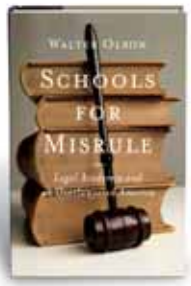

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Obamacare Is Unconstitutional

BY ROGER VINSON

On March 23, 2010, President Obama signed The Patient Protection and Affordable Care Act. This case was filed minutes after the President signed it. This case is not about whether the Act is wise or unwise legislation, or whether it will solve or exacerbate the myriad problems in our health care system. In fact, it is not really about our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government.

James Madison, the chief architect of our federalist system, observed in Federalist No. 51:

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

The Founders endeavored to resolve Madison's identified "great difficulty" by creating a system of dual sovereignty. The Tenth Amendment reaffirmed that relationship: "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." The Framers believed that limiting federal power, and allowing the "residual" power to remain in the hands of the states (and of the people), would help "ensure protection of our fundamental liberties" and "reduce the risk of tyranny and abuse." The great Chief Justice John Marshall noted "that those limits may not be mistaken, or forgotten, the Constitution is written."

THE SCOPE OF THE COMMERCE CLAUSE

To say that the federal government has limited and enumerated power does not get one far, however, for that statement is a long-recognized and well-settled truism. The ongoing challenge is deciding whether a particular federal law falls within or outside those powers.

For this claim, the plaintiffs contend that the individual mandate exceeds Congress' power under the Commerce Clause. At issue here is the assertion that the Commerce Clause can only reach individuals and entities engaged in an "activity"; and because the plaintiffs maintain

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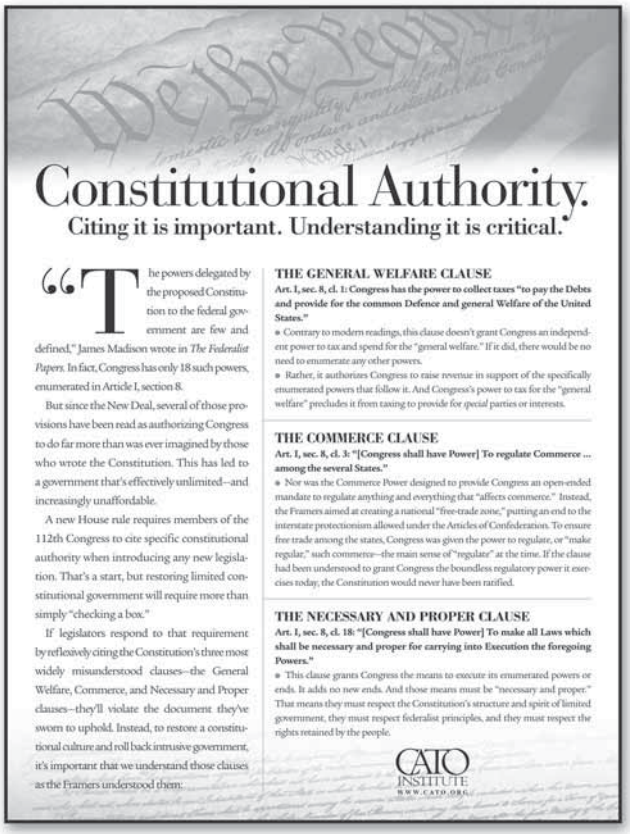
ROGER VINSON is senior U.S. district judge for the Northern District of Florida. This article is excerpted from his decision in *Florida v. Department of Health and Human Services*, issued on January 31, 2011, and available in full online. Internal citations have been omitted.



Constitutional Authority.

Citing it is important. Understanding it is critical.

"The powers delegated by the proposed Constitution to the federal government are few and defined," James Madison wrote in *The Federalist Papers*. In fact, Congress has only 18 such powers, enumerated in Article I, section 8.

But since the New Deal, several of those provisions have been read as authorizing Congress to do far more than was ever imagined by those who wrote the Constitution. This has led to a government that's effectively unlimited—and increasingly unaffordable.

A new House rule requires members of the 112th Congress to cite specific constitutional authority when introducing any new legislation. That's a start, but restoring limited constitutional government will require more than simply "checking a box."

If legislators respond to that requirement by reflexively citing the Constitution's three most widely misunderstood clauses—the General Welfare, Commerce, and Necessary and Proper clauses—they'll violate the document they've sworn to uphold. Instead, to restore a constitutional culture and roll back intrusive government, it's important that we understand those clauses as the Framers understood them:

THE GENERAL WELFARE CLAUSE

Art. I, sec. 8, cl. 1: Congress has the power to collect taxes "to pay the Debts and provide for the common Defence and general Welfare of the United States."

