

A Condensed Version of Judge Roger Vinson's Ruling Overturning the Affordable Care Act of 2010

Edited by Dave Racer*

Liberals fear it, conservatives hope the Supreme Court upholds it. Judge Roger Vinson's ruling on the Affordable Care Act of 2010, along with the others that have cleared District Court (or will) are sure to end up at the Supreme Court.

Very few people have actually read the decision. If I could "mandate" that all Americans read this decision, Americans would come to understand the profound issues it raises. For at stake is whether Congress is free to regulate every human activity – and I do not exaggerate.

If you have not had a chance to read the entire bill, but want to know its critical arguments, use this document. My purpose in writing this document is to summarize the arguments in Judge Roger Vinson's 2011 ruling.

The Case is titled "STATE OF FLORIDA, by and through Attorney General Pam Bondi, et al" v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.^{1b}

Judge Vinson considers the constitutionality of the Affordable Care Act of 2010 (also known as the Patient Protection and Affordable Care Act of 2010). More specifically, he rules on whether Congress has the power, under the Commerce Clause in Article I, Section 8, to require individuals to purchase health insurance.

At stake is whether Congress is free to regulate every human activity – and I do not exaggerate.

"...the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and undefined." (2)

(Note to the reader: All quotes taken from the ruling are indented. When Vinson quoted another document, there is a second indent with a code: [SC] for Supreme Court. [F] The Federalist Papers. My comments are flush left.)

First, His Rulings

I provide Judge Vinson's ruling on the mandate first, then his overall ruling.

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. (56)

The individual mandate is outside Congress' Commerce Clause power, and it cannot be otherwise authorized by an assertion of power under the Necessary and Proper Clause. It is not Constitutional. Accordingly,

summary judgment must be granted in favor of the plaintiffs on Count I. (63)

Next, Judge Vinson's ruling on severability (discussed below). This pertains to whether the entire ACA should be overturned or just the mandate:

In sum, notwithstanding the fact that many of the provisions in the Act can stand independently without the individual mandate (as a technical and practical matter), it is reasonably "evident," ... that the individual mandate was an essential and indispensable part of the health reform efforts, and that Congress did not believe other parts of the Act could (or it would want them to) survive independently. I must conclude that the individual mandate and the remaining provisions are all inextricably bound together in purpose and must stand or fall as a single unit. The individual mandate cannot be severed. (74)

Historical Context

His explanation of the history, use, and some abuse, of the Commerce Clause is valuable for any student of the Constitution. Vinson quotes the Federalist papers to set the discussion for defining the separation of state and federal government. From the Federalist No 51, at 348:

Vinson explained the founding fathers' concept of limited federal government.

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.' (3)

Modern Americans seem to have turned the Constitution on its head, believing that it delineates the rights of residents and citizens. In reality, it is the opposite. The federal constitution is a document of enumerated powers, and as such, tells the federal government what it is empowered to do – what the people allow it to do.

Judge Vinson turns to McCollough v. Maryland, decided in 1819, a decision that still stands as foundational to understand and apply precedent. In this cite, he explains the limitations of enumerated powers. :

'This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it...is now universally admitted.'...the question respecting the extent of the powers

actually granted is perpetually arising, and will probably continue to arise, so long as our system shall exist.' (4)

“Spending” Clause

Article I, Section 8 empowers Congress to appropriate money for certain authorized actions. Not all appropriations are constitutional, even though Congress might pass a bill to authorize them. Although the word “spending” is not in the constitution, this has come to be known as the Spending Clause. Vinson cites *South Dakota v. Dole*, 1987:

Under *Dole*, there are four restrictions on Congress' Constitutional spending power: (1) the spending must be for the general welfare; (2) the conditions must be stated clearly and unambiguously; (3) the conditions must bear a relationship to the purpose of the program; and (4) the conditions imposed may not require states 'to engage in activities that would themselves be unconstitutional.'...In addition, a spending condition cannot be 'coercive.' (6)

When Congress appropriates/spends money, it also asserts control over the object of the appropriation. Judge Vinson provides a significant insight to the founder fathers' intent about federal control over states, and how it has evolved.

