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

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.

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

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.

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.

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. 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 pay for the medical care received; (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 pay for the medical care received; (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 pay for the medical care received; (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

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 indeterminate 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.