

2011 Law Review

Write-on Competition

Instruction Packet

REMEMBER:

- By submitting your entry, you represent that you have neither sought nor received any outside assistance with the Write-On Competition. Such assistance includes, but is not limited to, any assistance from current law journal members, faculty members, other entrants, attorneys, or other law students.
- **Only include your name and SMU ID # on the Candidate Information Form in the Problem Packet. DO NOT place your name, student number, or any other identifying mark on any other page of your entry (other than that required by the Honor Pledge Form and the Declaration of Interest Form), or you will be automatically disqualified from the write-on competition.**
- Only submit your entry **once** (i.e., do not email your submission AND deliver a hard copy).
- Do NOT submit this instruction packet – submit **ONLY** your problem packet.

RULES AND REGULATIONS

The Write-On Problem Packet will be available beginning at 9:00am CST, Thursday, August 4th 2011.

There are two ways you may obtain a packet:

- (1) Download the Word or PDF files for the packet and sources located at:
<http://smu.edu/lra/About/CurrentCompetitions.asp>

There are three ways you may submit your entry:

- (1) If you are in Dallas, you may return a **hard copy** of your problem packet and a **disk** of your problem packet to Donnaise Baldwin (or slide under her door if during non-business hours), Room 4 on the bottom floor of Storey Hall. Entries must be received by 9:00am CST, Monday, August 8, 2011.
 - The disk should contain everything you turned in in hard copy form (the entire problem packet), which includes the Editing, Bluebooking, and Writing sections.
 - The disk should NOT have anything written on the front. Absolutely nothing. No name, SMU ID #, nor description of what documents are contained on the disk. Nothing.
- (2) You may send a **hard copy** of your problem packet and a **disk** of your problem packet via **regular mail**. Your entry MUST be overnighted and marked for **AM delivery** for Monday, August 8, 2011.
 - Physical Address: SMU Law Review, Attn: Donnaise Baldwin, 3315 Daniel, Room 4, Dallas, TX 75205
 - The Same rules apply for the disk as above.
- (3) You may **e-mail** your entry to dbaldwin@smu.edu. Your message must be **RECEIVED** by 9:00am CST, Monday August 8, 2011. We will NOT look at the time it was sent.
 - If you are e-mailing your submission, you do NOT need to include a disk (obviously).
 - If you submit your entry through e-mail, you may attach the problem packet as a whole, then attach the scanned Editing Exercise separately.
 - Regardless of how you include your attachments in your e-mail submission, do NOT put your name or SMU ID number anywhere on your submission, except the ONE page designated for you to do so in the problem packet. This includes NOT naming your attachments with any identifying information (like your name or SMU ID number)
 - However, you will need to put your name somewhere in the BODY of the e-mail so that we know who the e-mail is from. ☺

NO LATE ENTRIES WILL BE ACCEPTED!!!

FORMAT OF ENTRY

NOTE: For all three exercises, you **MUST** use the Bluebook rules specific to the **law review** typeface convention (NOT the practitioner’s typeface convention). Read **BB Rule 1.1** and **BB Rule 2** to better understand the law review typeface convention that you will be required to apply throughout the write-on problem packet. Do NOT follow any rules on typeface convention in the Greenbook that conflict with those of the Bluebook.

The **ONLY** resources you are permitted to use in completing the three exercises are:

1. Bluebook, 19th Edition (18th Edition is also acceptable)
2. Texas Rules of Form, 12th Edition (Greenbook) (11th Edition is also acceptable)
3. Legal or English dictionary
4. Editing Marks handout (attached to this information packet)

You may **NOT** use any other sources, including the cited sources themselves. Use of any outside sources is a violation of the Honor Code and will result in your disqualification from the write-on competition.

PART I: EDITING EXERCISE

This is an exercise to determine your ability to edit text and citations. Please be sure that you correct all **THREE** article excerpts below. **You are only responsible for making format, punctuation, and grammatical changes.** *Please do not alter the style of the articles, for this will be counted as a mistake (such prohibited stylistic changes include corrections made to the passive voice).*

Everyone will be required to make **all editing marks by HAND in RED ink**. All edits must be made in accordance with the “Editing Marks” handout provided in your instruction packet. You may **NOT** make edits electronically (this includes **NOT** using the “tracked changes” function). You will need to **scan the editing section in COLOR** and either attach it with your e-mail submission or put it on the disk to be submitted with your hard copy.

If the Bluebook requires the use of **SMALL CAPS** in a citation, use the “bold” editing mark (squiggly underline), rather than the “set in small caps” editing mark (<<word>>). If a word is **bold** in the article excerpts, this indicates that the word is in small caps, and you may leave it or correct it accordingly. Similarly, if a word is underlined in the article excerpts, this indicates that the word is in italics, and you may leave it or correct it accordingly. For purposes of the Editing Exercise, “recommended” or “encouraged” usage in the Bluebook is **mandatory**. The only exception is that you **MUST** disregard the part of BB Rule 10.2.2 that instructs you to abbreviate words of eight letters or more if substantial space is thereby saved and the result is unambiguous. Do **NOT** do that. All marks must be clear and easy to read to the extent possible.

TIP: Using erasable red pens is particularly helpful so that you can change edits later.

PART II: BLUEBOOKING EXERCISE

Included in the separate Bluebook Source Packet, you will find 15 sources (numbered in the upper right-hand corner). Please list the sources in numerical order by the number they have been assigned and in proper Bluebook/Greenbook form. **For the Bluebook Exercise ONLY, do NOT include pincites in your citation of sources.**

Although you will refer primarily to the Bluebook, you should refer to the Greenbook when citing Texas-specific material. If there are discrepancies between the two, cite all Texas-specific material according to the rules found in the Greenbook. For any other material, the Bluebook controls and must be followed.

For Texas cases, any necessary petition/writ status and history will be provided to you as it appears in the Texas Subsequent History Table.

Be aware that the Bluepages at the beginning of the Bluebook largely correspond to the practitioner's typeface convention. As such, you must NOT use the Bluepages as guidance for creating or editing the text and footnotes in your write-on entry. But, you may use the Bluepages to help point you to the correct Bluebook rule if you wish.

If the Bluebook instructs you to use small caps, **bold** the part of the citation you wish to be in small caps, rather than actually changing the citation to small caps font. Similarly, underline anything you wish to be in italics. This will allow us to more easily discern your intention.

PART III: WRITING EXERCISE

For the Writing Exercise, you must **agree or disagree with the majority opinion** and explain your reasoning based on the other sources that are provided to you (including the main case and any concurring or dissenting opinions). You must develop the strongest legal argument for your side. As such, you need not use all the sources, but you can if you wish. You have 5 sources total (including the main case). Each source has been cut from its original form. Page numbers have been affected, so you will not be graded on pincites. Please still include them, even if they are incorrect.

Technical Requirements:

- This is a CLOSED writing exercise. Use the included sources and ONLY the included sources. Do NOT do any additional research or your entry will be disqualified.
- Your writing entry must be **4-5 pages**, double-spaced, 12-point Times New Roman font, 1-inch margins on all sides. You will lose points if you write less than 4 pages or more than 5 pages.
- You MUST use footnotes. The footnotes must also be double-spaced and in 12-point Times New Roman font. Your footnotes are included in your page limit
- In constructing your footnotes, if the Bluebook instructs you to use small caps, **bold** the part of the citation you wish to be in small caps, rather than actually changing the citation to small caps, so that we can more easily discern your intention. Similarly, please underline anything you wish to be in italics.
- Please include your writing entry in the space provided in Part III of the Problem Packet.
- Only use the writing sample as one example – do not use it as a template for your writing entry if the organization and/or structure of the legal analysis is not the best approach to this problem (provided online at <http://smu.edu/lra/About/CurrentCompetitions.asp>).

Stylistic Notes:

- The Writing Exercise requires persuasive writing rather than objective writing. You are arguing what you think the law should be, bolstered by sound legal arguments, NOT what the law is.
- THERE IS NO RIGHT OR WRONG ANSWER. The purpose of the writing section is to evaluate your ability to analyze legal arguments and communicate your conclusions in a clear and intelligent manner.
- There is NO mandatory authority since there is no designated jurisdiction in which you are making your argument. You are merely fashioning the best legal arguments you can with the sources provided to you. The strength of the arguments, not the sources from which they are derived, is what is most important.
- The source materials are intended to provoke critical thought and encourage you to shape creative legal arguments. Therefore, you should not simply summarize the main case or the other sources. Your essay should reflect command of the materials you use, as well as very careful reasoning in the development of a thesis and supporting arguments.
- Do not feel hesitant about criticizing court decisions if you believe a court's analysis is flawed.