It is a matter of historical fact that at the time the Constitution was drafted and ratified, the Founders did not expect that the federal government would be able to provide sizable funding to the states and, consequently, be able to exert power over the states to the extent that it currently does. To the contrary, it was expected that the federal government would have limited sources of tax and tariff revenue, and might have to be supported by the states. This reversal of roles makes any state-federal partnership somewhat precarious given the federal government's enormous economic advantages. Some have suggested that, in the interest of federalism, the Supreme Court should revisit and reconsider its Spend Clause cases. See Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 chap. L. Rev. 195-96 (2001) (maintaining the 'greatest threat to state autonomy is, and has long been, Congress's spending power' and 'the states will be at the mercy of Congress so long as there are no meaningful limits on its spending power'). However, unless and until that happens, the states have little recourse to remaining the very junior partner in this partnership. (12)

Commerce Clause

Since the late 1930s, Congress has increasingly and more aggressively asserted its perceived powers under the

Commerce Clause. The Clause is one of the enumerated powers in Article 1, Section 8: "To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."

The ACA penalizes individuals for refusing to do something, i.e., purchase health insurance. Not purchasing health insurance is “inactivity” whereas purchasing health insurance is “activity.” Both parties agree about this, to some extent. But the ACA asserts Congress has power to regulate the inactivity of not purchasing health insurance.

Perez, decided in 1971, attempted to define Congress' right to regulate certain activities.

At issue here [*Perez*], as in the other cases decided so far, is the assertion that the Commerce Clause can only reach individuals and entities engaged in an 'activity'; and because the plaintiffs maintain 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 exercises its Commerce Clause power, but that, even if it is required, not having insurance constitutes activity. The defendants also claim that the individual mandate is sustainable for the 'second reason' that it falls within the Necessary and Proper Clause. (13)

Vinson begins his historical and evolutionary discourse on the Commerce Clause. First, he shows that

Congress could only assert the power inherent in the Commerce Clause under three specific instances.

The current state of the Commerce Clause law has been summarized and defined by the Supreme Court on several occasions:

[SC] - [W]e 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. 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. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce. *United States v. Lopez*...*Perez v. United States*...It is thus well settled that Congress has the authority under

the Commerce Clause to regulate three - and only three - 'categories of activity.' [Emphasis added] (19)

...every use of the word that appeared in the state ratification convention reports and finding 'the term was uniformly used to refer to trade or change'.

The third test required to validate use of the Commerce Clause is substantiality. It is also the most "frequently disputed" and 'most hotly contested facet'... This is drawn from United State v. Patton, 451 F.3d 615, 622-23 (10th Cir. 2006). For enumerated powers to be useful, there has to be a balance between too much leeway and too little.

Alexander Hamilton intimated in The Federalist, however, it did not at that time encompass manufacturing or agriculture. (22)

[SC] - ...the third allows Congress to regulate intrastate noncommercial activity, based on its effects. Consideration of effects necessarily involves matters of degree [and] thus poses not two hazards, like Cylla and Charybdis, but three. If we entertain too expansive an understanding of effects, the Constitution's enumeration of powers becomes meaningless and federal power becomes effectively limitless. If we entertain too narrow an understanding, Congress is stripped of its enumerated power, reinforced by the Necessary and Proper Clause, to protect and control commerce among the several states. If we employ too nebulous a standard, we exacerbate the risk that judges will substitute their own subjective or political calculus for that of the elected representatives of the people, or will appear to be doing so. (20)

And here we find the primary purpose that the founding fathers wrote the words that became known as the Commerce Clause: to avoid war between the states over trade and commerce.

This interpretation of commerce as being primarily concerned with the commercial intercourse associated with the trade or exchange of goods and commodities is consistent with the original purpose of the Commerce Clause...which is entitled to 'great influence in [its] construction.' See Gibbons, supra, 22 U.S. at 188-89.

There is no doubt historically that the primary purpose behind the Commerce Clause was to give Congress power to regulate commerce so that it could eliminate the trade restrictions and barriers by and between the states that had existed under the Articles of Confederation. (23)

And here we find the primary purpose that the founding fathers wrote the words that became known as the Commerce Clause: to avoid war between the states over trade and commerce.

