invoked to protect what we now call the top 1 percent from expropriation, including expropriation through debtor relief statutes, see THE FEDERALIST NO. 44 (James Madison).

² One formulation reads as follows: “[I]n making business decisions not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation’s best interest.” BLACK’S LAW DICTIONARY 226 (9th ed. 2009). For a concrete instantiation, see *Dodge v. Ford Motor Co.*, 170 N.W. 668, 682 (Mich. 1919) (“Courts of equity will not interfere in the management of the directors unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds, or refuse to declare a dividend when the corporation has a surplus of net profits which it can, without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of

In those cases, therefore, it takes the identification of a serious instance of self-dealing to oust the protection of that rule. The self-dealing issue arises whenever public officials are on both sides of a transaction. In my view it also arises when large numbers of private parties are ostensibly subject to the same formal requirements, but in which government officials are allowed to engage in what I have termed government by waiver, or selective release of one competitor from a rule that is left to bind another.³

By way of example, I have long defended a business judgment type approach in connection with the affirmative action programs that are run by state universities.⁴ In my view, there are surely clashing ideals with respect to the composition of various voluntary groups, which is reflected in the wide difference in attitude toward affirmative action programs in the private sector. It is therefore the sign of good sense to understand and respect the fact that these honest differences in opinion should allow a majority to have its way unless it acts in a fashion that is intended to oppress certain minorities. The colorblind principle that should apply to the enforcement of the criminal law, for example, has no strong appeal in this context. I have no special wisdom on the extent to which diversity is a value that should be respected by private institutions, but a genuine recognition that the number of private institutions that hold that diversity is such a value, should temper any willingness to adopt a per se rule that bans these associational preferences.

Even in this area, however, there is a distinction between the government when it acts in its capacity as a regulator and situations in which it acts in its capacity as a manager or operator of some public facility or program. By the same token, therefore, there are few government practices that are more obnoxious than the decision of any government body (or private accreditation agencies like the American Bar Association, which runs interference for state bar associations) to impose their preferences on private institutions. The function of bar associations is to deal with issues of educational quality and fitness of graduates to practice law. The very diversity that justifies the use of a business judgment rule for government managers now requires that a far stricter scrutiny be imposed on government regulators that seek to impose one set of uniform preferences on a wide range of private institutions that take a rather different view of matters. Religious institutions, for example, that seek to give preferences to their own members should be respected in their choices. Indeed, I see little reason why the

discretion as would constitute a fraud, or breach of that good faith which they are bound to exercise towards the stockholders." (quoting *Hunter v. Robert, Throp & Co.*, 47 N.W. 131, 134 (1890)) (internal quotation marks omitted)).

³ See generally Richard A. Epstein, *Government by Waiver*, NAT'L AFF., Spring 2011, at 39, available at <http://www.nationalaffairs.com/publications/detail/government-by-waiver>.

⁴ See generally Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky but Classical Liberal Defense*, 100 MICH. L. REV. 2036 (2002).

same rules of freedom of association should not apply to all such arrangements, from the Boy Scouts to the bowling club.⁵

The intermediate cases all involve the application of the doctrine of unconstitutional conditions, where the issue is whether the government can condition the expenditure of public funds on the willingness of private institutions to toe the line on matters that deal with their core beliefs. It is no accident that the totalitarian inclinations of government were all too evident in the Supreme Court's unwise decision in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*⁶ where a five-four majority held that Hastings could deny various privileges to a tiny Christian group that it routinely extended to other groups that fell under the Hastings Law School umbrella.⁷ It is also evident in connection with the Patient Protection and Affordable Care Act ("PPACA"), as the Secretary of Health and Human Services, Kathleen Sebelius, has taken it upon herself to exclude Roman Catholic schools, charities, and hospitals from the requirement that they supply contraception, abortion, and sterilization services to their own members.⁸ Closer to this discussion of the Commerce Clause, I take strong exception to her decision to exclude any institution from sharing the benefits of the PPACA unless it agrees to provide abortion-related services to persons who are not within their faith communities, even when they regard those behaviors as anathema to their core religious beliefs. Their members, as citizens, contribute to the common fund, and it is just a form of expropriation to include conditions that exclude them from participating in these programs on even terms with others. The government could never force Catholic institutions to administer abortions or sterilization if it did not have the spending power at its beck and call. It should never be allowed to acquire wealth first through taxation, which it then distributes back to its favored clientele.⁹ At one time, the doctrine of unconstitutional conditions had a distinctive liberal flavor, as it was used, rightly in my view, to prevent the state from holding that only those veterans that signed loyalty oaths could receive government benefits.¹⁰ It is a sad

⁵ Cf. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (holding that required inclusion of homosexuals violated the Boy Scouts' First Amendment right to expressive association).

⁶ 130 S. Ct. 2971 (2010).

⁷ *Id.* at 2984-95.

⁸ See *Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act*, 76 Fed. Reg. 46,621, 46,623-24 (Aug. 3, 2011) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, and 45 C.F.R. pt. 147). For criticism of the rule, see Timothy M. Dolan, *ObamaCare and Religious Freedom*, WALL ST. J., Jan. 25, 2012, at A17.

⁹ For my general statement of these principles, see generally RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1993).

¹⁰ *Speiser v. Randall*, 357 U.S. 513, 514-15, 529 (1958) (refusing to allow taxing authorities to condition real estate tax exemptions on signing a loyalty oath). The *Speiser* Court stated: "[T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." *Id.* at 519.

commentary on how quickly we can forget the origins of this rule, so that today this bulwark against government power is quietly jettisoned to allow a juggernaut with a liberal agenda to go forward.

This regrettable resort to the rational basis test in regulatory and conditional grant contexts has a deleterious impact on the quality of judicial reasoning. Once the Court decides under a rational basis test that any bad argument will suffice to uphold a statute, the Court lapses into the habit of making lazy and bad arguments. The pattern of discourse now takes on a self-inflicted presumption of judicial incompetence, under which overworked and undereducated judges are unable to grasp the essential elements of any large social question. Within this framework, deference becomes both an institutional and intellectual necessity. The prophecy of judicial ineptitude is largely self-fulfilling, by opinions that are at war with any sound constitutional analysis.

The striking difference between rational basis analysis and some higher level of scrutiny is encapsulated in one word, “conceivable,” that Justice Sandra Day O’Connor has used for a unanimous court in dealing with the question of when a government action is an impermissible taking for private use. In *Hawaiian Housing Authority v. Midkiff*,¹¹ she wrote to uphold a statutory scheme where the state legislature was prepared (once it received in escrow the needed funds from the tenant in possession) to condemn the landlord’s interest and transfer it to the tenant.¹² It looks like a taking not only from A to B, but from A’, A’’, etc. to B’, B’’, and the like. But unfazed by the obvious point that the more extensive the program the greater the constitutional violation, she wrote: “[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.”¹³ No scrutiny on means, and none on ends, can yield only one result.

The landscape differed in *Kelo v. City of New London*,¹⁴ which involved the taking of private property for urban improvement. Justice O’Connor, now repentant, dissented from her earlier *Kelo* decision. But it was Justice Clarence Thomas who best expressed the skeptical mood when he wrote that “the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.”¹⁵ It is hard to find any principled reason to think that the government action in *Kelo* was more high-handed and egregious than the *Midkiff* one. Everything turned on the acceptance or rejection of

¹¹ 467 U.S. 229 (1984).

¹² *Id.* at 233-34. (upholding HAW. REV. STAT. §§ 516-522 (1977)).

¹³ *Id.* at 241.

¹⁴ 545 U.S. 469 (2005).