STRUCTURE OF THE WRITING EXERCISE

1. Brief **introduction** containing the holding of the main case and explaining the issue you will seek to resolve and your position on the issue.
2. **Critically analyze** the case and determine whether the majority correctly or incorrectly decided the case.
 - If the court decided the case incorrectly, critique and distinguish the court's reasoning based on the legal arguments in the other sources you are given.
 - If the court decided the case correctly, your analysis should be original based on the court's holding and the other sources, not merely a recitation of the court's analysis.
 - In your analysis, you may (but are not required to) address:
 - ❖ Whether the court reinterpreted, affirmed, overruled, modified, narrowed, or broadened prior law and whether doing so was correct or incorrect
 - ❖ Whether the court correctly interpreted the authorities on which it relied
 - ❖ How the court handled opposing arguments
 - ❖ The concerns of the concurring or dissenting opinions
 - ❖ The extent to which the court's holding will create future ambiguities in the law
 - ❖ Whether the court's reasoning is logical
 - ❖ The assumptions, not necessarily articulated, that the court made to arrive at the conclusion it did
 - ❖ The weaknesses in the arguments contrary to your own conclusion
 - ❖ The implications and ramifications of the court's decision and how your own analysis and conclusion may affect this area of the law
3. **Conclude** briefly. Address the main holding of the case, the major theories relied upon by the court, and the general desirability or undesirability of the court's holding. You may (if you choose) address whether the holding creates confusion or clarifies matters, and to what extent the new rule promotes justice or merely substitutes one evil for another. Due to the general nature of the statements in this section, the conclusion need not include many footnotes.

Editing Marks

Mark	What It Means	How to Use It
	Delete	Take it fit out.
	Insert	The manuscript ^h
	Replace	min ^u scale
	Move	Read ^{book} @ today.
	Let it stand	Oops, ^{my} mistake. (STE)
	Transpose	In ^{essay} this
	Close up, no space	The Su ^p reme Court
	Less space	The ^{correct} way
	Insert space	The Vic ^e President
	Set in italics	In <u>Miranda</u> , the Court
	Set in small caps	«Texas L. Rev.»
	Set in bold	BBCs are fun
	Set in regular type	See <u>Marbury v. Madison</u>
	Lowercase	The <u>Manuscript</u>
	Capitalize	The U.S. <u>supreme court</u>
	Paragraph break	or more. ¶ The good ¶
	Quotation marks	Let's go, she said.
	Insert apostrophe	it's a boy
	Insert period	a Ph.D. in philosophy
	Insert colon	as follows:
	Insert semicolon	an editor;
	Insert comma	however,
	Insert exclamation mark	Oyez!
	Insert question mark	Would this be a just result?
	Insert brackets	[sic]
	Insert parentheses	Defendant (lessor)
	Insert hyphen	below market price
	Insert en dash	pages 176-24
	Insert em dash	the prongs — effect and inten
	Indent	□ The court
	Flush left	□ The court
	Lower	The chemical <u>formula</u> is H ₂ .
	Raise	The <u>book</u> was here, 2

2011 Law Review

Write-on Competition

Problem Packet

HONOR PLEDGE FORM

Entrants must sign the Write-On Competition Honor Pledge when returning their entry for the Write-On Competition. By signing the Honor Pledge, the entrant represents as follows:

- 1) I, the undersigned, have not sought nor received any outside assistance with the Write-On Competition other than such assistance as allowed by the Write-On Competition Instructions. Such prohibited outside assistance includes, but is not limited to, any assistance from current law journal members, faculty members, other Write-On Competition entrants, attorneys, and other law students.

- 2) I, the undersigned, represent that I have acted in accordance with the Southern Methodist University School of Law Honor Code, of which I have accepted or am deemed to have accepted prior to admission to the Southern Methodist University School of Law.

- 3) I, the undersigned, agree that if I have breached any portion of this Honor Pledge, I will immediately notify Danielle Olson, the Director of the Write-On Competition, or Steve Udick, the President of the SMU Law Review Association of such breach, and I will immediately withdraw my entry from consideration in the Write-On Competition.

- 4) I, the undersigned, understand the representations made in this Honor Pledge, and I agree to be bound by the provisions herein.

Signature of Entrant *

Date

Printed Name of Entrant

* If turning in electronically, type your name on this line.

CANDIDATE INFORMATION FORM

Name: _____

Email: _____

SMU ID #: _____

Phone number (with area code)*: _____

**You MUST give a number at which you can receive messages. Once offers are made, they must be accepted or declined within a limited time. If you cannot be reached by phone (e.g., Oxford participants), make sure to give us a valid e-mail address that you WILL check.*

Class level for Fall 2011 (please circle): 2L 3L 3E 4E

Expected date of graduation (Month/Year): _____

For Office Use Only:

Method of Submission: _____ *Time submitted:* _____ *Number Issued:* _____

DECLARATION OF INTEREST FORM

Please designate the law reviews for which you would like to be considered. Place an X next to all that apply.

SMU Law Review

International Law Review

If invited to join the SMU Law Review, would you also be interested in receiving an invitation to join the SMU International Law Review?

Yes

No

Science and Technology Law Review

If invited to join the SMU Law Review or the International Law Review, would you also be interested in receiving an invitation to join the SMU Science & Technology Law Review?

Yes

No

OPTIONAL Statement of Specific Interest in International Law

The SMU International Law Review Association generally extends invitations to those students in the top 25% of their class who demonstrate a good faith effort in the write-on competition. Because we also afford our members the unique opportunity to address issues of international law, we are also interested in extending a limited number of additional invitations to students who perform well in the write-on competition, and have a specific interest in these issues. If you would like to be considered for one of these additional positions with the ILRA, **briefly** discuss the nature of your interest in issues of international law in the space below.

Enter text here.

OPTIONAL Statement of Specific Interest in Legal Issues of Science and Technology

The SMU Science & Technology Law Review generally extends invitations to those students in the top 25% of their class who demonstrate a good faith effort in the write-on competition. Because we also afford our members the unique opportunity to address legal issues of science and technology, we are also interested in extending a limited number of additional invitations to students who perform well in the write-on competition, and have a specific interest in these issues. If you would like to be considered for one of these additional positions with the SMU Science & Technology Law Review, **briefly** discuss the nature of your interest in the space below.

Enter text here.

PART II: BLUEBOOKING EXERCISE

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10.
- 11.
- 12.
- 13.
- 14.
- 15.

END OF PART II

PART III: WRITING EXERCISE

(Please read the instructions and prompt in the instruction packet and insert your writing exercise submission here. You may delete this parenthetical if you wish.)

END OF PART III

PART I: EDITING EXERCISE

ARTICLE # 1

A. Defective Design is a Defective Argument

While failure to warn claims face an uphill battle for acceptance, design-defect claims are even less likely to succeed. The heart of the design-defect argument is that video game manufacturers know that their games can have a psychoneurological effect on gamers because the manufacturers intentionally design games to produce adrenaline and dopamine, leading to addiction.¹ But courts have routinely rejected the argument that video games—even if they are addictive—are subject to defective design claims. The core of the argument identified by courts against design-defect claims is that the allegedly addictive content of video games consists of thoughts and ideas.² As noted by the 6th Circuit, strict liability has never been applied to words, which are created from thoughts and ideas.³ Because thoughts and ideas are not tangible, they are not considered to be products for the purpose of products-liability claims.⁴ The distinction of tangible products versus intangible non-products is plainly presented in the Restatement, which defines a product as “*tangible* personal property distributed commercially for use or consumption.”⁵ But, the claims brought against video game manufacturers discussed here are not claims against the physical components of video games, but rather the thoughts and ideas that make up

¹ Scott Whittier, *School Shootings: Are Video Game Manufacturers Doomed to Tort Liability?*, ENTMT AND SPORTS LAWYER, Winter 2000, at 14.