Insurance was not commerce:

More telling than the original understanding of the Commerce Clause are the later Court rulings that referred directly to insurance. The

Court originally said that insurance is not commerce, in the sense of the Commerce Clause. The 1944 Court changed this, and in 1945, Congress responded by passing the McCarran-Ferguson act, which re-empowered states to regulate insurance.

Original Intent:

Interpretation includes what the law says, but also, why it says it. In this context, Vinson writes about the original purpose of the Commerce Clause, and this is a key understanding. He references James Madison's notes and found "that in none of the ninety-seven [sic] appearances of the term is it every used to refer unambiguously to activity beyond trade or exchange."

As an historical aside, I note that pursuant to this original understanding and interpretation of "commerce," insurance contracts did not qualify because "[i]ssuing a policy of insurance is not a transaction of commerce." Paul v. Virginia...(further explaining that insurance contracts "are not articles of commerce in any proper meaning of the word" as they are not objects "of trade and barter," nor are they "commodities to be shipped or forwarded from one State to another, and then put up for sale"). That changed in 1944, when the Supreme Court held that Congress could regulate the insurance business under the Commerce Clause. United States v. South-Eastern Underwriters... "Concerned that [this] decision might undermine state efforts to regulate insurance, Congress in 1945 enacted the McCarran-Ferguson Act. Section 1 of the Act provides that 'continued regulation and taxation by the several States

...in determining the full extent of any granted power, it may be helpful to not only focus on what the constitution says...but also why it says what it says (i.e., the problem or issue it was designed to address.

...in the early years of the Union, the word 'commerce' was understood to encompass trade, and the intercourse, traffic, or exchange of goods; in short, 'the activities of buying and selling that come after production and before the goods come to rest.' [Quoting Bork and Troy.] ...dictionaries from that time which defined commerce as 'exchange of one thing for another'.

of the business of insurance is in the public interest,' and that 'silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.'" Humana Inc. v. Forsyth (1999)...Thus, ever since passage of the McCarran-Ferguson Act, the insurance business has continued to be regulated almost exclusively by the states. (23)

Further expanding on the original purpose of the Commerce Clause, in H.P. Hood & Sons (1949) the Court explained it served to protect the new states from going to war over commerce by establishing a sort of level playing field.

[SC] - The desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of power over their internal affairs. No other federal power was so universally assumed to be necessary, no other state power was so readily relin[qu]ished. There was no desire to authorize federal interference with social conditions or legal institutions of the states. Even the Bill of Rights amendments were framed only as a limitation upon the powers of Congress. The states were quite content with their several and diverse controls over most matters but, as Madison has indicated, 'want of a general power over Commerce led to an exercise of this power separately, by the States, which not only proved abortive, but engendered rival, conflicting and angry regulations.' (24)

Judge Vinson quotes other cases (Gibbons, Kidd, EEOC v. Wyoming) that in fact, the Commerce Clause is the reason the founding fathers met to write a constitution.

'[i]t is important to remember that this clause was the Framers' response to the central problem that gave rise to the Constitution itself,' that is, the Founders had 'set out only to find a way to reduce trade restrictions.' See EEOC v. Wyoming...(24)

Vinson acknowledged that over time, Constitutions and their provisions can evolve, although he holds to original intent. He draws on Hamilton in The Federalist No 24 to explain:

[F] - Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs. Nothing, therefore, can be more fallacious than to infer the

extent of any power, proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a capacity to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity. The Federalist No. 34, at 210-11 (emphasis in original). (27)

But Congress Seldom Invoked the Commerce Clause

For more than 100 years, Congress seldom invoked the Commerce Clause. Instead, Congress, perhaps because it was tied more closely to the people, tended to avoid it. When Congress first attempted to expand it, the Court shot it down.

...it was not until 1887, one hundred years after ratification, that Congress first exercised its power to affirmatively and positively regulate commerce among the states. And when it did, the Supreme Court at that time rejected the broad conception of commerce and the power of Congress to regulate the economy was sharply restricted. See, e.g., Kidd v. Pearson, supra (1888). (28-29)

And for decades to follow, the Court repeatedly shot down Congress' attempts to expand the clause. Vinson quotes A.L.A. Schechter Poultry v. United States (1935) as an example. Here, in the early stages of the New Deal, the Court overturned Congress' attempt to regulate wages and hours in intrastate commerce.