¹⁵ *Id.* at 510 (Thomas, J., dissenting).

the appropriate standard of review that was signaled by the two different ways in which it was possible to deploy the term “conceivable.”

The importance that is attached to standards of review is what ultimately will decide the outcome of the two major constitutional challenges to Title I and Title II of PPACA. The first of these deals with the individual mandate, based on the Commerce Clause, by which individuals have to pay a fine to government if they do not purchase healthcare insurance.¹⁶ The second question, dealing with Medicaid, raises the issue of whether the federal government may present states with the following choice: either agree to take on new business of a large amount, paid for out of your own resources, or forfeit all federal assistance for existing Medicaid programs as your own citizens continue to pay taxes for Medicaid services that now will only benefit the citizens of other states.¹⁷ In dealing with these issues, everything depends on how the standard of review is framed. Use rational basis consistently and the sheer complexity of the program means that the federal government will prevail, as the Justices can see both sides of every question. Use a standard of intermediate or strict scrutiny and all of a sudden any federalism case becomes a horse race because a critical intelligence is brought to bear to the arguments on both sides of the dispute.

That is surely true here. The question under the individual mandate is whether it lies within the power of Congress under the Commerce Clause, and the question of the Medicaid mandate is whether the use of the spending power results in placing the state in a subservient position. In both cases, the standard of review issue is closely intertwined with the doctrine of unconstitutional conditions.

In both cases, moreover, the only way for the attacks to have a chance of success is for the U.S. Supreme Court to jettison its habitual reliance on the rational basis test for federalism issues. The only way that this can be done is to force the Justices to have a more intense level of judicial engagement, by persuading them that the rational basis test is utterly inconsistent with the structure of American federalism, which was recognized by the sound precedents that held sway until the constitutional transformation of the New Deal. Part I of this Essay deals, therefore, with this historical evolution under the Commerce Clause in connection with the individual mandate. Part II deals with the parallel questions under the spending power. In this last Part it is clear that Justice O’Connor’s consistent and stout defense of strong state rights in the federal system—which are in such striking contrast to her porous and unsatisfactory *Midkiff* opinion—offers the only path of success. I shall take these up in order.

¹⁶ See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1501-1502, 124 Stat. 119, 242-52 (2010).

¹⁷ See *id.* §§ 2001-2002, 124 Stat. at 271-82.

I. THE INDIVIDUAL MANDATE UNDER THE COMMERCE CLAUSE: THE NEW DEAL TRANSFORMATION

Prior to the oral argument, any handicapping of the odds for the success of overturning the individual mandate had to rate them at less than 50/50. There was no indication that any of the four liberal Justices—Ginsburg, Breyer, Sotomayor, and Kagan—are less than rock-solid pro-government on the issue. For the mandate to fall, therefore, all five conservative Justices had to be willing to knock out a cog from the largest piece of social legislation in nearly fifty years, perhaps ever. The conventional wisdom had it that Justices Scalia, Thomas, and Alito might be willing to do so, but Chief Justice Roberts and Justice Kennedy were less likely to be supporters of this view. The tone of the questioning, especially Justice Kennedy's opening question: "Can you create commerce in order to regulate it?" may well have changed the odds.

Nonetheless, it is clear that Circuit Court decisions may still prove to be a more accurate harbinger of what is to come. To give but one example, it is possible to read the recent decision by Judge Laurence Silberman in *Seven-Sky v. Holder*,¹⁸ to uphold the mandate is a strong straw in the wind. Judge Silberman is a distinguished conservative jurist, whose views could easily be read to presage the votes of any of the five conservative Justices. His opinion thus represents a defection from the conservative to the liberal position on this issue, which makes the challengers' uphill battle even steeper.

The best way to shore up the shaky five, therefore, is to get them to re-think the underpinnings of the Commerce Clause, and to wean them from the rational basis principle that crept into the area during the New Deal transformation of federal law. That transformation is evident in many of the Commerce Clause formulations, especially in connection with the so-called aggregation principle, which holds that small instances of given behavior must be viewed together to see if they have an indirect effect on interstate conduct, thereby affording the Congress a rational basis on which to act. The principle clearly has a lot to say about the need to herd everyone into the individual mandate. It seems ready made for the occasion to quote the 1971 Supreme Court case of *Perez v. United States*.¹⁹ In dealing with a federal loan sharking statute, the case held that "a class of activities was held properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce."²⁰ Since the individual mandate is general legislation that necessarily impacts multiple individual instances, the statement of the question leads to only

¹⁸ 661 F.3d 1 (D.C. Cir. 2011).

¹⁹ 402 U.S. 146 (1971).

²⁰ *Id.* at 152 (emphasis omitted).

one answer in this and every other case. That *reductio ad absurdum* motivated Justice Potter Stewart's frustrated protest in *Perez*. He could not see how Congress could "rationally" make the connection between loan sharking and interstate commerce, unless the entire sphere of criminal activity could necessarily be regulated at the federal level.²¹ Put otherwise, *Perez* covertly denies that there are any effective limits on Congress's power under the Commerce Clause.

That result was, of course, exactly the point of the majority decision, which relied explicitly on all the judicial decisions that ratified the consolidation of the New Deal by sweeping away all the constitutional objections against it.²² *United States v. Darby*²³ upheld the Fair Labor Standards Act.²⁴ *United States v. Wrightwood Dairy Co.*²⁵ upheld the power of Congress to regulate the price of milk under the Agricultural Marketing Agreement Act of 1937.²⁶ And *Wickard v. Filburn*²⁷ upheld the power of Congress to regulate the ability of a farmer to feed his own wheat to his own cows under the Agricultural Adjustment Act of 1938.²⁸ In rendering these decisions, the Supreme Court consciously posited a supposed continuity from the Founding Period through the New Deal. Thus, in *Perez*, the Court announced that in *Darby*, *Wrightwood* and *Wickard*, "the broader view of the Commerce Clause announced by Chief Justice Marshall had been restored."²⁹

The commerce power, he [Chief Justice Stone] said, "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."³⁰

The only problem with this oft-quoted statement is that Chief Justice Marshall never said it. His sentence read: "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one."³¹ It takes an extraordinary constitutional law to treat "extend" and "restricted" as synonyms, when they are in fact oppo-

²¹ *Id.* at 157-58 (Stewart, J., dissenting) ("Because I am unable to discern any rational distinction between loan sharking and other local crime, I cannot escape the conclusion that this statute was beyond the power of Congress to enact. The definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments.").

²² See generally *id.* at 150-57 (majority opinion).

²³ 312 U.S. 100 (1941).

²⁴ *Id.* at 125-26.

²⁵ 315 U.S. 110 (1942).

²⁶ *Id.* at 125-26.

²⁷ 317 U.S. 111 (1942).

²⁸ *Id.* at 130-33.

²⁹ *Perez v. United States*, 402 U.S. 146, 151 (1971).

³⁰ *Id.* (quoting *Wrightwood Dairy*, 315 U.S. at 119).

³¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824).

sites. No Supreme Court Justice should ever snip a vital sentence at its key point in order to reserve its meaning. That huge misreading is not made any more palatable by its constant repetition.³² This blatant maneuver is only the tip of a large iceberg. To get to the root of this transformation, it is necessary to expose the deep cleavage between the Commerce Clause, as it came down from the Constitutional Convention in 1787, and the faux Commerce Clause that emerged out of the New Deal.