- Contrary to modern readings, this clause doesn't grant Congress an independent power to tax and spend for the "general welfare." If it did, there would be no need to enumerate any other powers.
- Rather, it authorizes Congress to raise revenue in support of the specifically enumerated powers that follow it. And Congress's power to tax for the "general welfare" precludes it from taxing to provide for *special* parties or interests.

THE COMMERCE CLAUSE

Art. I, sec. 8, cl. 3: "[Congress shall have Power] To regulate Commerce ... among the several States."

- Nor was the Commerce Power designed to provide Congress an open-ended mandate to regulate anything and everything that "affects commerce." Instead, the Framers aimed at creating a national "free-trade zone," putting an end to the interstate protectionism allowed under the Articles of Confederation. To ensure free trade among the states, Congress was given the power to regulate, or "make regular," such commerce—the main sense of "regulate" at the time. If the clause had been understood to grant Congress the boundless regulatory power it exercises today, the Constitution would never have been ratified.

THE NECESSARY AND PROPER CLAUSE

Art. I, sec. 8, cl. 18: "[Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."

- This clause grants Congress the means to execute its enumerated powers or ends. It adds no new ends. And those means must be "necessary and proper." That means they must respect the Constitution's structure and spirit of limited government, they must respect federalist principles, and they must respect the rights retained by the people.

CATO INSTITUTE
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The Cato Institute's latest full-page ad, following earlier ones on climate change, the stimulus, and budget cutting, ran in the *Washington Post*, *Politico*, *The Hill*, *Roll Call*, and *Human Events*. This ad urged Congress to better understand the limits on power established in America's founding document.

Continued from page 1

that an individual's failure to purchase health insurance is, almost by definition, "inactivity," the individual mandate goes beyond the Commerce Clause and is unconstitutional. The defendants contend that activity is not required before Congress can exercise its Commerce Clause power, but that, even if it is required, not having insurance constitutes activity.

The Commerce Clause is a mere sixteen words long, and it provides that Congress shall have the power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

For purposes of this case, only seven words are relevant: "To regulate Commerce . . . among the several States." There is considerable historical evidence that in the early years of the Union, the word "commerce" was understood to encompass trade, and the intercourse, traffic, or exchange of goods. In a frequently cited law review article, constitutional scholar Randy E. Barnett has painstakingly tallied each appearance of the word "commerce" in Madison's notes on the Constitutional Convention and in *The Federalist*, and discovered that in none of the 97 appearances of that term is it ever used to refer unambiguously to activity beyond trade or exchange.

The Supreme Court's first description of commerce (and still the most widely accepted) is from *Gibbons v. Ogden*. Chief Justice Marshall explained that "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."

To acknowledge the foregoing historical facts is not necessarily to say that the power under the Commerce Clause was intended to (and must) remain limited to the trade or exchange of goods, and be confined to the task of eliminating trade barriers erected by and between the states. The drafters of the Constitution were aware that they were preparing an instrument for the ages, not one suited only for the exigencies of that particular time.

> "This case is not really about our health care system at all. It is principally about our federalist system."

NOVEL AND UNPRECEDENTED

The plaintiffs rely heavily on *Lopez* and *Morrison* in framing their arguments, while the defendants look principally to *Wickard* and *Raich*. These cases all have something to add to the discussion. However, while they frame the analysis, and are important from a historical perspective, they do not by themselves resolve this case. That is because, as Congress's attorneys in the Congressional Research Service and Congressional Budget Office advised long before the Act was passed into law, the notion of Congress having the power under the Commerce Clause to directly impose an individual mandate to purchase health care insurance is "novel" and "unprecedented." Never before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States. However, unprecedented or not, I will assume that the individual mandate can be Constitutional under the Commerce Clause and will analyze it accordingly.

IS INACTIVITY ACTIVITY?

The threshold question that must be addressed is whether activity is required before Congress can exercise its power under the Commerce Clause. Commerce Clause jurisprudence has contracted and expanded (and contracted and expanded again) during our nation's development. But, in every one of those instances—in both the contractive and expansive—there has always been clear and inarguable activity, from exerting control over and using navigable waters (*Gibbons*) to growing or consuming marijuana (*Raich*). The Supreme Court has never been called upon to consider if "activity" is required.