...the Court invalidated regulations fixing employee hours and wages in an *intrastate* business because the activity being regulated only related to *interstate* commerce "indirectly." [Emphasis added] The Supreme Court characterized the distinction between "direct" and "indirect" effects on interstate commerce as "a fundamental one, essential to the maintenance of our constitutional system," for without it "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government." Id. at 548. (29-30)

Then things changed. The Court overturned longstanding precedent and the clear understanding of the meaning of the Commerce Clause in three key New Deal cases: N.L.R.B. v. Jones and Laughlin Steel Corp. (1937), United States v. Darby (1941), and Wickard v. Filburn (1942).

N.L.R.B. 1937:

N.L.R.B., the 1937 decision, for the first time allowed Congress to regulate intrastate (as opposed to interstate) commerce, provided the object of regulation had "substantial effect" on interstate commerce. Remarkably, this decision overturned the distinctions in Schechter, at least to some degree and upheld the Fair Labor Standards Act of 1938.

“Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.” (30) (Quoting NLRB)

In upholding the wage and hour requirements in the Fair Labor Standards Act, and its suppression of substandard labor conditions, the Court reaffirmed that with respect to intrastate “transactions” and “activities” having a substantial effect on interstate commerce, Congress may regulate them without doing violence to the Constitution. (30)

Darby, 1941:

Darby is another case related to the Fair Labor Standards Act and overturned *Hammer v. Dagenhart*, an earlier decision dealing with wage and hour laws.

In upholding the wage and hour requirements in the Fair Labor Standards Act, and its suppression of substandard labor conditions, the Court reaffirmed that with respect to intrastate “transactions” and “activities” having a substantial effect on interstate commerce, Congress may regulate them without doing violence to the Constitution. (30)

Wickard, 1942:

Vinson states that until today (as asserted in the ACA), *Wickard v. Filburn* had been perceived to deal with the most expansive Congressional attempt concerning the Commerce Clause. The Court ruled against *Filburn*. *Filburn* had grown 12 acres of wheat, from which he harvested 239 bushels that he used for his own purposes. He never sold it. He did not directly engage in “commerce” as the founding fathers clearly understood it.

At issue in *Wickard* were amendments to the Agricultural Adjustment Act of 1938 that set acreage allotments for wheat farmers in an effort to control supply and avoid surpluses that could result in abnormally low wheat prices. (30)

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

* * *

That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. (31)

...“a class of activities” that have a substantial impact on interstate commerce when those activities are aggregated with all similar and related activities --- even though the activities within the class may be themselves trivial and insignificant. (31)

Commerce Clause Had Been Expanded

Vinson explained that after the 1930s, Congress began asserting increased power under the Commerce Clause. He then leapt forward in time to more recent cases that could be related to the ACA.

As an aside, this evolution and expansion of Congress’ assertion of its power is instructive. Each time the Court upholds an expansion of Congressional power, Congress asserts more power. At what point does the Court say “enough” and in so doing, revert to original intent? (The latter is unlikely.)

Lopez-1995:

United State v. Lopez (1995) concerned an attempt to regulate guns using the Commerce Clause. Gun ownership is protected under the Second Amendment.

Congress declared that gun violence affected commerce, as someone injured or killed could no longer participate in the same manner or to the same extent as before the violence occurred. *Lopez* dealt with criminal penalties related to the Gun Free School Zones Act of 1990. The Court warned that there were limits to how far Congress could go, and in *Lopez*, they had exceeded the limits.

...the Court observed that even in cases which had interpreted the Commerce Clause more expansively, every decision to date had recognized that the power granted by the Clause is necessarily “subject to outer limits” which, if not recognized and respected, could lead to federal action that would “effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” (33)

If the Court accepted the argument that violence itself is a form of commerce, the Court wondered whether Congress couldn’t consider *any activity* to affect commerce and therefore, open to federal regulation.

It found that if such theories were sufficient to justify regulation under the Commerce clause (even though their underlying logic and truth were not questioned), "it is difficult to perceive any limitation on federal power" and "we are hard pressed to posit any activity by an individual that Congress is without power to regulate." (34)

[SC] [To accept such arguments and uphold the statute, the majority concluded, would require the Court:]. . . to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do. (34)

What is striking, as one reviews the evolution of how Congress and the Court views the enumerated powers, in this case the Commerce Clause, is their loss of fidelity toward original intent.