There is, alas, no mythical restoration of some bygone Eden. Looked at from the vantage point of the original Constitution, the PPACA should be dead on arrival. But the New Deal transformation of long-established Commerce Clause jurisprudence introduced a set of unprincipled (but fine-grained) distinctions that turn the law into a mass of linguistic absurdities, which should lead ordinary people to doubt the collective sobriety of the legal profession. The regnant view of the Commerce Clause gives full sway to the legitimacy of *Wickard v. Filburn* when it should treat that decision as a derelict on the law. The issue here is of manifest importance, but it is not for that reason difficult. Text, structure, context, and history demonstrate in combination that *Wickard* and the endless efforts to rationalize that decision should be emphatically rejected as a matter of first principle.

In making out this strong rejectionist claim, I am not insisting, or even suggesting, that the Supreme Court has to overrule the *Wickard* line of cases in order to strike down the individual mandate in the PPACA. It is quite clear that so much water has passed over the dam, and so many federal programs are now in place solely because of the *Wickard* magic, that this result will never take place. But what it is possible to do is to undermine the legitimacy of *Wickard* and its progeny, so that it no longer becomes a fit platform from which to expand the current scope of the Commerce Clause to the point of forcing individuals into activities against their will. That prohibition works in two ways. First, it means that the Commerce Clause should not be read to allow the Congress to force people to buy insurance or do daily exercise. No state government could have those extensive powers under their own constitutions. The federal government should not have that power either. Second, a systematic application of the unconstitutional conditions doctrine means that the federal government cannot say that any person that wants to use the interstate highways, or to watch television, has to agree to purchase health insurance or succumb to the individual mandates. These conditions are, at best, unrelated to the activities to which they are attached. It is widely understood that the Congress could condition access to public roads on having a driver's license, but not on the willingness to waive future private tort actions against the federal government. Both these feints should be disallowed. The purpose of the remainder of this Part is to

³² For a more detailed defense of this position, see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1401-08 (1987).

explain why *Wickard* has only longevity on its side, because the case from principle points inexorably against that decision.

A. *Commerce Versus Manufacture*

Start with the text: “Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”³³ On its face, this doesn’t read like an unlimited dictate that lets Congress impose national solutions to what it regards as national problems. Commerce is a subset of the nation’s economic power, and the natural reading of that term covers the types of matters that would be included, for example, in the Uniform Commercial Code, which deals with sales, negotiable interests, secured transactions, and the like. Read in this fashion, the Clause confirms what James Madison wrote in *Federalist No. 45*, namely that powers delegated to the federal government are “few and defined,” while those left to the states “are numerous and indefinite.”³⁴ One reason why Judge Silberman’s opinion in *Seven-Sky* is so unsatisfactory is that it wrenches the Clause out of its textual and historical context, putting the issue like this: “No Supreme Court case has ever held or implied that Congress’s Commerce Clause authority is limited to individuals who are presently engaging in an *activity* involving, or substantially affecting, interstate commerce.”³⁵

To defend this proposition, Judge Silberman looks to the text and hones in on the word “regulate,” which he correctly points out as meaning “[t]o adjust by rule or method,” as well as “[t]o direct.”³⁶ From this, though, he wrongly concludes that there is “no textual support” for the challenge to PPACA.³⁷ The interpretation of the Commerce Clause cannot be compressed into a single word. The Clause has to be read in its entirety, which forces two other questions to the fore. First, what is the meaning of commerce? The implicit subtext of Judge Silberman’s analysis is that it embraces any and all productive activity, whether economic or noneconomic. Indeed, he goes further, insisting that there is nothing in the decided cases that extend the Clause so far as to preclude Congress from taking the next step, which is to regulate various forms of economic inactivity as well. Under that expansive view, Congress can now require individuals to take out insurance, and to do so whether it is to prevent them from freeloading

³³ U.S. CONST. art. I, § 8, cl. 3.

³⁴ THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 2003).

³⁵ *Seven-Sky v. Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011).

³⁶ *Id.* (alterations in original) (quoting 2 A DICTIONARY OF THE ENGLISH LANGUAGE 1667 (1755), available at http://johnsonsdictionaryonline.com/?page_id=7070&i=1667) (first internal quotation marks omitted).

³⁷ *Id.*

on others, to provide emergency facilities, or to exact from them extra dollars that will allow high-risk people into the system, without imposing a general tax on income to fund those losses.

In making this extravagant claim, Judge Silberman at no point cites the key 1824 decision of Chief Justice John Marshall in *Gibbons v. Ogden*,³⁸ which sets the direction of the debate over the proper scope of the Commerce Clause. At issue in *Gibbons* was whether Gibbons, the operator of two steamboats from Elizabethtown, New Jersey, to New York, New York, had to respect the exclusive franchise originally given to Robert Fulton and Robert Livingstone (and assigned to Ogden) to operate steamboats in New York State waters.³⁹

Chief Justice Marshall held that these voyages were within interstate commerce, meaning that the federal law trumped this form of state action.⁴⁰ In so doing, however, he made clear the limits of the federal power. Indeed, he spent an extensive amount of time belaboring the point that navigation across state lines was part of interstate commerce,⁴¹ which would have been totally unnecessary if the definition of commerce had the broad definition given to it in any of the New Deal cases and accepted as gospel in both *Perez* and *Seven-Sky*. The opinion stated: “State inspection laws, health laws, and laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c. are not within the power granted to Congress.”⁴² In dealing with this issue, he envisions a progression of goods that start life as subject to the power of the states; they then move into domestic and foreign commerce; finally, they emerge from commerce where “[t]hey form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government.”⁴³

New York’s monopoly, therefore, was not disturbed with respect to boats that started and ended their journeys in New York State water. Marshall could not have been clearer in the sentence already quoted: “Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one.”⁴⁴ This proposition is then followed by the acknowledgement that “the completely interior traffic of a

³⁸ 22 U.S. (9 Wheat.) 1 (1824).

³⁹ *Id.* at 1-2.

⁴⁰ *Id.* at 189-90 (“The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”).

⁴¹ *Id.* at 194-96.

⁴² *Id.* at 203 annot.

⁴³ *Id.* at 203.

⁴⁴ *Gibbons*, 22 U.S. at 194.

State” is outside the scope of the Clause,⁴⁵ from which it follows that manufacturing, mining, and agriculture are outside its scope as well.

In tracing the future misuse of *Gibbons*, it is important to give special attention to Marshall’s use of the term “restricted.” There was no hint whatsoever in *Gibbons* that the federal government could regulate manufacture or other services provided on a local basis. Indeed, any decision to the contrary would have provoked a constitutional uproar because it would have allowed Congress to abolish slavery within the Southern States, which was inconceivable at the time.

Not one echo of Marshall’s careful limitations is heard in the modern cases. Judge Silberman’s statement of fundamental principles ignores them totally. Instead, Silberman presupposes that the limits to Congress’s Commerce Clause power revolve around the question of whether it is only limited to individuals who are “engaging in an *activity* involving, or substantially affecting, interstate commerce.”⁴⁶ The word “activity” does not appear in the constitutional text, and is manifestly broader in meaning than the term “commerce.” The phrase “substantially affecting” interstate commerce is equally foreign to Chief Justice Marshall’s reading of the commerce power, for it clearly implies that important local activities somehow become national activities if they are of sufficient frequency or magnitude, which is a conscious reversal of Marshall’s meaning.