² *Sanders v. Acclaim Entm't, Incorporated*, 188 F. Supp. 2d 1264, 1277 (D. Colo. 2002).

³ *Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990).

⁴ *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, 810 (W.D. Kentucky 2000).

⁵ RESTATEMENT (3D) OF TORTS: PRODUCTS LIABILITY § 19 (1998) (emphasis added).

the entertainment content of the games. Courts have uniformly held that thoughts, ideas, words, and pictures are not “products” and are therefore not subject to products liability claims such as defective design.⁶

B. Fighting Off the Chill

Courts have been dealing with video-game litigation for years, in the context of whether they influence gamers to commit acts of violence. Those cases generally are decided on First Amendment grounds in favor of the defendant game manufacturers. This would likely still apply to failure-to-warn cases in most jurisdictions. As noted by the sixth circuit in *Watters*, strict liability has not been extended to cover thoughts and ideas as conveyed through words or pictures.⁷ In *Watters*, the plaintiff had alleged that that game developer for *Dungeons and Dragons* was negligent in the publication and distribution of the game materials and had violated a duty to warn of the games potential addictive quality.⁸ In denying these claims, the district court held that the first amendment prohibited the imposition of liability because allowing the plaintiff to proceed would have a dramatically chilling effect on all farms of expression, which would eviscerate the meaning of the First Amendment.⁹

Critics of this reasoning point out that this “chilling” effect would be minimal as video game developers could simply include projected payments for compensatory damages in their business plan as a cost of doing business.¹⁰ But, this argument seems to ignore the sheer number of gamers playing

⁶ *James v. Meow Media, Inc.*, 300 F.3d 683, 700-01 (6th Cir. 2002); *Watters*, 904 F.2d at 381; *Sanders*, 188 F. Supp. 2d at 1279.

⁷ *Watters*, 904 F.2d at 381.

⁸ *Id.* 379.

⁹ *Watters v. TSR, Inc.*, 715 F. Supp. 819, 822 (W.D. Ky. 1989).

¹⁰ David C. Kiernan, NOTE, *Shall the Sins of the Son Be Visited Upon the Father? Video Game Manufacturer Liability for Violent Video Games*, 52 HASTINGS L.J. 207, 207 (2000).

today. If these individuals began to successfully sue game developers, the industry could very likely crumble. Additionally, allowing these suits to continue would wear down First Amendment rights of adults who play video-games and could lead to further erosion reaching into other forms of media.¹¹ The threat of liability could well force developers to limit their new games to those targeted to children in order to avoid any potential lawsuit that might arise from a more “adult” game.¹² Courts have strictly followed the *Brandenburg* test for a reason - by protecting speech so long as it does not incite unlawful action, it sets a high bar and thereby protects First Amendment liberties.¹³

The supreme court has long held that entertainment is a protected form of speech.¹⁴ While the Supreme Court has not yet specifically addressed video games as an entertainment form, multiple courts have included video games in the definition of “entertainment” and have extended 1st amendment speech protection to games.¹⁵

¹¹ William Li, NOTE, *Unbaking the Adolescent Cake: The Constitutional Implications of Imposing Tort Liability on Publishers of Violent Video Games*, 45 ARIZ. L. REV. 467, at 495 (2003).

¹² William Li, NOTE, *Unbaking the Adolescent Cake: The Constitutional Implications of Imposing Tort Liability on Publishers of Violent Video Games*, 45 ARIZ. L. REV. 467, at 495 (2003).

¹³ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹⁴ *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

¹⁵ See, e.g., *American Amusement Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167 (D. Conn. 2002); *Sanders*, 188 F. Supp. 2d at 1264.

ARTICLE #2

A. From patents To Supermarkets

About 70 % of the food available in american supermarkets contains genetically modified substances.¹⁶ The United States are the top producer of genetically modified crops, followed by Brazil, Argentina, India, and Canada.¹⁷ The vast majority of corn grown in the United states and about a quarter of the products in the supermarket contain corn.¹⁸ These corn-containing products span an array that may surprise most consumers—from beverages containing high fructose corn syrup to ketchup, cake mixes, syrups, margarine, salad dressing, and vitamins.¹⁹

The 3 companies leading the biotech food products industry are Monsanto, DuPont's Pioneer Hi-Bred, and Syngenta.²⁰ "These three companies develop most of the new [genetic cross bred] traits [in the industry] and license them to each other, smaller seed companies, and public breeding programs."²¹ Monsanto alone sold \$7.3 Billion dollars of seeds and seed genes in 2009, placing first among its competitors.²² Indeed, Monsanto seeds dominate. "Ninety percent of the U.S. soybean crop and eighty

¹⁶ How Consumers Process Information at the Heart of Debate Over Labeling of Genetically Modified Foods, **Pew Charitable Trusts** (June 27, 2002),

http://www.pewtrusts.org/news_noon_detail.aspx?id=33460.

¹⁷ See James Kanter, In Europe, a Move to Ease Curbs on Growing Biotech Crops, N.Y. Times, July 8, 2010, at B4.

¹⁸ Michael Pollan, **The Omnivore's Dilemma: A Natural History of Four Meals** 19 (2006).

¹⁹ Id. at 18–19.

²⁰ Elizabeth I. Winston, What Ifs and Other Alternative Intellectual Property and Cyberlaw Story: If Seeds Were Not Patentable?, 2008 **Mich. St. L. Rev.** 321, 329 n.45 (2008).

²¹ Id.

²² Robert Langreth and Herper, Matthew, The Planet Versus Monsanto, **Forbes**, Jan. 18, 2010, at 64.

percent of the corn and cotton crop are grown with seeds containing Monsanto's technology."²³ The company focuses largely on corn, cotton, and soybean crops rather than on a wider variety of crops because these are more likely to generate a large enough return on their investment in biotechnology.²⁴ While traditionally, genetic material was transferred between the same species (eg, plant to plant), genetic engineering technology now permits transfers between and among any genus or species.²⁵ Thus, for example, both a tomato and a pig can contain genes from a fish.²⁶ The crossing of traits carries many benefits that before now were not possible. It can increase nutritional value (eg, rice containing beta-carotene), freshness for storage (eg, tomatoes containing a fish gene to reduce rotting), and resistance to insects and pests.²⁷

The advancements continue. Monsanto is currently working on a genetically modified soybean that would contain high levels of omega-3 fatty acids; these fish-based fatty acids have been shown to promote a healthy heart.²⁸ Additionally, on a more esthetic note, in Israel, gene technology is being used to create exotic "designer" fruits and vegetables to entice consumers: tomatoes smell that like

²³ id.

²⁴ Id.69. Because genetically modified corn and soybeans are not often sold directly to consumers they are "less controversial." Id.

²⁵ See, e.g., Charles W. Schmidt, Genetically Modified Foods: Breeding Uncertainty, **Envtl. Health Persp.** (Aug. 1, 2005), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1280366/pdf/ehp0113-a00526.pdf>.

²⁶ see Liangxue Lai et al., Generation of Cloned Transgenic Pigs Rich In Omega-3 Fatty Acids, 24 **Nature Biotechnology** 435–36 (Apr. 2006), available at <http://www.nature.com/nlot/journal/v24/n4/pdf/nbt1198.pdf>.

²⁷ John Charles Kunich, 74 **S. Cal. L. Rev.** 807, 810–11, Mother Frankenstein, Doctor Nature, and the Environmental Law of Genetic Engineering (2001).

²⁸ Id.

lemons, carrots shaped like potatoes, strawberries shaped like carrots, and blue bananas.²⁹ It probably will not be long before these products land in United States supermarkets.

Beyond genetically engineered crops, as this Article is being prepared, the food and drug administration (FDA) is in the process of reviewing the first genetically altered animal for our kitchens—salmon.³⁰ AquaBounty Technologies, the salmon's developer, wishes to create and sell eggs that have been genetically modified to produce salmon that grow twice as fast as conventional atlantic salmon.³¹ It contains a growth hormone from a Chinook salmon and genetic material from another kind of fish, the ocean pout, that permits the growth hormone to be released year round, unlike non-engineered salmon, which do not produce growth hormone in cold weather.³² not surprisingly, this salmon appears to be patented.³³ While its nutritional content is claimed to be identical to their naturally occurring counterpart, the genetically modified salmon takes 18 months to grow and mature rather than the usual three years.³⁴ Interestingly, it is not entirely clear whether the FDA, under the current regulations, has the authority to review this genetically altered salmon, and it is possible that its

²⁹ Edmund Sanders, Yes, We Have Blue Bananas, **L.A. Times**, May 29, 2010, at A1.