Gonzales v. Raich, 2005, challenged California's law that allowed individuals to grow medicinal marijuana for their own use. Congress, and the Court, asserted that growing marijuana for personal use is a commercial activity that affects commerce, somewhat like Wickard, and the Court said Congress had the enumerated power to regulate it.

"At issue in Raich was whether Congress had authority under the Commerce and Necessary and Proper Clauses to prohibit, via the Controlled Substances Act, "the local cultivation and use of marijuana in compliance with California law." (36)

The defendants were two women who had neither bought nor sold marijuana, and the marijuana they used never crossed state lines. Its sale is illegal in most states and therefore, it does not enjoy a legal free market.

The Court found Wickard to be "striking" in similarity and "of particular relevance" to the analysis as that case "establishes that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut regulation of the interstate market in that commodity."... (36)

...the "production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity." (37)

Morrison, 2000:

At issue in US v Morrison, 2000 was the Violence Against Women Act. Congress asserted that it had the right to extend criminal penalties in the Act using the Commerce Clause. Congress relied on the theory that when a women has been victimized by violence, she cannot travel or engage in commerce. Therefore, her inability to participate should be considered an activity. The court found, based in part on Lopez, that violence against women as asserted in this law was not an economic activity.

[SC] - Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. (35)

Raich, 2005:

Vinson acknowledges that Raich and Wickard seem at odds with Lopez and Morrison. Vinson goes to the Eleventh Circuit for a description of the differences.

By contrast, the statute in Raich was a broader legislative scheme "at the opposite end of the regulatory spectrum." Supra, 545 U.S. at 24. It was "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of [controlled substances]," which were "activities" the Supreme Court determined to be "quintessentially economic" in nature. See id. at 24-25. The Court reached this conclusion by "quite broadly defin[ing] 'economics' as 'the production, distribution, and consumption of commodities.'" (37)

Pause for a brief comment:

What is striking, as one reviews the evolution of how Congress and the Court views the enumerated powers, in this case the Commerce Clause, is their loss of fidelity toward original intent. The original intent, as Vinson clearly demonstrated, dealt only with the trade of items of value across state lines, or national

borders. The clear purpose of the Commerce Clause was to avoid armed conflict between the states.

Although Hamilton and others acknowledge that the Commerce Clause and the entire constitution would need adapt to change, Vinson states it is highly unlikely in the context in which Hamilton commented that he would have approved of the Clause if he saw its contemporary abuse.

Necessary and Proper Clause

The constitution empowers Congress to take proper actions to enforce its power under the Commerce Clause – all that is “necessary and proper.” Yet, a common concern emerged during the ratification process that Congress would abuse the necessary and proper clause.

Hamilton defended the clause in The Federalist No 33, at 204-205. His comments should be clear enough of an indicator that Congress cannot move to the extreme that it has and use this clause as a guise to do so. Hamilton and Madison both wrote that the clause is redundant, since without those words, it would be clear that Congress had the power to regulate allowable commerce.

[F] - These two clauses have been the source of much virulent invective and petulant declamation against the proposed Constitution. They have been held up to the people in all the exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated; as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane; and yet, strange as it may appear, after all this clamor, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence, that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specific powers. (58-59)

Vinson quotes Jefferson who, in 1800, saw the negative potentiality of Congress abusing this clause by adding to it a sort of labored logic and then attempt to regulate everything. Foreign trade by ocean requires ships, ships require, copper, copper must be mined, and therefore, Congress can regulate mining. That is the logic at work in the mandate touching this clause.

Ultimately, the Necessary and Proper Clause vests Congress with the power and authority to exercise means which may not in and of themselves fall within an enumerated power, to accomplish ends that must be within an enumerated power. (60)

[SC] When a “Law . . . for carrying into Execution” the Commerce Clause [violates other Constitutional principles], it is not a “Law . . . proper for carrying into Execution the Commerce Clause,” and is thus, in the words of the Federalist, “merely an act of usurpation” which “deserves to be treated as such.” Printz, supra, 521 U.S. at 923-24 (62)

A Solution Is Necessary

Vinson acknowledges that failure to pay for health care services is a serious issue. Furthermore, he agrees that when someone uses medical services he/she is engaged in commerce. But that does not extend to present behavior (when not engaged) or future behavior (when they may or may not engage). A good deal of money is at stake by those who do not pay for care.