At one point, Marshall does note that Congress has a “plenary” power.⁴⁷ But read in context, that evocative term does not mean that Congress can regulate everything under the sun. Indeed the full sentence speaks of this plenary power “though limited to specified objects” cannot be undone by the states.⁴⁸ Plenary means dominant within a limited sphere, not dominant in a broad sphere. Read in context, the word only means that once an activity falls within the restricted definition of “commerce among the several states,” the states must yield to the national government on matters within that area. Judge Silberman lets the cat out of the bag when he notes that “[t]he Framers, in using the term ‘commerce among the states,’ obviously intended to make a distinction between interstate and local commerce, but Supreme Court jurisprudence over the last century has largely eroded that distinction.”⁴⁹ This destroys the myth of a seamless history in a world turned upside down by judicial sleight of hand. It is now necessary to explain how the expansion took place.

One conspicuous stop on this journey is the 1895 decision of *United States v. E.C. Knight Co.*,⁵⁰ which rightly read *Gibbons* to hold that manu-

⁴⁵ *Id.*

⁴⁶ *Seven-Sky v. Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011).

⁴⁷ *Gibbons*, 22 U.S. at 197.

⁴⁸ *Id.*

⁴⁹ *Seven-Sky*, 661 F.3d at 16.

⁵⁰ 156 U.S. 1 (1895).

facture preceded commerce and was not part of it. It was well understood that these activities were subject to the exclusive jurisdiction of the states. *E.C. Knight* thus makes reference to the 1888 decision in *Kidd v. Pearson*,⁵¹ which addressed the other side of the coin: only states could regulate the manufacture of intoxicating liquors—an issue that fits into this story later—from which the federal government was blocked:

If it be held that the term [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry.⁵²

Elsewhere in *Kidd*, the Court makes it clear that an indirect effect on the volume of interstate commerce, which could result from forbidding either manufacturer or retail sales, is not enough to bring the case within the power of the federal government for the same reason as described above.

Can it be said that a refusal of a State to allow articles to be manufactured within her borders (for export) any more directly or materially affects her external commerce than does her action in forbidding the retail within her borders of the same articles after they have left the hands of the importers? That the latter could be done was decided years ago; and we think there is no practical difference in principle between the two cases.

“As has been often said, ‘legislation [by a State] may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution,’” unless, under the guise of police regulations, it “imposes a direct burden upon interstate commerce,” or “interferes directly with its freedom.”⁵³

In this context, the distinction between “direct” and “indirect” is not some mystical or indeterminate conception beyond the ability of a court to apply or a Congress to respect. “Direct” is the regulation of the shipment of goods in interstate commerce. “Indirect” is the regulation of those activities that take place either prior to or after that shipment. *Wickard* does not distinguish between the two cases, but the prior law did in unmistakable terms, and for one reason: the old view rests on the integrity of two related lines. The first was between production and transportation.⁵⁴ The second was be-

⁵¹ 128 U.S. 1 (1888).

⁵² *Id.* at 21.

⁵³ *Id.* at 23 (alteration in original) (quoting *Hall v. De Cuir*, 95 U.S. 485, 487, 488 (1878)).

⁵⁴ See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918) (“When [goods are] offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.”), *overruled in part by* *United States v. Darby*, 312 U.S. 100 (1941).

tween transportation and use or consumption.⁵⁵ Collapse these two distinctions and the limited nature of the commerce power is gone.

The logic of the time could not be clearer. Manufacture preceded commerce, so that each activity was subject to one and only one sovereign. What was striking about the decision in *E.C. Knight* was that it built on both *Gibbons* and *Kidd* to forge a vision of federalism that was faithful to the original plan. Within that scheme, what was notable about *E.C. Knight* was that it treated the enforcement of the Sherman Antitrust Act against nationwide cartels as though it were a local matter—a decision that did not last long at all in light of the Court’s subsequent decision in *Addyston Pipe & Steel Co. v. United States*.⁵⁶ The takeaway from the entire line of cases is that before the New Deal no one ever understood that local manufacturing, agriculture, mining, or the provision of any kind of service from retail to health care was not subject to the exclusive regulation of the states. The only dent during this period on the hard line of local regulation occurred in the *Houston, East & West Texas Railway Co. v. United States (Shreveport Rate Cases)*,⁵⁷ in which then Justice Hughes held that Congress could regulate intrastate railroads that were in direct competition with interstate lines:

[These cases] illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.⁵⁸

Note these limitations. The Hughes opinion refers to “the common instrumentalities of interstate and intrastate commercial intercourse,”⁵⁹ which does not include manufacturing, and in line with *Gibbons* there remains much internal commerce that lies outside the scope of the federal government. The case represents a slight erosion of earlier principles, and an indefensible one.⁶⁰

⁵⁵ See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 124 (1942).

⁵⁶ 175 U.S. 211 (1899).

⁵⁷ 234 U.S. 342 (1914).

⁵⁸ *Id.* at 353.

⁵⁹ *Id.*

⁶⁰ For a longer critique, see RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 53-58 (2006).

B. *Direct Regulation of Commerce*

Thus far it is clear that the earlier cases did not impose any limitation on the way in which Congress could regulate the shipment of goods in interstate commerce. But during the late nineteenth century, the pressure built for more comprehensive regulation. On the conservative side, the demand for national regulation by Congress of alcohol and gambling helped propel the movement forward. On the progressive side, the desire to regulate food, drugs, and child labor added additional impetus to the search to find ingenious ways to circumvent the uniform limitations found running from *Gibbons* to *E.C. Knight*. Those pressures reached the Supreme Court in the pivotal 1903 *Lottery Case (Champion v. Ames)*,⁶¹ which held—only by a five-to-four vote—that the federal government could prohibit the shipment of lottery tickets in interstate commerce, even when their production and use was legal in the states at both ends of the journey.⁶² In effect, federal officials used their monopoly power over interstate commerce to leverage their control over local activities. *Champion* is clearly distinguishable from *E.C. Knight*. Nonetheless, structurally it is clearly wrong because, left unchecked, it spells the end of federalism. All firms have to ship goods in interstate trade to survive, and the Congressional chokehold on interstate commerce would have allowed Congress to put the following hard choice to all merchants: either bend to the federal will on matters of local production or abandon the national market. One can only imagine what the reaction would have been if, in 1840, Congress had attempted to pass a statute that forbade the shipment of cotton from slave plantations into either the national or the foreign market. The problem with *Champion* is that it represents the classic type of monopoly extension argument. The United States has no competitor when it regulates the shipment of goods in interstate commerce. It can therefore use that power to extract any concession from local firms so long as it is less expensive than the loss of its access to markets outside the state. The leverage thus forces virtually every major firm to forsake the national market, which clearly they cannot afford to do.

Champion represents a new and striking departure from the Court's earlier Commerce Clause jurisprudence. But far from being some isolated rogue decision, *Champion* created the decisive opening for President Theodore Roosevelt's Pure Food and Drug Act of 1906⁶³ to put some teeth into drug regulation without running afoul of the clear limitations of *E.C. Knight*. The 1906 Act made it "unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug

⁶¹ 188 U.S. 321 (1903).

⁶² *Id.* at 363-64.

⁶³ Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768 (codified at 21 U.S.C. §§ 1-15 (1934)), *repealed by* Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, § 902(a), 52 Stat. 1040, 1059.

which is adulterated or misbranded.”⁶⁴ It outlawed the “introduction” or “shipment” of misbranded foods and drugs into the states—but, conspicuously, it did *not* regulate the manufacture of drugs within the states.⁶⁵ The reason was clear enough. Everyone realized what eluded the New Deal Justices: *Champion* did not overrule *E.C. Knight*.