³⁰ Editorial, First, Grill Robo-Salmon's Producers—and the FDA, **The Oregonian** (July 7, 2010, 6:23 PM), http://www.oregonlive.com/opinion/index.ssf/2010/07/first_grill_robo-salmons_produ.html.

³¹ Id.

³² Andrew pollack, **Genetically Altered Salmon Set to Move Closer to Dinner Table**, N.Y. Times, June 26, 2010, at A1.

³³ See U.S. Patent No. 5,545,808 (filed Mar. 10, 1994) (Transgenic salmonid fish expressing exogenous salmonid growth hormone); U.S. Patent No. 5,480,774 (filed Oct. 14, 1993) (Determination of genomic sex in salmonids).

³⁴ Pollack, *supra* note 17, at A1.

authority could be challenged.³⁵ Nevertheless, if this salmon is approved, it would be the first genetically modified animal approved for human consumption.³⁶ However: like genetically modified corn and other crops, it will not be labeled.³⁷

³⁵ see Gregory N. Mandel, *Gaps, Inexperience, Inconsistencies, and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals*, 45 *William. & Mary L. Rev.* 2167, 2209 (2004).

³⁶ Editorial, *supra* note 15; see also Pollack, *supra* note 17, at A1. .

³⁷ See id.

ARTICLE #3

II. The Right to Life from conception in the American Convention and the American Declaration

The American Convention on Human Rights is invariably singled out as the most emphatic recognition of the unborn child's right to life at present in International law. In it, Latin American states privy to the Convention³⁸ explicitly recognized that life begins at conception and granted human rights protection to the unborn child in article 4 (1) of the Convention, which states: Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.” Likewise, in the American Declaration of the Rights and Duties of Man (hereinafter “American Declaration” or “Declaration”),³⁹ a non

³⁸ See Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S. T.S. No. 36, [hereinafter “American Convention Ratifications”]. As of February Two Thousand and Eleven, parties privy to the American Convention are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

³⁹ Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. G.A. Res. XXX, art. I, O.A.S. Doc. OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1948), available at

http://www.oas.org/DIL/American_Declaration_of_the_Rights_and_Duties_of_Man.pdf [hereinafter “American Declaration”].

binding regional instrument, all member states of the Organization of American States⁴⁰ recognized a universal right to life in that “every human being has the right to life” in article I. The declaration’s *travaux préparatoires* explicitly included the right to life protection for “those who are not yet born” and a right to life “from conception,”⁴¹ which evinces an original intent protect to the unborn child from acts that would deliberately end his or her life.

III. Inter-American Court Relevant Precedents

To date, the Inter-American Court of Human Rights (hereinafter “Inter-American

⁴⁰ See Charter of the Organization of American States, Signatures and Ratifications, Organization of American States, Department of International Law, available at http://www.oas.org/dil/treaties_A-

[41_Charter_of_the_Organization_of_American_States_sign.htm](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States_sign.htm) (last visited May 2 2011).

⁴¹ See Annual Report of the Inter-American Commission on Human Rights, Case 2141, Inter-Am. C.H.R., Report No. 23/81, OEA/Ser.L./V/II.54, doc. 9 rev. 1 ¶¶ 14 (a), 19 (b), available at <http://www.cidh.org/annualrep/80.81eng/USA2141.htm> [hereinafter “Baby Boy”], citing *Actas y Documentos*, Document CB-310/CIN-31, Vol. V at 449.

Court” or “Court”)⁴² has not issued any judgments or consultative opinions on challenges to the unborn child’s right to life from conception, as established in article 4 (1) of the Convention.

The Court however has referred to unborn children as “children”, “minors”, and “babies” in at least 3 cases: Gómez-Paquiyaui Brothers v. Peru,⁴³ a case in which it also granted reparations for the death of an unborn child, Miguel Castro-Castro Prison v. Peru,⁴⁴ and Goiburú et al. v. Paraguay.⁴⁵ Furthermore, the Court called induced abortion

⁴² The Inter-American Court on Human Rights is a regional international human rights tribunal created by the O.A.S., a regional governmental organization integrated by most of the western Hemisphere countries, that is, the United States of America, Canada and most Latin American and Caribbean states. O.A.S. member states that have accepted the Court’s jurisdiction are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela. See American Convention Ratifications, supra note one.

⁴³ I/A Court H.R., Gómez-Paquiyaui Bros. v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 110 (July Eighth, 2004).

⁴⁴ I/A Court H.R., Castro Prison v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 160 (Novem. 25, 2006).

⁴⁵ I/A Court H.R., Goiburú et al v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 153 (Sept. 22, 2006).

a “barbaric act” in the case of Las Dos Erres v. Guat.⁴⁶ In addition, in Sawhoyamaxa Indigenous Cmty. v. Para.,⁴⁷ the Court found state duties to secure the right to pre-natal health of mothers and unborn children, especially those belonging to vulnerable communities. These instances reflect the Courts acknowledgement of the unborn child as a subject of human rights entitled to the right to life and the right to pre-natal developmant.

A. REPARATIONS FOR THE DEATH OF AN UNBORN CHILD

According to article 63 (1) of the American Convention, the Court may order reparations for individuals who have been affected by human rights violations committed by states. In Gómez-Paquiyaury Brothers v. Peru, the Inter-American Court granted reparations to a pregnant mother for the mis-carriage of her unborn child. The Court specifically referred to Jorge Javier, the deceased fetus, as a “baby” and a “child”.⁴⁸ Jorge Javier was the unborn child of Marcelina Haydée Gómez Paquiyaury, a sibling of the murder victims, who was 9 months pregnant at the time of the murders. She suffered a nervous ailment and miscaried a few days later. The Court ordered reparations for the

⁴⁶ The Court stated that “pregnent women were subject to induced abortions and other barbaric acts?” Las Dos Erres Massacre v. Guat., Preliminary Objections, Merits, Reparations and Costs , Inter-Am. Ct. H.R. (Ser. C), (Nov. 24, 2009) at ¶ 39.

⁴⁷ I/A Court H.R., Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 146 (Mar. 29, 2006)

⁴⁸ I/A Court H.R., Gómez-Paquiyaury Bros. v. Peru, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 110 at note 62, ¶¶ 67(x), 216 (July 8th, 2004).

loss of her child,⁴⁹ to which it referred as one of the “devastating consequences of the facts of the instant case on the {victim’s} family as a whole, and individually on each of its members.”⁵⁰

B. REPARATIONS FOR VIOLATIONS OF THE RIGHT TO PRE-NATAL HEALTH

The Court found a right to pre-natal health for both expecting mothers and unborn children in Sawhoyamaya Indigenous Community. v. Paraguay, where a vulnerable community suffered from the lack of access to health services. The Inter-American Court affirmed that, especially during pregnancy delivery and breastfeeding the state must guarantee vulnerable indigenous women access to health services, while adopting special measures based on the best interests of the child, according to children’s rights enunciated in article 19 of the American Convention.

⁴⁹ Id., paragraph 197.

⁵⁰ Id., ¶ 216.

END OF PART I

162 F.3d 195, 47 ERC 1939, 15 IER Cases 1285, 29 Env'tl. L. Rep. 20,405
(Cite as: 162 F.3d 195)



United States Court of Appeals, Second Circuit.
UNITED STATES of America, ex rel. Jonathan STE-
VENS, qui tam and as relator, Plaintiff-Appellee,
United States of America, Intervenor,

v.

The STATE OF VERMONT AGENCY OF NATURAL
RESOURCES, Defendant-Appellant.

Docket No. 97-6141.
Argued Feb. 2, 1998.
Decided Dec. 7, 1998.

Qui tam suit was brought against state under the False Claims Act. State's motion to dismiss for lack of subject matter jurisdiction was denied by the United States District Court for the District of Vermont, [J. Garvan Murtha, J.](#), and state appealed. The Court of Appeals, [Kearse](#), Circuit Judge, held that: (1) a qui tam suit under the False Claims Act should be viewed as an action brought by the United States, and hence is not barred by the Eleventh Amendment when brought against a state, and (2) a state is a "person" within meaning of the False Claims Act, and thus qui tam suit can be brought against a state under the Act.