...\$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... (49-50)

(The \$43 billion is a troubling number. It’s true significance is unclear on at least two levels: 1) Does the \$43 billion represent the amount medical providers bill for services, or the amount they agree to receive based on their network schedules? 2) Is two percent outside the range of bad debt common in other service industries? All businesses suffer bad debt (uncollectables): The pertinent question is whether the ratio among medical providers is greater than other services, and whether medical providers have other means by which to collect this debt, rather than to resort to mandatory health insurance.)

Key Principle:

Pretty much anything that is available to us to purchase, or choose not to purchase, has an effect on commerce. I do not buy beer. You do not buy broccoli. I do not purchase the services of a tanning parlor. You do not purchase the services of a Sushi Bar. By not purchasing these foods or services, we have affected commerce.

If we accept the idea that Congress has the authority to compel individuals to purchase insurance because the decision to purchase or not purchase has an effect on commerce, then literally, the same logic could be extended to any purchase decision.

There is quite literally no decision that, in the natural course of events, does not have an economic impact of some sort. The decisions of whether and when (or not) to buy a house, a car, a television, a dinner, or even a morning cup of coffee also have a financial impact that --- when aggregated with similar economic decisions --- affect the price of that particular product or service and have a substantial effect on interstate commerce. To be sure, 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. (53)

Every day, individuals make dozens of decisions that have a commercial effect. When these decisions are aggregated with those of 310 million of us, there is simply no way to calculate the impact on commerce.

The important distinction is that “economic decisions” are a much broader and far-reaching category than are “activities that substantially affect interstate commerce.” While the latter necessarily encompasses the first, the reverse is not true. “Economic” cannot be equated to “commerce.” And “decisions” cannot be equated to “activities.” Every person throughout the course of his or her life makes hundreds or even thousands of life decisions that involve the same general sort of thought process that the defendants maintain is “economic activity.” There will be no stopping point if that should be deemed the equivalent of activity for Commerce Clause purposes. (55)

If we accept the idea that Congress has the authority to compel individuals to purchase insurance because the decision to purchase or not purchase has an effect on commerce, then literally, the same logic could be extended to any purchase decision.

If an individual owns health insurance and does not use it, is that also an activity Congress could regulate? Vinson asks whether Congress could compel individuals that own mandated health insurance to pursue preventive care, if they choose not to do so.

Article I, Sec. 8 gives Congress power to do what is necessary and proper to enforce or assert its enumerated power to regulate commerce. But to be constitutional, the power asserted must meet several tests, otherwise anything could be justified as necessary and proper. One of those tests is that the activity deemed necessary, if not specifically commerce, should be modest and narrow in its scope.

A statute mandating that everyone purchase a product from a private company or be penalized (merely by virtue of being alive and a lawful citizen) is not a “modest”

addition to federal involvement in the national health care market, nor is it “narrow [in] scope.” (57)

What is insurance?

Insurance is meant to provide relief for unpredictable events (with the exception of permanent life insurance, which is purchased with the knowledge that death will occur). Every type of insurance, whether purchased or not, has an effect on commerce, if a loss occurs. Defenders of the individual mandate insist that because hospitals are forced to provide care, therefore people should be insured - called a “backstop” argument. Vinson extends that to other forms of insurance.

The defendants thus refer to the failure to buy health insurance as a “financing decision.” However, this is essentially true of any and all forms of insurance. It could just as easily be said that people without burial, life, supplemental income, credit, mortgage guaranty, business interruption, or disability insurance have made the exact same or similar economic and financing decisions based on their expectation that they will not incur a particular risk at a particular point in time; or that if they do, it is more beneficial

for them to self-insure and try to meet their obligations out-of-pocket, but always with the benefit of “backstops” provided by law, including bankruptcy protection and other government-funded financial assistance and services. (54)

Disaster for Insurance Companies, if the Mandate Falls

The Affordable Care Act requires insurance companies to issue coverage without regard to a person’s medical condition. This is called “guarantee issue.” The ACA also requires insurance companies to ignore any pre-existing condition. This is akin to an auto insurance company being forced to issue coverage to someone after an accident has occurred.

