Written by **Joe Wolverton, II, J.D.** on April 10, 2010

ObamaCare and the Commerce Clause

As I wrote yesterday in the introduction to this series on ObamaCare, the aim of the survey is not to identify this or that provision in the act that shocks the conscience of constitutionalists (death panels, care rationing, RDIF implantation, etc.), rather our goal is to keep our focus on the lack of constitutional authority for this law, specifically buttressing the proposition that nowhere in our founding document do "we the people" empower Congress or the President to act in this sphere of activity.

If we do otherwise, we are merely players in a fixed game where the line of scrimmage moves back and forth a few yards at a time, while the clock ticks away and the establishment incrementally drives the ball down the field toward the end zone of absolutism and we discover to our horror that the clock has expired.

Our first inquiry regards the Commerce Clause. This is the opposition's leading scorer, and on fourth and long, they call this veteran off the bench and time and time again he pulls off a stunning victory. Since the earliest scrimmages in the battle of absolutism versus individual liberty, the advocates of the federal nanny state have pointed to the Commerce Clause as authority for their various expansions of the national government.

Section 1, Article 8 of the Constitution grants Congress the authority to, "regulate commerce with foreign nations, and among the several states." The fact that Congress passed and President Obama signed the Patient Protection and Affordable Care Act into law demonstrates that neither the legislative nor executive branch of the national government is bothered by constitutional restrictions on their power. As a matter of fact, it is imprecise to say that the Constitution restricts the power of the national government. The truth is that the Constitution empowers the national government with very specific, limited and enumerated powers, leaving all others to the "states, respectively, or to the people."

For nearly 80 years, the Commerce Clause has been wrested by a national government determined to appear to justify its unlawful behavior by donning a cloak of constitutionality. That cloak is tattered and worn, and fortunately, there are a few who refuse to be fooled by the disguise. In recent years, the Supreme Court has heard challenges to the unlimited scope of this authority, and exercising its proper role as a check on the other branches of the government, limits on the federal power to regulate commerce have been imposed.

One of the chief cases wherein the Court sought to mark the metes and bounds of congressional authority to regulate commerce was the case of *United States v. Alfonso Lopez, Jr.* In the *Lopez* case, Mr. Lopez was convicted of having violated the federal Gun-free School Zone Act of 1990 for having

brought a handgun and cartridges to school. In this act, Congress outlawed the possession of firearms within a "school zone" and based this law on its power to regulate commerce. According to the attorney general, this law was a reasonable exercise of the powers granted by the Commerce Clause in that carrying a firearm near a school might lead to commission of a violent crime, which in turn would adversely affect the overall economic condition of the states and effectively impede the free flow of commerce nationwide.

Unimpressed with the legal tenability of this tenuous link between commerce and the activity for which he was convicted, Lopez's attorneys appealed his conviction asserting that the act was unconstitutional as Congress exceeded its constitutional authority in exercising such regulation over schools.

Remarkably, the Fifth Circuit Court of Appeals overturned the conviction, whereupon the government petitioned the Supreme Court for review and the Court accepted. In a 5-4 decision, the Court affirmed the decision of the Court of Appeals and held that:

To uphold the Government's contentions here, we have 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.

This decision represented the first time since the Great Depression and the resulting slate of socialist programs foisted on the nation by FDR that the Court attempted to clamp constitutional fetters on the ever-overreaching arm of federal authority to "regulate commerce."

Another important decision attempting to effect a restriction on the flexibility of the Commerce Clause was *United States v. Antonio Morrison, et al*. The issue in this case was the constitutionality of the Violence Against Women Act of 1994. The matter involved a young woman at Virginia Tech University who accused Antonio Morrison of rape. The state grand jury failed to indict Morrison, and the accuser then brought charges against Morrison under the Violence Against Women Act.

This law, as the Gun-free School Zone Act, was promulgated under the ostensible authority of the Commerce Clause. The Congress excused the federal assumption of police power on the grounds that a gender that lived in fear of crime could not be productive and that commerce would be negatively affected. In another split decision, the Court ruled in favor of Morrison and held that violent crimes such as those addressed by the Violence Against Women Act had at best an attenuated effect on interstate commerce, certainly not a substantial one.

While these crucial Supreme Court decisions demonstrate that body's willingness to impose restrictions on Congress' authority to relate every aspect of human life to commerce and then regulate it based on that relationship, the newly enacted healthcare law is distinct from these cases in a very signal way.

Noticeably, neither *Lopez* nor *Morrison* dealt with a law mandating compulsory purchase of a commodity. Not only does ObamaCare require every individual to buy a health insurance policy or be punished, but it also makes compliance with that mandate a condition of legal residency in the United States.

While the Constitution explicitly authorizes Congress to regulate commerce and the Supreme Court has

validated the exercise thereof in a string of decisions, there is no precedent in our over 200 years of constitutional jurisprudence for the ability of Congress to force citizens to buy something regardless of their own preference.

This latest expression of legislative madness denigrates the very principle of personal liberty that is at the core of our constitutional Republic. If Congress is permitted to envelope the iron fist of absolutism within the velvet glove of the Commerce Clause, then there is nothing that will not fall within that purview.

If this federal fever and the accompanying delirium is not soon broken, future legislatures will demand that Americans purchase (or not) this or that item or service that they deem beneficial (or detrimental) to the free flow of commerce. Green initiatives will mandate the purchase of solar panels, electric cars, etc. Information technology laws will order us under penalty of law to wire our homes with high-speed Internet.

There is no end to the lengths the federal government will go to control our lives if we, the people, do not halt the advance and demand that the national government retreat within the borders of power drawn by our Founding Fathers in the Constitution.

Other installments in this series:

Obamcare: An Introduction

The States Respond to ObamaCare

ObamaCare and Taxes: Broken Promises

ObamaCare and the Decline of Freedom