Affirmed.

Weinstein, District Judge, filed a dissenting opinion.

West Headnotes

[\[1\] Federal Courts 170B](#) 574

[170B](#) Federal Courts

[170BVIII](#) Courts of Appeals

[170BVIII\(C\)](#) Decisions Reviewable

[170BVIII\(C\)2](#) Finality of Determination

[170Bk572](#) Interlocutory Orders Appealable

[170Bk574](#) k. Other particular orders. [Most](#)

[Cited Cases](#)

District court order denying motion to dismiss on ground of Eleventh Amendment immunity is immediately appealable. [U.S.C.A. Const.Amend. 11](#).

[\[2\] United States 393](#) 122

[393](#) United States

[393VIII](#) Claims Against United States

[393k120](#) Making or Presentation of False Claims and Other Offenses Relating to Claims

[393k122](#) k. Penalties and actions therefor. [Most Cited Cases](#)

Failure to comply with the mandatory threshold requirements for a qui tam suit under the False Claims Act, of filing complaint under seal, without service on defendant, while providing copy to the United States to allow it to consider intervening, warrants dismissal of the qui tam complaint with prejudice, which bars the qui tam plaintiff from refileing such a suit, but leaves the government free to bring suit on its own. [31 U.S.C.A. § 3730\(b\)\(2\)](#).

[\[3\] United States 393](#) 122

[393](#) United States

[393VIII](#) Claims Against United States

[393k120](#) Making or Presentation of False Claims and Other Offenses Relating to Claims

[393k122](#) k. Penalties and actions therefor. [Most Cited Cases](#)

The government has substantial authority to terminate qui tam suit under the False Claims Act, even over the objection of the qui tam relator, and although the relator must be given a hearing, the court need not, in order to dismiss, determine that the government's decision is reasonable, but only that it is supported by a valid governmental purpose that is not arbitrary or irrational and has some rational relation to the dismissal. [31 U.S.C.A. § 3730\(c\)\(2\)\(A, B\)](#).

[\[4\] Federal Courts 170B](#) 265

[170B](#) Federal Courts

[170BIV](#) Citizenship, Residence or Character of Parties, Jurisdiction Dependent on

[170BIV\(A\)](#) In General

[170Bk264](#) Suits Against States

[170Bk265](#) k. Eleventh Amendment in general; immunity. [Most Cited Cases](#)

#2

**MICHIGAN
COMPILED LAWS**

Annotated

*Under Arrangement of the Official
Compiled Laws of Michigan*

**Sections
145.1 to 168.590**

THOMSON
—★—
WEST

2008

Mat #40615966

For effective date provisions of P.A.1999, No. 218, see the Historical and Statutory Notes following M.C.L.A. § 168.53.

Library References

Elections ◊146.
Westlaw Topic No. 144.
C.J.S. Elections § 95.

168.409d. Candidates for court of appeals judge; nominees, declaration, certification; death or disqualification of candidate

Sec. 409d. (1) In each appellate court district the candidates for office of judge of the court of appeals receiving the largest number of votes at any primary election, to a number equal to twice the number of persons to be elected as set forth in the report of the board of state canvassers, based on the returns from the various boards of county canvassers and election precincts, or as determined by the board of state canvassers as the result of a recount, shall be declared the nominees for the office at the next general November election. The board of state canvassers shall certify the nomination to the county election commissions.

(2) If, after the deadline for filing nominating petitions under section 409b,¹ there are fewer candidates for nomination or nominees for the office of judge of the court of appeals than there are persons to be elected at the general November election because of the death or disqualification of a candidate more than 65 days before the general November election, then a person, whether or not an incumbent, may qualify as a nominee for that office at the general November election by filing nominating petitions as required by section 409b. However, the filing shall be made before 4 p.m. on the twenty-first day following the death or disqualification of the candidate or 4 p.m. on the sixtieth day preceding the general November election, whichever is earlier, and the minimum number of signatures required is 1,000 or ½ the minimum number required under section 409b, whichever is less.

(3) The secretary of state shall certify the nomination of each person who qualifies as a nominee under subsection (2) to the board of election commissioners of each county in the appellate court district for the general November election.

Amended by P.A.1990, No. 32, § 1, Imd. Eff. March 21, 1990.

¹ M.C.L.A. § 168.409b.

Historical and Statutory Notes

Source:

P.A.1954, No. 116, § 409d, added by P.A. 1963, 2nd Ex.Sess., No. 60, § 1, Imd. Eff. Dec. 27, 1963.
C.L.1948, § 168.409d.
C.L.1970, § 168.409d.

The 1990 amendment, inserted the subsection numbering; in subsec. (1), in the first sentence

substituted "the board of state canvassers" for "said board"; "the" for "said" following "nominees for"; and deleted "ensuing" following "next"; and in the second sentence substituted "the" for "such" preceding "nomination" and "commissions" for "commission"; and added subsecs. (2) and (3).

ABOVE THE LAW

PRACTICALLAW.COM
The online resource for Corporate Counsel.

Learn about our **FREE TRIAL**

PRACTICAL LAW COMPANY®

Search

BIG LAW **SMALL LAW FIRMS** **LAW SCHOOLS** **IN-HOUSE COUNSEL** **LEGAL TECHNOLOGY** **JOBS** **CAREER CENTER**

PLUS [ASIA CHRONICLES](#) [BONUSES](#) [ADVICE](#) [LAWSUIT OF THE DAY](#) [ARCHIVES](#) [SEND TIPS](#) tips@abovethelaw.com or text (646) 820-TIPS

06 May 2011 at 1:53 PM **BIGLAW, TRAVEL / VACATION**

Should I Stay or Should I Go? How to Take Vacation from Biglaw Without Being Sent Packing

By NATASHA LYDON

It's that time of year. The never-ending winter is finally retreating and we're getting the few weeks that pass for spring in New York, before the city turns into a humid swamp for four months. The lucky ones who pocketed **spring bonuses** want an excuse to spend them. Minds drift to thoughts of vacation — a temporary escape from billable hours and fleeting chance to remember what sunlight feels like. If only it were that simple.

Fact: Americans on average get **far fewer paid vacation days** than workers in other developed countries, **including Japan**, which invented the concept of **karōshi** (death by overwork). Sadder fact: most Americans **don't use** the precious few vacation days that they have.

Lawyers are particularly bad about this. Biglaw attorneys are lucky enough to get four weeks of vacation each year, but most don't use them.

These 20 paid, get-out-of-jail-free days are part of your compensation package. Refusing to use



11

Tweet

5

Like

Submit

Sign up

Subscribe

Get Above the Law updates in your inbox!

ABOVE THE LAW **Above the Law** Like 7,452

[RSS](#) [Twitter](#)

More subscription options

PRACTICALLAW.COM
The online resource for Corporate Counsel.

Learn about our **FREE TRIAL**

PRACTICAL LAW COMPANY®

09 May 2011 at 10:15 AM **ASIA CHRONICLES, SPONSORED CONTENT**

The Asia Chronicles: Kinney's 30 (so far) 2011 Asia Placements

<http://abovethelaw.com/2011/05/>

Article

*289 A REFRESHING JURY COLA: [\[FNd1\]](#) FULFILLING THE DUTY TO COMPENSATE JURORS ADEQUATELY

Evan R. Seamone [\[FNal\]](#)

Copyright (c) 2002 Evan R. Seamone

	Introduction: State Inaction to Increase Jury Compensation and the Need to Identify Forward-Looking Standards	291
	A. Jury Compensation and the Courts: A Neglected Issue	295
	B. The Problem With Jury Compensation: Lack of an Index Accounting for Inflation or the Cost of Living	298
I.	Legal Aspects of Jury Compensation	301
	A. Constitutional Implications	302
	1. Inadequate Pay as an Infringement on the Juror's Fifth Amendment Interest in Just Compensation	302
	2. Inadequate Pay as a Violation of the Thirteenth Amendment's Prohibition of Involuntary Servitude	305
	B. Statutory Implications	306
	b) Cases Finding that Jurors Are Similar to Employees	



Press Room

Press Releases

PRESS RELEASE 2005/19



29 September 2005

The International Court of Justice amends Article 43 of the Rules of Court

THE HAGUE, 29 September 2005. The International Court of Justice has amended Article 43 of the Rules of Court, dealing with the matter of notifications to be given by the Court to non-parties to a case which are parties to a convention whose construction may be in question in the proceedings.