Mandate defenders acknowledge that, because of guarantee issue and no pre-ex, individuals will be incented to avoid purchasing coverage. Congress agreed with the insurance companies. But by so saying, Congress admitted a major fault with the Act, in that it has imposed requirements on the insurance industry, knowing they will fail without the mandate.

...admitting that the Act will have serious negative consequences, e.g., encouraging people to forego health insurance until medical services are needed, increasing premiums and costs for everyone, and thereby bankrupting the health insurance industry --- unless the individual mandate is imposed...Such an application of the Necessary and Proper Clause would have the perverse effect of enabling Congress to pass ill-conceived, or economically disruptive statutes, secure in the knowledge that the

more dysfunctional the results of the statute are, the more essential or “necessary” the statutory fix would be. (60)

Mandate defenders also insist that no one can opt-out of medical care; eventually, everyone consumes health care services, no matter how limited. Vinson agrees, but he asserts this does not require purchase of insurance. Many individuals are capable of paying their own care, without insurance. Others are able to work out payment plans, and medical providers are free to exercise their own discretion about collection or forgiveness of debt.

Vinson explains there are many life events from which one cannot opt-out. Eating. Food. No one can go without food, but Congress does not mandate that everyone must eat. Housing. Everyone must live somewhere. Congress does not mandate the type, size, location, or rules related to housing, not does it require that everyone must purchase one. Vinson mentions transportation, since everyone at some time will need to be transported. Congress, he suggests, could use this argument to require that everyone purchase a GM automobile, since the United States subsidizes the company.

Severability:
Can the ACA stand without the Mandate?

Vinson asks and answers the question of whether the mandate can be severed from the balance of the Act. To strengthen his argument, he cites many references by Congress and the attorneys for the United States that the mandate is essential for the entire Act to function. But he also acknowledges that severability “is a doctrine of judicial restraint.”

Vinson cites *Free Enterprise Fund v. Oublic Co. Accounting Oversight Board* (2010).

“Generally speaking, when confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem, severing any ‘problematic portions while leaving the remainder intact.’” (64)

But he goes on to say that with few exceptions, Congress conceived of the ACA as a whole, each provision relying on others. Ergo, you cannot separate the mandate from the Act, or Congress’ intent fails.

Furthermore, evidence is strong that Congress did not want the bill to be severable.

The lack of a severability clause in this case is significant because one had been included in an earlier version of the Act, but it was removed in the bill that subsequently became law. “Where Congress includes [particular] language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the [omitted provision] was not intended.” *Russello v. United States*, 464 U.S. 16, 23-24, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983). (67)

To justify the ACA’s insurance reforms, Congress and President Obama blamed insurance companies for all that ails health care. During the summer of 2009, the President

noticeably changed the words he used to promote health “care” reform to health “insurance” reform. The ACA, therefore, was marketed as badly needed insurance reform.

Moreover, the defendants have conceded that the Act’s health insurance reforms cannot survive without the individual mandate, which is extremely significant because the various insurance provisions, in turn, are the very heart of the Act itself. The health insurance reform provisions were cited repeatedly during the health care debate, and they were instrumental in passing the Act. In speech after speech President Obama emphasized that the legislative goal was “health insurance reform” and stressed how important it was that Congress fundamentally reform how health insurance companies do business, and “protect every American from the worst practices of the insurance industry.” (68)

The U.S. Secretary of Health and Human Services, acting as the chief executor of the ACA, made the argument for inseverability. The defendant, Vinson said, laid out the clear indication that the mandate and the ACA were inseparable. The defendant, it must be reiterated, made this claim, not Judge Vinson. His comment on this, however, gives a remarkable and stark insight into the purpose of health insurance exchanges.