The expansionist agenda of Congress to use direct regulation to gain control over the internal operations of the state came to a temporary halt, moreover, in the 1918 case *Hammer v. Dagenhart*.⁶⁶ There the Court refused to extend *Champion* beyond those classes of goods that were subject to regulation, at least at the state level, under the morals head of the police power.⁶⁷ *Hammer* barred Congress from prohibiting the shipment in interstate commerce of goods made in factories that did not conform to the federal minimum age standard for child labor.⁶⁸ Once again, it was clear that Congress could not leverage its power over interstate commerce to control activities that were reserved to the states under the original constitutional scheme. Since, moreover, direct regulation was off limits to the federal government, so too was taxation, its close regulatory substitute. In 1922, the *Child Labor Tax Case*⁶⁹ held that Congress could not seek to pressure the states by taxing all goods made with child labor that were shipped in interstate commerce.⁷⁰ To this point at least, basic constitutional structure held firm. The key point was that taxation is known to be an effective, if only partial, substitute for direct prohibition. Indeed, if the tax is set consciously above the potential gains from all transactions of a given class, its effects are indistinguishable from a regulation. All economic activity of the given kind will cease, and the revenues raised will be zero—the exact outcome from a direct prohibition.

The hold of *E.C. Knight* on the basic understanding of the Commerce Clause is also evident in the text of the Eighteenth and Twenty-First Amendments.⁷¹ The first of these established prohibition in 1920. The second repealed it in 1933. The Eighteenth Amendment prohibited the manufacture, sale, or transportation of intoxicating liquor, which covered the full gamut of activities at the federal and state level. But when the Twenty-First Amendment repealed prohibition, it did not mention manufacture. Instead, Section 2 reads as follows:

⁶⁴ Pure Food and Drug Act § 1.

⁶⁵ *See id.* § 2.

⁶⁶ 247 U.S. 251 (1918), *overruled in part by* United States v. Darby, 312 U.S. 100 (1941).

⁶⁷ *Id.* at 273-74.

⁶⁸ *Id.* at 276.

⁶⁹ 259 U.S. 20 (1922).

⁷⁰ *Id.* at 39-40.

⁷¹ U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI, § 1.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.⁷²

This Amendment does not apply to all activities but only to the transportation or importation of intoxicating liquors, and only with respect to those states that choose to remain dry. The only way that this provision is intelligible is against the backdrop that the federal government could not by legislation either prohibit or authorize the manufacture or sale of intoxicating liquor, both of which remained exclusively local options. That was of course the combined result of decisions like *Kidd*, which established local control over the manufacture of intoxicating spirits, and *E.C. Knight*, which blocked the federal government from regulating these goods.⁷³ Hence the Amendment makes it clear that the federal government cannot make a state dry. But once any state exercised the option to stay dry, Congress was duty-bound to prohibit transportation or importation. In one sense this rule is old because it recognizes that Congress had power only over transportation. But in a second respect it was striking because it appears to compel the federal government to engage in that form of regulation over commerce, where that term is used in the same sense that it was used in *Gibbons*.

This older synthesis held firm until as late 1935, when the Supreme Court in *A.L.A. Schechter Poultry Corp. v. United States*⁷⁴ struck down key provisions of key federal codes of fair competition on the ground that sick chickens were no longer in interstate commerce once they were off-loaded from interstate railroads onto local trucks.⁷⁵ The opinion in *Schechter* is not labored or forced. It shows further that the older rule that uses hard boundary lines to demarcate the division of federal and state power did not become obsolete with time. Quite the opposite, matters of jurisdiction are, like determinations of liability, on/off switches. Either you have it or you do not. These binominal outcomes map well into strong and sharp lines that establish the respective spheres of influence of the national and state governments.

Understand what is at stake. That sharp edge is not some form of silly formalism of unsophisticated minds. Rather, it is recognition that dichotomous decisions require simple yes/no structures. The large reduction of joint sovereignty over most local activities had the additional advantage of removing the risk of dual, and possibly inconsistent, enforcement of primary activities of ordinary individuals and firms. The central truth is that no change in the overall conditions of markets rendered the constitutional

⁷² *Id.* amend. XXI, § 2.

⁷³ *Kidd v. Pearson*, 128 U.S. 1, 23-24 (1888); *United States v. E.C. Knight Co.*, 156 U.S. 1, 14-17 (1895).

⁷⁴ 295 U.S. 495 (1935).

⁷⁵ *Id.* at 543.

structure of 1789 inappropriate for the new set of circumstances. The principles that applied to interstate steamships applied as well to automobiles, railroads, airplanes, telephones, and telegraphs. Indeed, the stability of the overall structure was an added advance to the new system.

Nonetheless, two years after *Schechter* the dam broke. The key case was *National Labor Relations Board v. Jones & Laughlin Steel Corp.*⁷⁶ Decided in 1937, a closely divided Supreme Court magically expanded the scope of the commerce power to allow the National Labor Relations Act to regulate unionization in manufacturing plants.⁷⁷ *Darby*, *Wrightwood Dairy*, and *Wickard* followed in rapid succession so that by 1942, the new constitutional structure had transformed itself into some long-established truth. For decades the received wisdom was that under *Wickard*, the Commerce Clause gave Congress a carte blanche. That consensus was rudely shattered in 1995 in *United States v. Lopez*,⁷⁸ where Chief Justice Rehnquist, writing for a narrow five-to-four majority, struck down the Gun-Free School Zones Act that forbade carrying a gun within 1,000 feet of a school.⁷⁹

In one sense, the opinion was a sea change insofar as it indicated that there was at least some outer limit on the scope of federal power. But at root, the opinions in *Lopez* do nothing to unpack the deep contradictions in Commerce Clause interpretation. Chief Justice Rehnquist uneasily embraced both James Madison and *Wickard* simultaneously in his highly influential account of the three strands of the commerce power.⁸⁰ Thus, after a quick review of all the familiar precedents from *Gibbons* through *Perez*, he writes as though these cases have identified a single harmonious vision of the commerce power, without pausing to discuss the evolution of the doctrine:

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce [*Darby*]. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities [*Shreveport*]. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce [*Jones & Laughlin*].⁸¹

At no point is there the slightest explicit acknowledgment that the first category refers the territory covered by *Gibbons* but subject to an important caveat about the tension between *Champion* and *Hammer*. The second category covers only a limited exception that does not reach those cases of

⁷⁶ 301 U.S. 1 (1937).

⁷⁷ *Id.* at 43.

⁷⁸ 514 U.S. 549 (1995).

⁷⁹ *Id.* at 551-52, 567-68.

⁸⁰ *See id.* at 552-59.

⁸¹ *Id.* at 558-59 (citations omitted).

internal commerce. The third category does all the work, by extending the scope of power far beyond the traditional categories, so much so that the greatest revolution in constitutional history is captured, as it were, in code by the shift from “indirect effects” on interstate commerce to “substantial relation” to interstate commerce.⁸² The choice of semantics thus concealed the enormous gap between the three categories.

The shaky Rehnquist opinion in *Lopez* was buttressed by an opinion of Justice Anthony Kennedy, who relied on a dubious form of linguistic skepticism, insisting that “semantic or formalistic categories” can’t define commerce.⁸³ But his philosophical point gets it exactly backwards for the reasons set out above. Jurisdictional questions require the same clear boundaries that are found between landowners, on public roads, or on athletic fields. Any hard line demarcations will always outperform the kind of balancing tests that appeal to Justice Kennedy, by lowering simultaneously both decision costs and error costs. To retreat from a sensible solution to an amorphous one is not the path to constitutional clarity.