Two new paragraphs have been added, in order to cover the case of international organizations parties to such conventions and to establish an appropriate procedural framework for this purpose.

Until now, the Court has sent notifications in these circumstances only to States parties to such conventions.

Amendments made to Article 43

Article 43, paragraph 1, as amended, repeats unchanged the current text of Article 43. This lays down the procedure to be followed to implement Article 63, paragraph 1, of the Statute, which refers only to States; that paragraph reads: "Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith".

Article 43, paragraph 2, as amended, provides that from now on: "Whenever the construction of a convention to which a public international organization is a party may be in question in a case before the Court, the Court shall consider whether the Registrar shall also notify the public international organization concerned"; an organization thus notified may then submit its observations on the matter.

Paragraph 3 states that the procedure to be followed in submitting those observations is that described in Article 69, paragraph 2, of the Rules of Court, which reads as follows:

"When a public international organization sees fit to furnish, on its own initiative, information relevant to a case before the Court, it shall do so in the form of a Memorial to be filed in the Registry before the closure of the written proceedings. The Court shall retain the right to require such information to be supplemented, either orally or in writing, in the form of answers to any questions which it may see fit to formulate, and also to authorize the parties to comment, either orally or in writing, on the information thus furnished."

The full text of Article 43 of the Rules of Court, as amended, is annexed to this press release.

The complete updated text of the Rules of Court may be found on the Court's website (www.icj-cij.org) under the heading "Basic documents".

EDITORIAL

Education reform: Shorter week, more learning

More than 120 school districts across the U.S. are finding that less can be more — less being fewer days spent in school.

By Meghan Newton

Page A6

May 8, 2011

The general assumption is that when it comes to educating American kids, more is more. Longer school hours. Saturday school. Summer school. Yet more than 120 school districts across the nation are finding that less can also be more — less being fewer days spent in school.

The four-day school week has been around for decades, according to the [National Council of State Legislatures](#), but it's quietly spreading as a money-saving tactic, especially after several states — including [Montana](#), [Georgia](#), [Missouri](#) and [Washington](#) — passed legislation allowing school districts to make the switch as long as they lengthened each school day so that there was no reduction in instructional hours. Teachers work just as much under the four-day plan, so there are no cost reductions there, but schools have saved from 2% to 9%, according to a [2009 report](#) by the Center for Education Policy at the University of Southern Maine. Utility and transportation costs are lower; there's no need to serve a fifth lunch each week; even the reduced wear and tear on buildings has helped.

Here's the surprise: There appear to be educational benefits as well. Absenteeism among students and teachers in these schools has fallen appreciably, the report said. (As a result, schools also paid less money for substitute teachers.) Students reported feeling more positive about school. Dropout rates fell, students behaved better and participation in extracurricular activities rose. Parents of young children often objected to the change because of the need to find childcare, but once the programs were in place, the report said, they often found that it was easier to find care for one full day a week than for several partial days. Test scores didn't fall, and in many cases, they rose.

As promising as all this sounds, the findings are far from definitive. The four-day week has been tried mostly in tiny, rural school districts. Providing the necessary childcare could be more of a challenge in urban areas. And despite the findings above, four-day schedules might turn out to be more helpful to high school students than children in primary grades, who have shorter attention spans. For those children, teachers said, it would help to schedule meatier academic subjects early in the day, but it still means the later hours are likely to be less academically productive.

Four-day school weeks aren't an educational panacea, but they are intriguing. Even in Los Angeles, there might be individual schools where such an arrangement would lower dropout rates and perhaps give teenage students an opportunity to find part-time jobs. Some teachers might prefer it too, which would be a way to provide a benefit without additional cost.

California has 10 or so school districts, all with fewer than 500 students, that use the four-day week.

#

K 263
1
10/13

PRIVACY AND HUMAN RIGHTS

REPORTS AND COMMUNICATIONS PRESENTED AT
THE THIRD INTERNATIONAL COLLOQUY ABOUT THE
EUROPEAN CONVENTION ON HUMAN RIGHTS,
ORGANISED BY THE BELGIAN UNIVERSITIES
AND THE COUNCIL OF EUROPE, WITH THE
SUPPORT OF THE BELGIAN GOVERNMENT
BRUSSELS, 30 SEPTEMBER - 3 OCTOBER 1970

EDITED BY
A. H. ROBERTSON

BY A. H. ROBERTSON

- Characterization in the Conflict of Laws*
(Harvard, 1940)
- The Council of Europe*
(London, 1956; second edition 1961; French translation 1965)
- European Institutions*
(London, 1959; second edition 1966; third edition 1973)
- Human Rights in Europe*
(Manchester, 1963)
- Human Rights in the World*
(Manchester, 1972)

PUBLISHED LECTURES

- The Council of Europe as an Organ of Inter-governmental Co-operation*
(University of Strasbourg, 1954)
- Legal Problems of European Integration*
(Receuil des Cours, Académie de Droit International, The Hague, 1957)
- The Law of International Institutions in Europe*
(Melland Schill Lectures, University of Manchester, 1961)
- Constitutional Developments in the Council of Europe*
(Institut d'Etudes Européennes, Brussels, 1964)
- The International Protection of Human Rights*
(Montague Burton Lecture, University of Nottingham, 1970;
Spanish translation in *Foro Internacional*, Mexico, 1970)

EDITED BY A. H. ROBERTSON

Human Rights in National and International Law
(Manchester, 1968)

MANCHESTER
UNIVERSITY PRESS

© 1973 MANCHESTER UNIVERSITY PRESS
Published by the University of Manchester at
THE UNIVERSITY PRESS
316-334 Oxford Road, Manchester M13 9NR

UK ISBN 0 7190 0533 X

Distributed in the USA by
HUMANITIES PRESS INC
450 Park Avenue South, New York, N.Y. 10016
Distributed in India by
N. M. TRIPATHI (PRIVATE) LTD
Princess Street, Bombay 2

CONTENTS

Preface	page vii
Introduction	1
ONE Jacques Yvelu	
The European Convention on Human Rights and the right to respect for private life, the home and communications	18
Written communications by Andrew Martin 95, the Human Rights Division of the United Nations 106, Dario Folligno 115, and J. J. Cremona 122.	
TWO Modern scientific and technological developments	
I Pierre Juwigny	
Modern scientific and technical developments and their consequences on the protection of the right to respect for a person's private and family life, his home and communications	129
II R. V. Jones	
Some threats of technology to privacy	139
Written communications by Tommaso Buocciarelli 162, G. B. F. Niblett 167, and Derek H. Hene 174	
THREE Torkel Opsahl	
The Convention and the right to respect for family life, particularly as regards the unity of the family and the protection of the rights of parents and guardians in the education of children	182
Written communications by Willibald Fahr 247, and Ludwig Adamovich 250	
FOUR Jan de Meyer	
The right to respect for private and family life, home and communications in relations between	

159172

Printed in Great Britain by Butler & Tanner Ltd, Frome and London

NOV 5 1976

#8

CHARTER OF THE UNITED NATIONS
AND
STATUTE OF THE
INTERNATIONAL COURT OF JUSTICE



SAN FRANCISCO · 1945

CHAPTER I PURPOSES AND PRINCIPLES

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international

disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

CHAPTER II MEMBERSHIP

Article 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.

ONLY THIS PARAGRAPH

CONSTITUTION
OF THE
STATE OF NEW MEXICO
ADOPTED JANUARY 21,
1911

ARTICLE II
Bill of Rights

~~Sec. 1 [Supreme law of the land.]~~

~~The state of New Mexico is an inseparable part of the federal union, and the constitution of the United States is the supreme law of the land.~~

Sec. 2. [Popular sovereignty.]

All political power is vested in and derived from the people: all government of right originates with the people, is founded upon their will and is instituted solely for their good.

Sec. 3. [Right of self-government.]

The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state.

CITE TO 2 AND 3

#10

United States Library of Congress

HR 5328

Introduced in House

May 18, 2010

H. R. 5328

To amend the Internal Revenue Code of 1986 to reduce international tax avoidance and restore a level playing field for American businesses.