[SHHS] - [T]he [individual mandate] is essential to the Act’s comprehensive scheme to ensure that health insurance coverage is available and affordable. In addition to regulating industry underwriting practices, the Act promotes availability and affordability through (a) “health benefit exchanges” that enable individuals and small businesses to obtain competitive prices for health insurance; (b) financial incentives for employers to offer expanded insurance coverage, (c) tax credits to low income and middle-income individuals and families, and (d) extension of Medicaid to additional low-income individuals. The [individual mandate] works in tandem with these and other reforms. . .

[SHHS] - [The individual mandate] is essential to Congress’s overall regulatory reform of the interstate health care and health insurance markets . . . is “essential” to achieving key reforms of the interstate health insurance market . . . [and is] necessary to make the other regulations in the Act effective. (69-70)

Vinson Says Courts Should Not Attempt to Fix Laws

Vinson explains that it might be possible to overturn the mandate, and not the whole bill. To do so, however, would require the Court to engage in "line drawing" in an attempt to explain what stays and what goes. He thinks this is not possible with the ACA.

Vinson quotes *Ayotte v. Planned Parenthood, 2006*. Vinson says to go through the ACA line by line, and exclude certain provisions while retaining others, is "...tantamount to rewriting a statute in an attempt to salvage it..." which Ayotte prohibits.

[SC] - After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all? All the while, we are wary of legislatures who would rely on our intervention, for it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside to announce to whom the statute may be applied. This would, to some extent, substitute the judicial for the legislative department of the government. (72)

Congress Must Obey the Constitution

Vinson acknowledges that health care reform is a necessary and noble goal. He also cites Congress' authority to do so, but not in the manner it did in the ACA.

He explains that summary judgment, according to the Court's rulings, is attained with a declaratory judgment, thereby enjoining the executive branch from moving ahead with implementation. But, as history showed, the Obama Administration instead picked up the beat of implementation. The Obama Administration, like Congress, has chosen to ignore the Constitution when it is inconvenient for them to obey it.

Regardless of how laudable its attempts may have been to accomplish these goals in passing the Act, Congress must operate within the bounds established by the Constitution. Again, this case is not about whether the Act is wise or unwise legislation. It is about the Constitutional role of the federal government. (75-76)

Critical Distinction

He chose a very powerful quote from Brzonkala, in which the Appeals Court overturned the "Violence Against Women Act" (and the Supreme Court affirmed). This quote should be required reading for all individuals that want to use the Congress (or any legislative body) as a means to accomplish legislation, or to uphold unconstitutional legislation. It is very sobering, and if Vinson's ruling is overturned, and the Supreme Court upholds the mandate, it is a clear indicator that "we will have ceased to be a society of law..."

[SC] - No less for judges than for politicians is the temptation to affirm any statute so decorously titled. We live in a time when the lines between law and politics have been purposefully blurred to serve the ends of the latter. And, when we, as courts, have not participated in this most perniciously Machiavellian of enterprises ourselves, we have acquiesced in it by others, allowing opinions of law to be dismissed as but pronouncements of personal agreement or disagreement. The judicial decision making contemplated by the Constitution, however, unlike at least the politics of the moment, emphatically is not a function of labels. If it were, the Supreme Court assuredly would not have struck down the "Gun-Free School Zones Act," the "Religious Freedom Restoration Act," the "Civil Rights Act of 1871," or the "Civil Rights Act of 1875." And if it ever becomes such, we will have ceased to be a society of law, and all the codification of freedom in the world will be to little avail. Brzonkala, *supra*, 169 F.3d at 889. (77)

ⁱ Case No.: 3:10-cv-91-RV/EMT - State of Florida v. United States Department of Health and Human Services
2011 Federal Court, Florida District: Florida .

* Dave Racer is co-author of [four books](#), numerous articles, and a [national speaker](#) on health care reform. He earned his Master of Letters Degree from [Oxford Graduate School](#), writing his [thesis](#) on comprehensive health care reform. Dave is a member of the [Minnesota Association of Health Underwriters](#), where he is active on its Legislative Committee. He is a board member of the [Minnesota Physicians and Patients Alliance](#), and teaches American government and the constitution at [Y.E.A.H. Academy](#).

Dave is the President and CEO of DGRCommunications, Inc. He can be contacted at:

DGRCommunications, Inc.,
1535 Barclay St,
St Paul, MN 55106
Ph: 651.340.1911
Cell: 651.247.5650
Fax: 651.305.8317