In dealing with PPACA, also known as ObamaCare, it is no accident that in *Seven-Sky*, Judge Silberman dutifully treated *Wickard* as the lodestar against which ObamaCare should be decided—only to note the case gives no particular guidance on the question of whether individual inaction can be regulated under the commerce power.⁸⁴ He rightly concedes that no act of Congress has ever attempted to regulate this form of pure inaction.⁸⁵ He then quickly notes that, by the same token, no judicial decision has said that these forms of inaction could not be regulated.⁸⁶ As a lower court judge, he is entitled to kick the can upstairs, because his is the unhappy task of making sense of an elaborate line of Supreme Court cases that have never really grappled with the issue.

Now that it has reached the Supreme Court, ObamaCare still faces an uncertain fate. With the exception of Justice Clarence Thomas, the current Supreme Court is, after *Lopez*, dead-set against overturning *Wickard*. But the Justices do not have to overturn *Wickard* to strike down the individual mandate. What they must do is acknowledge what Judge Silberman has denied—*Wickard*’s indefensible pedigree—and then refuse to budge one inch further. With *Wickard*’s overreaching discredited, it is far easier to accept the sensible claim that commerce does not apply to transactions that people never entered into. Quite simply, the action/inaction distinction would be beside the point if the New Deal Court had not gone off the deep

⁸² Cf. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 831-32 (3d ed. 2000) (discussing the significance of *Lopez*).

⁸³ *Lopez*, 514 U.S. at 569 (Kennedy, J., concurring).

⁸⁴ *Seven-Sky v. Holder*, 661 F.3d 1, 17-18 (D.C. Cir. 2011).

⁸⁵ *Id.* at 17 (“[Prior] cases did not raise the question—presented here—of whether “inactivity” can also be regulated.”).

⁸⁶ *Id.* at 17-18.

end in the first place. Manifestly, if *Gibbons* were still law, the PPACA wouldn't stand a snowball in hell's chance of surviving. But if the Justices recognize publicly that *Wickard* is an inexcusable constitutional aberration, then knocking out the individual mandate should be a piece of cake, for the one point that is absolutely incorrect in Judge Silberman's opinion is that national problems require national solutions.⁸⁷ Not so. The situation on the ground is, often, quite the opposite. The National Labor Relations Act, for instance, did not solve any national problem when it introduced a regime of mandatory collective bargaining into all employment relations throughout the United States. Nor did the Agricultural Adjustment Act of 1938, sustained in *Wickard*, solve any national problem when it authorized the Department of Agriculture to initiate a system of nationwide cartels for the allocation of various crops. To be sure, it solved the problem of how labor and agricultural interests could monopolize large segments of the economy. But such "solutions" come at the cost of the welfare of the public at large. And such will be the case with PPACA, should it be sustained on this point.

Today's economic situation is indeed grim and is likely to remain so for some time. The last thing that this nation needs is a national solution to a problem that is better solved in a piecemeal way by the states, whose ability to dole out goodies is limited by the competition that they face from other states. All it takes for the Supreme Court to reach that position is to engage seriously with the precedents and not rely on a potted version of the rational basis test to allow it to skip past deep problems with the current law. The U.S. Supreme Court should confess error and acknowledge that its past decisions are bad both as a matter of constitutional history and constitutional theory. It should not compound past errors by extending an imperial version of the commerce power into new areas where it has yet to go, and which, as Judge Silberman acknowledges, are conceptually distinguishable from every legislative initiative that the federal government has undertaken to date. National problems require not authoritarian national solutions; rather, they require a healthy dose of interstate competition that has for too long been suppressed.

II. THE MEDICAID MANDATE

At first blush, the issues involved in connection with the Medicaid mandate seem to have little to do with the set of interpretive issues raised in connection with the individual mandate.⁸⁸ The Medicaid mandate requires

⁸⁷ *But see id.* at 20 ("The right to be free from federal regulation is not absolute, and yields to the imperative that *Congress be free to forge national solutions to national problems*, no matter how local—or seemingly passive—their individual origins." (emphasis added)).

⁸⁸ For a vivid description of the consequence, see I. Glenn Cohen & James F. Blumstein, *The Constitutionality of the ACA's Medicaid-Expansion Mandate*, 366 NEW ENG. J. MED. 103 (2012).

the state to undertake providing Medicaid insurance for individuals between 100 percent and 133 percent of the poverty level.⁸⁹ In addition, the PPACA sets a new “minimum essential coverage” level—equal to that needed to satisfy the requirements of the individual mandate for all covered persons that states must supply to all Medicaid recipients.⁹⁰ Last, the PPACA requires that the states take on the responsibility for providing “the care and services themselves, or both”; if they refuse to comply with these provisions, they lose their federal matching funding for current Medicaid expenses.⁹¹ But in this instance, appearances are misleading. What drives the question of whether the mandate will be valid is the connection between the rational basis test and the doctrine of unconstitutional conditions. In this instance, the issue arises in connection with the spending power found in Article I:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States⁹²

The first point to note about this Clause is that the limitation to “the common Defence and the general Welfare of the United States” should not be read as if there were no limits on the objects of government expenditures. The key point is that “common Defence” is a classical public good that could only be provided to some individuals if it is provided for all. Therefore, only taxation can fund the expenditures, even if there are, as is always the case, deep differences as to what counts as a wise military policy. The “general Welfare of the United States” is cut out of the same cloth so that only those expenditures that have the character of public goods are covered by the Clause. The notion that a series of direct payments that go to some individuals from taxes collected by others is not a credible account of a public good, which at a minimum excludes the prospect of redistribution by seeking to raise (generally) the wealth of all individuals together.⁹³ “It was ‘generally agreed,’ noted New York Democratic Senator Robert Wagner, that the General Welfare Clause was ‘a restriction upon the power to tax rather than an independent grant of legislative authority.’”⁹⁴

⁸⁹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2001(a)(5), 124 Stat. 119, 274 (2010) (codified at 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (Supp. IV 2010)).

⁹⁰ *Id.* § 2001(a)(2), 124 Stat. at 271 (codified at 42 U.S.C. § 1396a(k)(1)); *id.* § 1501(b), 124 Stat. at 244 (codified at 26 U.S.C. § 5000A).

⁹¹ *See id.* § 2304, 124 Stat. at 296 (codified at 42 U.S.C. § 1396d(a)).

⁹² U.S. CONST. art I, § 8, cl. 1.

⁹³ For further discussion, see generally John C. Eastman, *Restoring the “General” to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001).

⁹⁴ Brief of Amici Curiae Center for Constitutional Jurisprudence et. al. in Support of Petitioners, *Florida v. U.S. Dep’t of Health & Human Servs.* (No. 11-400), 2012 WL 135051 (quoting 79 CONG. REC. 9286 (1935)). The cited brief contains numerous other references to the same effect.

Senator Wagner's view is consistent with the general view that the Constitution contains limited and enumerated powers, and this position was largely upheld in *United States v. Butler*,⁹⁵ which involved yet another meddlesome agricultural subsidy project justified on the ground that

due to disparity between the prices of agricultural and other commodities, with consequent destruction of farmers' purchasing power and breakdown in orderly exchange, which, in turn, have affected transactions in agricultural commodities with a national public interest and burdened and obstructed the normal currents of commerce, calling for the enactment of legislation.⁹⁶

As usual, the explanations offered are economic nonsense, which is designed to conceal the fact that farmers wanted the federal government to set minimum price for agricultural goods to help fortify their economic position. The usual reference "to purchasing power" is another way of saying that farmers should be insulated from the effects of general competition, even though the higher prices to them imply higher costs to individuals who in hard times find it difficult to put food on the table. The statute of course does nothing to facilitate "orderly exchange," which is best achieved by allowing goods to achieve their normal price. How market prices have "burdened and obstructed" normal commerce is never explained. How cartel prices facilitate markets was left equally unexplained.