IN THE HOUSE OF REPRESENTATIVES

May 18, 2010

Mr. Doggett (for himself, Mr. McDermott, and Ms. DeLauro) introduced the following bill; which was referred to the Committee on Ways and Means

A BILL

To amend the Internal Revenue Code of 1986 to reduce international tax avoidance and restore a level playing field for American businesses.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'International Tax Competitiveness Act of 2010'.

SEC. 2. TREATMENT OF FOREIGN CORPORATIONS MANAGED AND CONTROLLED IN THE UNITED STATES AS DOMESTIC CORPORATIONS.

(a) In General. [Section 7701 of the Internal Revenue Code of 1986](#) (relating to definitions) is amended by redesignating subsection (p) as subsection (q) and by inserting after subsection (o) the following new subsection:

'(p) Certain Corporations Managed and Controlled in the United States Treated as Domestic for Income Tax.-

'(1) In general. Notwithstanding subsection (a)(4), in the case of a corporation described in paragraph (2) if-

'(A) the corporation would not otherwise be treated as a domestic corporation for purposes of this title, but

'(B) the management and control of the corporation occurs, directly or indirectly, primarily within the United States,

then, solely for purposes of chapter 1 (and any other provision of this title relating to chapter 1), the corporation shall be treated as a domestic corporation.

'(2) Corporation described.-

'(A) In general. A corporation is described in this paragraph if-

'(i) the stock of such corporation is regularly traded on an established securities market, or

'(ii) the aggregate gross assets of such corporation (or any predecessor thereof), including assets under management for investors, whether held directly or indirectly, at any time during the taxable year or any preceding

Agreement for
ENVIRONMENTAL COOPERATION
GLOBE Program

} TITLE

Agreement Between the
UNITED STATES OF AMERICA
and LATVIA

Signed at Riga January 27, 1999

with

Appendices



Not Reported in A.2d, 2009 WL 579227 (Conn.Super.)
(Cite as: **2009 WL 579227 (Conn.Super.)**)

C Only the Westlaw citation is currently available.

West Headnotes

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Stamford-Norwalk.
HEALTH COMMUNICATIONS, INC.

v.

CHICKEN SOUP FOR THE SOUL PUBLISHING,
LLC et al.


No. X05CV084014539S.
Feb. 6, 2009.

Background: Former publisher of inspirational book compilation series filed suit against series' co-authors, new publisher of series, and new publisher's distributor, alleging claims for breach of contract and breach of implied covenant of good faith and fair dealing against co-authors and new publisher, and alleging that distributor of engaging in unfair trade practices. Former publisher filed motion seeking preliminary injunction to compel new publisher to halt publication of new compilation books. New publisher filed motion to dismiss in part. Co-authors filed motion to dismiss for lack of personal jurisdiction. Distributor filed motion to strike complaint against it.

Holdings: The Superior Court, Judicial District of Stamford-Norwalk, [Blawie](#), J. held that:

- (1) issuance of preliminary injunction was not warranted;
- (2) breach of contract claim arising out of new publisher's publication of compilation series was not preempted by federal Copyright Act;
- (3) trial court's exercise of long-arm jurisdiction over non-resident co-authors complied with due process; and
- (4) distributor was not liable to former publisher under either Connecticut Unfair Trade Practices Act or Florida Deceptive and Unfair Trade Practices Act (FDUTPA).

Motions to dismiss denied; motion to strike complaint granted; injunctive relief denied.

[1] Injunction 212  **138.37**

[212](#) Injunction

[212IV](#) Preliminary and Interlocutory Injunctions

[212IV\(A\)](#) Grounds and Proceedings to Procure

[212IV\(A\)3](#) Subjects of Relief

[212k138.36](#) Contracts

[212k138.37](#) k. In general. [Most Cited](#)

[Cases](#)

Former publisher of inspirational book compilation series failed to establish likelihood of success in proving that new publisher's similar book compilations constituted an "adaptation, abridgement or condensation," of prior compilations within meaning of early publishing contracts between former publisher and series' co-authors, which stated that during contracts' term, co-authors would not publish or authorize publication of any compilations by anyone other than former publisher, as necessary to support issuance of preliminary injunction compelling new publisher to halt publication of new compilation books; later agreements reached by parties for more compilations contained additional and specific language that was lacking in earlier contracts, and this specific language was omitted from superseding agreement between parties.

[2] Injunction 212  **138.37**

[212](#) Injunction

[212IV](#) Preliminary and Interlocutory Injunctions

[212IV\(A\)](#) Grounds and Proceedings to Procure

[212IV\(A\)3](#) Subjects of Relief

[212k138.36](#) Contracts

[212k138.37](#) k. In general. [Most Cited](#)

[Cases](#)

Any breach of contract between former publisher of inspiration book compilation series and co-authors of series by new publisher of inspirational book compilation series by virtue of new publisher's republication of four stories in its new compilations that had appeared in prior compilation published by former

Restatement (Third) of The Law Governing Lawyers
Current through June 2010

Copyright © 2000-2011 by the American Law Institute

Chapter 1. Regulation Of The Legal Profession
Topic 5. Law–Firm Structure And Operation
Title C. Supervision Of Lawyers And Nonlawyers Within An Organization

§ 12. Duty Of A Lawyer Subject To Supervision

(1) For purposes of professional discipline, a lawyer must conform to the requirements of an applicable lawyer code even if the lawyer acted at the direction of another lawyer or other person.

(2) For purposes of professional discipline, a lawyer under the direct supervisory authority of another lawyer does not violate an applicable lawyer code by acting in accordance with the supervisory lawyer's direction based on a reasonable resolution of an arguable question of professional duty.

Comment:

a. Scope and cross-references. This Section states the extent to which a lawyer under the supervisory authority of another lawyer must exercise independent judgment to conform to rules of an applicable lawyer code. The Subsections are a close paraphrase of ABA Model Rules of Professional Conduct, Rule 5.2 (1983). The stated sanction for violating the rules of the Section is professional discipline. For the consequences, if any, for civil litigation of proof of violation of a duty stated in the Section, see [§ 11](#), Comment *a*.

b. Responsibility of a supervised lawyer. As indicated in Subsection (1), a lawyer under the direct supervisory authority of another lawyer does not by the fact of supervision become absolved from violations of an applicable lawyer code. Thus, a junior law-firm associate working under the supervision of a senior partner is nonetheless personally responsible to know and apply relevant lawyer-code and other legal requirements in the course of the associate's work. Even a direct instruction from the senior lawyer does not protect the supervised lawyer except to the limited extent provided in Subsection (2) (see Comment *c*). Similarly, attempted instructions or announcements of binding firm policy by a nonlawyer manager, such as the firm's business manager, for example on the manner in which clients are to be charged fees, do not bind even the most junior lawyer in the firm if following such an instruction would violate the lawyer's duty under an applicable lawyer code.

ONLY CITE TO COMMENT B

52 S.W.3d 250
(Cite as: 52 S.W.3d 250)



Court of Appeals of Texas,
Corpus Christi.
Richard Eugene BRUCE and Michael James Vargas,
Appellants,
v.
K.K.B., INC. d/b/a Seafood & Spaghetti Works, Ap-
pellee.

No. 13-99-455-CV.
June 7, 2001.
Rehearing Overruled Aug. 23, 2001.

Survivors of vehicle accident involving restaurant patron brought dram shop liability action against restaurant. The 347th District Court, Nueces County, [Joaquin Villarreal, III, J.](#), entered summary judgment for restaurant. Survivors appealed. The Court of Appeals, [Rodriguez, J.](#), held that: (1) more than scintilla of evidence existed to show that when restaurant provided patron alcohol, it was apparent that patron was obviously intoxicated to extent that she presented clear danger to self and others, and (2) genuine issue of material fact as to whether restaurant patron's intoxication was apparent to restaurant at time it served patron wine precluded summary judgment for restaurant.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 **242(2)**

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k242 Necessity of Ruling on Objection or Motion
30k242(2) k. Rulings on Motions. [Most Cited Cases](#)

Restaurant, as defendant in dram shop liability action, waived argument that summary judgment

evidence presented by survivors or vehicle accident involving restaurant patron, who were plaintiffs in action, was not properly before trial court because it was not timely filed, where restaurant failed to obtain ruling on objections from trial court. [Rules App.Proc., Rule 33.1\(a\)\(2\)\(A\)](#).