The defendants contend, however, that despite the inarguable presence of activity in every Supreme Court case to date, activity is not required under the Commerce Clause. In fact, they go so far as to suggest that to impose such a requirement would be bold and radical. According to the defendants, because the Supreme Court has never identified a distinction between activity and inactivity as a limitation on Congress's commerce power, to hold otherwise would "break new legal ground" and be "novel" and "unprecedented." First, it is interesting that the defendants—apparently believing the best defense is a good offense—would use the words "novel" and "unprecedented," since those are the exact same words that the CRS and CBO used to describe the individual mandate before it became law. Furthermore, there is a simple and rather obvious reason why the Supreme Court has never distinguished between activity and inactivity before: it has not been called upon to consider the issue because, until now, Congress had never attempted to exercise its Commerce Clause power in such a way before. In every Supreme Court case decided thus far, Congress was not seeking to regulate, under its commerce power, something that could even arguably be said to be "passive inactivity."

It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause. If it has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting—as was done in the Act—that compelling the actual transaction is itself "commercial and economic in nature, and substantially affects interstate commerce," it is not hyperbolizing to suggest that Congress could do almost anything it

wanted. It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place. If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain, for it would be "difficult to perceive any limitation on federal power" (*Lopez*), and we would have a Constitution in name only. Surely this is not what the Founding Fathers could have intended.

Having found that "activity" is an indispensable part [of] the Commerce Clause analysis, the constitutionality of the individual mandate will turn on whether the failure to buy health insurance is "activity."

Preliminarily, based solely on a plain reading of the Act itself (and a commonsense interpretation of the word "activity" and its absence), I must agree with the plaintiffs' contention that the individual mandate regulates inactivity. Section 1501 states in relevant part: "If an applicable individual fails to [buy health insurance], there is hereby imposed a penalty." By its very own terms, therefore, the statute applies to a person who does not buy the government-approved insurance; that is, a person who "fails" to act pursuant to the congressional dictate.

The defendants insist that the uninsured are active. In fact, they even go so far as to make the claim—which the plaintiffs call "absurd"—that going without health insurance constitutes "economic activity to an even greater extent than the plaintiffs in *Wickard* or *Raich*."

The defendants contend that there are three unique elements of the health care market which, when viewed cumulatively and in combination, belie the claim that the uninsured are inactive. First, as living and breathing human beings who are always susceptible to sudden and unpredictable illness and injury, no one can "opt out" of the health care market. Second, if and when health services are sought, hospitals are required by law to provide care, regardless of inability to pay. And third, if the costs incurred cannot be paid (which they frequently cannot, given the high cost of medical care), they are passed along (cost-shifted) to third parties, which has economic implications for everyone. Congress found that the uninsured received approximately $43 billion in "uncompensated care" in 2008 alone. These three things, according to the defendants and various health care industry experts and scholars on whom they rely, are "replicated in no other market" and defeat the argument that uninsured individuals are inactive.

> "It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause."

First, it is not at all clear whether or why the three allegedly unique factors of the health care market are Constitutionally significant. What if only one of the three factors identified by the defendants is present? After all, there are lots of markets—especially if defined broadly enough—that people cannot "opt out" of. For example, everyone must participate in the food market. Instead of attempting to control wheat supply by regulating the acreage and amount of wheat a farmer could grow as in *Wickard*, under this logic Congress could more directly raise too-low wheat prices merely by increasing demand through mandating that every adult purchase and consume wheat bread daily, rationalized on the grounds that because everyone must participate in the market for food, nonconsumers of wheat bread adversely affect prices in the wheat market.

Or, as was discussed during oral argument, Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system. Similarly, because virtually no one can be divorced from the transportation market, Congress could require that everyone above a certain income threshold buy a General Motors automobile—now partially government-owned—because those who do not buy GM cars (or those who buy foreign cars) are adversely impacting commerce and a taxpayer-subsidized business.

That the defendants' argument is "unsupported by Commerce Clause jurisprudence" can perhaps best be seen by looking to *Lopez*. Although that case is distinct from this one in some notable ways, in the context of the defendants' "health care is unique" argument, it is quite similar.

THE LOPEZ CASE

In *Lopez*, the majority was concerned that using the Commerce Clause to regulate things such as possession of guns in school zones would "obliterate" the distinction between what is national and what is local and effectively create a centralized government that could potentially permit Congress to begin regulating "any and all aspects" of our lives, including marriage, divorce, child custody, and education. The dissent insisted that this concern was unfounded because the statute at issue was "aimed at curbing a particularly acute threat" of violence in schools that had "singularly disruptive potential." This was "the rare case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce."