The best way to throw a bone in the direction of farmers is to have direct restrictions on the levels of output of the sort that were eventually sustained in *Wickard*. But in 1935, the Commerce Clause had yet to be extended so that the Congress resorted to a tax and spend scheme similar to that at work in the *Child Labor Tax Case*. Thus under the statute: "The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity . . . at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value."⁹⁷ The proceeds of these taxes were paid to those farmers that agreed to reduce their acreage in production.⁹⁸ The combination of the tax and the expenditure were intended to have the same effect as a direct order on farmers to limit their production. This would have been outside congressional power under *E.C. Knight*, which was still in effect. Justice Owen Roberts understood the risks that were posed and struck down the plan.⁹⁹

If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to ac-

⁹⁵ 297 U.S. 1 (1936).

⁹⁶ *Id.* at 53 (citing Agricultural Adjustment Act, 7 U.S.C. § 601 (1934)).

⁹⁷ Agricultural Adjustment Act, 7 U.S.C. § 609(a)-(b).

⁹⁸ *Id.* § 612(a).

⁹⁹ *Butler*, 297 U.S. at 78.

compish the same end, clause 1 of § 8 of Article 1 would become the instrument for total subversion of the governmental powers reserved to the individual states.¹⁰⁰

In effect, the purpose of the decision was to make sure that there would be no end-run around the Commerce Clause. The narrow application of *Butler* fell into desuetude after *Wrightwood* and *Wickard* because once direct regulation is proper, the risk of circumvention of constitutional limitations is now at an end. Nonetheless, the issue resurfaced again in *South Dakota v. Dole*¹⁰¹ in connection with the explicit limitation that the Twenty-First Amendment imposed on the ability of Congress to regulate the manufacture, sale, or consumption of intoxicating liquors within the state. To dodge this limitation, Congress passed a rule providing that any state that did not pass a law limiting the general drinking age to twenty-one would be required to surrender 5 percent of the revenues it received from the national highway program.¹⁰² The revenue loss in most instances exceeds the harm to the state from hewing to a lower drinking age. Left with this choice, states will abjectly surrender.

In dealing with this issue, we face the same question of judicial engagement that is raised in the Commerce Clause line of cases. When taking a serious view of the structural limitations, the amount of the tax does not matter here any more than it did in the *Child Labor Tax Case*. The effort to use conditional spending as a way to expand federal power for an issue that the Twenty-First Amendment removed from the national government is inconsistent with the structural design of the Constitution. Justice Brennan took just that view in an opinion that was short and to the point.¹⁰³ Writing for the majority, however, Chief Justice Rehnquist was more clever than wise when he sought to draw a distinction between “encouragement” and “coercion,” such that the former was allowed and the latter was not.¹⁰⁴

His distinction does not hold water because all the revenues that the government wished to withhold did not come from banana trees, but from taxes collected from citizens of each state. The decision to first take and then return only if conditions are satisfied is no less coercive than the decision of an adult to take money from an eighteen-year-old individual that he will return only if the former agrees to give up drinking until he turns twenty-one. In the private case it does not matter whether the amount that the adult takes is all that the eighteen-year-old has or only 5 percent of his wealth. Put bluntly, the fine-spun distinction between encouragement and coercion cannot work by looking solely at the amount of money subject to the threat. There is no way to draw a hard line on questions that are matters

¹⁰⁰ *Id.* at 75.

¹⁰¹ 483 U.S. 203 (1987).

¹⁰² *Id.* at 205-06, 211.

¹⁰³ *See id.* at 212 (Brennan, J., dissenting).

¹⁰⁴ *Id.* at 211-12 (majority opinion).

of degree. Therefore, it should come as no surprise that, armed with the rational basis test, not a single lower court has ever struck down a conditional grant as coercive, even when the statute takes as much as 95 percent of the revenues.¹⁰⁵ As with any effort to set the line between local and interstate commerce, fuzzy tests of degree do not map into the on/off switches that are needed to make the inquiry work.

Nonetheless, Chief Justice Rehnquist's opinion in *Dole* marched off in the wrong direction with its strong embrace of the rational basis test. Starting from the assumption that the Twenty-First Amendment prohibited Congress from setting the drinking age directly, he nonetheless concluded that it could do so indirectly through the Spending Clause.¹⁰⁶ His view in this instance was that Congress imposes all sorts of conditions on its expenditures, and then leaps quickly to the conclusion that "[i]n considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress."¹⁰⁷

The evident motivation for this position was the awareness that huge numbers of government grants are subject to conditions. Any constitutional prohibition against conditional grants, therefore, would have the effect of shutting down the United States government because it could no longer be permissible to insist that the recipient of government revenues deliver military aircraft or consulting services. The only question is whether there is some subclass of conditions that pose a threat to the overall constitutional order, which will of necessity arise only in a small fraction of cases. On this score, for example, Chief Justice Rehnquist cited to *Fullilove v. Klutznick*,¹⁰⁸ which sustained a program whereby a government grantee had to agree to devote 10 percent of grant money to minority business enterprises, so long as other certain conditions could be satisfied.¹⁰⁹ But that case presents none of the structural issues involved in either *Butler* or *Dole*. The key antecedent issue is whether the Equal Protection Clause allows for the government to take race into account in its legislative pronouncements. If it does (and it actually does) then there is no question that the Congress can take these considerations into account, but only to the same extent, in dealing with its own expenditure program. There is, quite simply, no concern with the kinds of issues that we have in this case.

It is of course, equally clear that the structural elements in *Butler* were paramount in the eyes of Justice Roberts.¹¹⁰ To cite the case for the (wrong) proposition that the general welfare should be broadly construed does not

¹⁰⁵ See, e.g., *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989); see also *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997).

¹⁰⁶ See *Dole*, 483 U.S. at 209-11.

¹⁰⁷ *Id.* at 207.

¹⁰⁸ 448 U.S. 448 (1980) (plurality opinion).

¹⁰⁹ *Id.* at 453, 488-92.

¹¹⁰ See *Butler v. United States*, 297 U.S. 1, 62-63 (1935).

negate the brute fact that, even under that standard, Justice Roberts struck down the offending provisions of the Agricultural Adjustment Act.¹¹¹ Chief Justice Rehnquist thus knew that he could not adopt a rule that made all conditions per se constitutional, which led to his feeble attempt to allow the percent of the grant subject to condition to mark the line between coercion and encouragement.

Unfortunately, none of the mushy factors to which he turned was remotely equal to this task. The clear statement requirement—“if Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation’”¹¹²—does not reach the dignity of federal constitutional standard. It hardly answers a challenge to congressional overreach for Congress to have made its illegal intention known clearly. And it hardly matters if the recipient receives notice, when the most it could do is mitigate the harm from illegal government action, but never undo its effects entirely. Even with years of advance notice, South Dakota could do nothing to recover the 5 percent of the road grant that it lost. Nor is it, as Chief Justice Rehnquist suggested, of any particular consequence that the condition imposed be “related to” the grant in question. Under the rational basis test there is enough connection between the drinking of alcohol by minors and road fatalities. But the question in issue is not that factual question, but instead whether the federal government has any role to play in making these determinations.

To her great credit, Justice O’Connor did not fall for these flimsy rationales. Instead she understood that the structural issues in question required the Court to face the same question that it rightly answered in *Hammer v. Dagenhart*. *Hammer* may have been (wrongly, as noted above) overruled by the New Deal Commerce Clause cases, but in dealing with this issue Justice O’Connor, who has long been concerned with the boundaries of federalism, wrote a dissent in *Dole* that relied on the unconstitutional conditions logic that underlay the Court’s decision in *Hammer*: “While *Butler*’s authority is questionable insofar as it assumes that Congress has no regulatory power over farm production, its discussion of the spending power and its description of both the power’s breadth and its limitations remain sound.”¹¹³ Earlier in the opinion, she noted:

¹¹¹ See *id.* at 68 (“We are not now required to ascertain the scope of the phrase ‘general welfare of the United States’ or to determine whether an appropriation in aid of agriculture falls within it. Wholly apart from that question, another principle embedded in our Constitution prohibits the enforcement of the Agricultural Adjustment Act. The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised, and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end.”).

¹¹² *Dole*, 483 U.S. at 207 (alterations in original) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

¹¹³ *Id.* at 216-17 (O’Connor, J., dissenting).

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced.¹¹⁴

Such is an approach that distinguishes between different types of condition, which, of course, is exactly what *Hammer* said. The key point here is to apply this anticircumvention argument to various kinds of conditions. To do so, the first question is whether the direct form of regulation would raise federalism issues. Two subsequent Supreme Court cases show that this can happen when the federal government seeks to impose direct limitations on how the states cover their own business. *New York v. United States*¹¹⁵ held that the federal government could not commandeer state governments by forcing them to take title to nuclear wastes,¹¹⁶ and *Printz v. United States*¹¹⁷ held similarly that it could not force state law enforcement figures to run background checks on gun applicants.¹¹⁸ The clear implication is that the notion of separation of powers means that the federal demands cannot conscript state governments to do their bidding. In a sense, this push back against federal power has a deeper dye than the resistance to federal commerce power because only in the *New York* case did the federal government take over a state agency. With the Commerce Clause, the federal laws "only" preempt or trump state laws.

Now the clear gulf between both *New York* and *Printz*, on the one side, and *Dole* and the Medicaid mandate on the other side, is that the former involve direct regulation and the latter involve the conditional use of the spending power. But once rational basis is rejected as the standard of constitutional review, the direct/indirect distinction is stripped of its weight, such that where direct regulation is illicit, so too are conditions imposed on federal spending. That test works quite easily with *Dole* because of the distinctive role of the Twenty-First Amendment within the federal scheme.

The situation with Medicaid is more complex because, under current law, there is no direct prohibition against public expenditures for Medicaid at the federal level. At that point it is a bit more difficult to tease out the proper from the improper use of conditions. Obviously any situation in which the federal government tells states that they must use Medicaid expenditures for Medicaid purposes is obviously correct. The parallel is that the federal money distributed through the highway system could impose

¹¹⁴ *Id.* at 215.

¹¹⁵ 505 U.S. 144 (1992).

¹¹⁶ *Id.* at 149, 188.

¹¹⁷ 521 U.S. 898 (1997).

¹¹⁸ *Id.* at 902, 935.

restrictions on drunk driving or the use of alcohol on public roads because those activities were within its power prior to the introduction of prohibition.

Yet the Medicaid mandate, without question, goes much further. The first point here is that at stage one of the process the federal government collects substantial amounts from the citizens of each state, which it funnels back to them through the Medicaid program. Thus one recent study noted that California had \$25 billion of funds at risk and Arizona had \$6.3 billion at risk.¹¹⁹ The precise numbers are not critical but the style of argument is. Under the PPACA the state that does not accept coverage for additional people has to either forfeit these dollars and cover the individuals on Medicaid using their own money, or not cover them. Indeed, in this case it is not clear that they should not be covered because of the burden that each bears to acquire insurance under the individual mandate. It is, therefore, in the interest of every state to expend any figure that is less than the amount of the taxes lost in order to keep those tax revenues. Yet to do so they must engage in massive tax increases on the one hand and the cutting of other expenditure programs relating to education, law enforcement, and the like on the other.

There is, of course, no explicit order to make these cuts. But the new burden that is placed on this program, years after its introduction, eliminates all possibilities mitigating steps that can do anything effective to soften the blow. In these cases, therefore, the necessary and known consequence of the federal Medicaid mandate is to commandeer huge chunks of state resources and to require, often explicitly, state officials to run the federal program. The exact level of these costs is of course unknown at present because the regulations are incomplete, and upon completion are likely to change again. But that uncertainty only increases the net burden, while doing nothing to resolve the question that can be resolved right now on the strength of the available record. It takes, therefore, a supreme level of indifference to how these rules play out in practice to say that these burdens do not rise to the level of coercion when, unlike the previous programs, they result in massive dislocation of established state practices. The states are damned if they take the money, and they are damned if they do not. There is no “encouragement” in this case, only relentless coercion that should be struck down because of the many ways in which the use of the conditional spending power fundamentally alters the structure of state and federal relations for the worse.¹²⁰

¹¹⁹ Edmund F. Haislmaier, *Quantifying Costs to States of Noncompliance with PPACA's Medicaid Expansion*, BACKGROUND (Heritage Found., D.C.), Jan. 12, 2012, at 3 tbl.1.

¹²⁰ For an argument that the midstream correction should be judged by the normal rules for contract modification, which are resistant to unilateral changes because of risk of predatory or opportunistic behavior, see Brief of James F. Blumstein, as Amicus Curiae in Support of Petitioners, *Florida v. U.S. Dep't of Health & Human Servs.* (No. 11-400), available at <http://www.healthreformgps.org/wp->

CONCLUSION

The current level of ambition found in the PPACA is not only a consequence of the constellation of political forces during the 2009-2010 period; it is also a consequence of the background of Supreme Court doctrine as it applies to both the Commerce Clause and the Spending Clause, the first of which is implicated in the individual mandate, and the second in the Medicaid mandate. Notwithstanding the different location of these two constitutional challenges, their underlying structure is remarkably similar. In both cases, what has emboldened Congress to act as it has is the confidence of its dominant faction that the rational basis test will let it glide past all difficulties, which indeed it does.

The only viable counterattack is to trace the history of both Clauses in order to establish the proposition that no serious engagement with the constitutional text can work with an uncritical acceptance of that test. The constitutional history that discredits the rational basis test is neither ambiguous nor obscure. It teaches that the rational basis test is a modern addition to constitutional law created by Justices who were so determined to expand the scope of federal power that they dismantled all the major constitutional limitations on federal power. If this earlier history were arguable and controversial, the case for reverting to earlier positions would be weak. But in this instance, there is no real ambiguity on how either of these Clauses was construed. Nor is there much to be said for the political stability of the current system that has conferred far too much power on the federal government, which in turn leads to the excessive influence of whatever faction is able to pull the strings of power in its favor. There are sufficient reliance interests so that many programs, Medicaid included, cannot be undone. But there remains no reason to expand these programs in new and mischievous ways. The earlier rules imposed discipline and order on the federal government that have allowed this nation to flourish. The current rules will usher in an era of empty promises, false expectations, and ruinous financial commitments. A constitution that is built to stand for the ages cannot long survive if its key structural limitations are honored in words but violated in deed. The age for judicial excuses should be over. The Court should recover its lost heritage by striking down the individual mandate and the Medicaid extension, which pose a deadly threat to the theory and practice of limited government.

content/uploads/Blumstein-amicus-11-4001.pdf. See also Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 521-22 (1981) (arguing that in many contract cases, judges “have acted to deter opportunism and hence decrease its costs,” and describing opportunism as “[a] major problem [that] occurs when a performing party behaves contrary to the other party’s understanding of their contract, but not necessarily contrary to the agreement’s explicit terms, leading to a transfer of wealth from the other party to the performer”).