Two things become apparent after reading these arguments attempting to justify extending Commerce Clause power to the

legislation in that case, and the majority opinion (which is the controlling precedent) rejecting those same arguments. First, the contention that Commerce Clause power should be upheld merely because the government and its experts or scholars claim that it is being exercised to address a "particularly acute" problem that is "singular [],'' "special," and "rare"—that is to say "unique"—will not by itself win the day. Uniqueness is not an adequate limiting principle, as every market problem is, at some level and in some respects, unique. If Congress asserts power that exceeds its enumerated powers, then it is unconstitutional, regardless of the purported uniqueness of the context in which it is being asserted.

Second, and perhaps more significantly, under *Lopez* the causal link between what is being regulated and its effect on interstate commerce cannot be attenuated and require a court "to pile inference upon inference," which is, in my view, exactly what would be required to uphold the individual mandate. For example, in contrast to individuals who grow and consume marijuana or wheat (even in extremely small amounts), the mere status of being without health insurance, in and of itself, has absolutely no impact whatsoever on interstate commerce—not "slight," "trivial," or "indirect," but no impact whatsoever—at least not any more so than the status of being without any particular good or service. If impact on interstate commerce were to be expressed and calculated mathematically, the status of being uninsured would necessarily be represented by zero. Of course, any other figure multiplied by zero is also zero. Consequently, the impact must be zero, and of no effect on interstate commerce. The uninsured can only be said to have a substantial effect on interstate commerce in the manner as described by the defendants: (i) if they get sick or injured; (ii) if they are still uninsured at that specific point in time; (iii) if they seek medical care for that sickness or injury; (iv) if they are unable to pay for the medical care received; and (v) if they are unable or unwilling to make payment arrangements directly with the health care provider, or with assistance of family, friends, and charitable groups, and the costs are thereafter shifted to others. In my view, this is the sort of piling "inference upon inference" rejected in *Lopez* and subsequently described in *Morrison* as "unworkable if we are to maintain the Constitution's enumeration of powers."

> "The causal link between what is being regulated and its effect on interstate commerce cannot require a court 'to pile inference upon inference.'"

While $43 billion in uncompensated care from 2008 was only 2% of national health care expenditures for that year, it is clearly a large amount of money, and it demonstrates that a number of the uninsured are taking the five sequential steps. And when they do, Congress plainly has the power to regulate them at that time (or even at the time that they initially seek medical care), a fact with which the plaintiffs agree. But, to cast the net wide enough to reach everyone in the present, with the expectation that they will (or could) take those steps in the future, goes beyond the existing "outer limits" of the Commerce Clause and would, I believe, require inferential leaps of the sort rejected in *Lopez*. The defendants' argument that people without health insurance are actively engaged in interstate commerce based on the purported "unique" features of the much broader health care market is neither factually convincing nor legally supportable.

The defendants next contend that the uninsured have made the calculated decision to engage in market timing and try to finance their future medical needs out-of-pocket rather than through insurance, and that this "economic decision" is tantamount to activity.

The problem with this legal rationale, however, is it would essentially have unlimited application. There is quite literally no decision that, in the natural course of events, does not have an economic impact of some sort. It is not difficult to identify an economic decision that has a cumulatively substantial effect on interstate commerce; rather, the difficult task is to find a decision that does not.

CONCLUSION

Because I find both the "uniqueness" and "economic decision" arguments unpersuasive, I conclude that the individual mandate seeks to regulate economic inactivity, which is the very opposite of economic activity. And because activity is required under the Commerce Clause, the individual mandate exceeds Congress' commerce power, as it is understood, defined, and applied in the existing Supreme Court case law.

Congress must operate within the bounds established by the Constitution. For the reasons stated, I must reluctantly conclude that Congress exceeded the bounds of its authority in passing the Act with the individual mandate. Because the individual mandate is unconstitutional and not severable, the entire Act must be declared void. This has been a difficult decision to reach, and I am aware that it will have indeterminable implications. At a time when there is virtually unanimous agreement that health care reform is needed in this country, it is hard to invalidate and strike down a statute titled "The Patient Protection and Affordable Care Act."

My conclusion in this case is based on an application of the Commerce Clause law as it exists pursuant to the Supreme Court's current interpretation and definition. Only the Supreme Court (or a Constitutional amendment) can expand that.

The Patient Protection and Affordable Care Act is unconstitutional. ■