[2] Appeal and Error 30 **852**

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k851 Theory and Grounds of Decision of Lower Court
30k852 k. Scope and Theory of Case. [Most Cited Cases](#)

When a trial court's order granting summary judgment does not specify the ground or grounds relied on for the ruling, summary judgment will be affirmed on appeal if any of the theories advanced are meritorious. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c, i\)](#).

[3] Appeal and Error 30 **856(1)**

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k851 Theory and Grounds of Decision of Lower Court
30k856 Grounds for Sustaining Decision Not Considered
30k856(1) k. In General. [Most Cited Cases](#)

Appellate court could affirm summary judgment for restaurant that was defendant in dram shop action on either traditional or no evidence grounds, where restaurant moved for summary judgment on both traditional and no-evidence grounds, and trial court did not specify upon which ground it granted motion. [Vernon's Ann.Texas Rules Civ.Proc., Rule 166a\(c, i\)](#).



Effective: December 17, 2010

United States Code Annotated [Currentness](#)
Title 26. Internal Revenue Code ([Refs & Annos](#))
Subtitle A. Income Taxes ([Refs & Annos](#))
Chapter 1. Normal Taxes and Surtaxes ([Refs & Annos](#))
Subchapter N. Tax Based on Income from Sources Within or Without the United States
[Part III](#). Income from Sources Without the United States
[Subpart F](#). Controlled Foreign Corporations ([Refs & Annos](#))
→ **§ 954. Foreign base company income**

(a) Foreign base company income.--For purposes of [section 952\(a\)\(2\)](#), the term “foreign base company income” means for any taxable year the sum of--

(1) the foreign personal holding company income for the taxable year (determined under subsection (c) and reduced as provided in subsection (b)(5)),

(2) the foreign base company sales income for the taxable year (determined under subsection (d) and reduced as provided in subsection (b)(5)),

(3) the foreign base company services income for the taxable year (determined under subsection (e) and reduced as provided in subsection (b)(5)),

[(4) Repealed. [Pub.L. 108-357, Title IV, § 415\(a\)\(1\)](#), Oct. 22, 2004, 118 Stat. 1511]

(5) the foreign base company oil related income for the taxable year (determined under subsection (g) and reduced as provided in subsection (b)(5)).

CITE TO (a)

Main Case



**STATE OF FLORIDA, by and through Attorney General Pam Bondi,
et al.; Plaintiffs, v. UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, et al., Defendants.**

Case No.: 3:10-cv-91-RV/EMT

**UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF FLORIDA, PENSACOLA DIVISION**

*2011 U.S. Dist. LEXIS 8822; 2011-1 U.S. Tax Cas. (CCH) P50,193; 107
A.F.T.R.2d (RIA) 724; 22 Fla. L. Weekly Fed. D 535*

**January 31, 2011, Decided
January 31, 2011, Filed**

JUDGES: ROGER VINSON, Senior United States District Judge.

OPINION BY: ROGER VINSON

OPINION

ORDER GRANTING SUMMARY [*6] JUDGMENT

On March 23, 2010, President Obama signed health care reform legislation: "The Patient Protection and Affordable Care Act." Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (the "Act").

This case, challenging the Constitutionality of the Act, was filed minutes after the President signed. It has been brought by the Attorneys General and/or Governors of twenty-six states (the "state plaintiffs")¹; two private citizens (the "individual plaintiffs"); and the National Federation of Independent Business ("NFIB") (collectively, the "plaintiffs"). The defendants are the United States Department of Health and Human Services, the Department of Treasury, the Department of Labor, and their secretaries (collectively, the "defendants"). I emphasized once before, but it bears repeating again: 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 [*7] issues regarding the Constitutional role of the federal government.

1 The states are Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota,

Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming.

James Madison, the chief architect of our federalist system, once famously observed:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. 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 Framers believed that limiting federal power, and allowing the "residual" power to remain in the hands of the states (and of the people), [*9] would help "ensure protection of our fundamental liberties" and "reduce the risk of tyranny and abuse." See *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) (citation omitted). Very early, the great Chief Justice John Marshall noted "that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803). Over two centuries later, this delicate balancing act continues. Rather than being the mere historic relic of a bygone era, the principle behind a central government with limited power has "never been more relevant than in this day, when accretion, if not actual accession, of power to the federal government seems not only unavoidable, but even expedient." *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820, 826 (4th Cir. 1999) (en banc), aff'd sub nom, *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).³

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. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 405, 4 L. Ed. 579 (1819) The ongoing challenge is deciding whether a particular federal law falls within or outside those powers. It is frequently a difficult task and the subject of heated debate and strong disagreement.

BACKGROUND

In Count I, all of the plaintiffs challenge the "individual mandate" set forth in Section 1501 of the Act, which, beginning in 2014 will require that everyone (with certain limited exceptions) purchase federally-approved health insurance, or pay a [*12] monetary penalty.⁴ The individual mandate allegedly violates the *Commerce Clause*, which is the provision of the Constitution Congress relied on in passing it.

DISCUSSION

II. Individual Mandate (Count One)

For this claim, the plaintiffs contend that the individual mandate exceeds Congress' power under the *Commerce Clause*. To date, three district courts have ruled on this issue on the merits. Two have held that the individual mandate is a proper exercise of the commerce power [*Liberty Univ., Inc. v. Geithner*, F. Supp. 2d , 2010 U.S. Dist. LEXIS 125922, 2010 WL 4860299 (W.D. Va. Nov. 30,

2010); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010)], while the other court held that it violates the *Commerce Clause*. *Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010).

At issue here, 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. [*28] 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 defendants also claim that the individual mandate is sustainable for the "second reason" that it falls within the Necessary and Proper Clause.⁷

7 The Necessary and Proper Clause is not really a separate inquiry, but rather is part and parcel of the *Commerce Clause* analysis as it augments that enumerated power by authorizing Congress "To make all Laws which shall be necessary and proper" to regulate interstate commerce. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 22, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005); see also *id.* at 34-35, 39 (Scalia, J., concurring in judgment)

B. Analysis

(1) The *Commerce Clause*

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

[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 [*38] 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, 514 U.S. 549, 558-59, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (citations omitted); accord *United States v. Morrison*, 529 U.S. 598, 608-09, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000); It is thus well settled that Congress has the authority under the *Commerce Clause* to regulate three -- and only three -- "categories of activity." *Lopez*, *supra*, 514 U.S. at 558. The third category is the one at issue in this case.

As will be seen, the "substantially affects" category is the most frequently disputed and "most hotly contested facet of the commerce power." *Garcia*, *supra*, 540 F.3d at 1250. This is because, while under the first two categories Congress may regulate and protect actual interstate commerce,

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 Scylla 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 [*40] their own subjective or political calculus for that of the elected representatives of the people, or will appear to be doing so.

United States v. Patton, 451 F.3d 615, 622-23 (10th Cir. 2006). Before attempting to navigate among these three "hazards," a full review of the historical roots of the commerce power, and a discussion of how we got to where we are today, may be instructive.

(a) The Commerce Clause in its Historical Context

The Supreme Court's first [*43] description of commerce (and still the most widely accepted) is from *Gibbons v. Ogden*, *supra*, which involved a New York law that sought to limit the navigable waters within the jurisdiction of that state. In holding that "commerce" comprehended navigation, and thus it fell within the reach of the *Commerce Clause*, 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." 22 U.S. at 72.

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.¹² 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.

Thus, the exercise and interpretation of the commerce power has evolved and undergone a significant change "as the needs of a dynamic and constantly expanding national economy have changed." See *EEOC*, *supra*, 460 U.S. at 246 (Stevens, J., concurring). But, I will begin at the beginning.

(b) Evolution of Commerce Clause Jurisprudence

Some have maintained that the *Commerce Clause* power began as, and was intended to remain, a narrow [*53] and limited one.

But, everything changed in 1937, beginning [*57] with the first of three significant New Deal cases. In *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937), the Supreme Court held for the first time that Congress could also regulate purely intrastate activities that could be said to have a "substantial effect" on interstate commerce.

And then came *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942), which, until recently, was widely considered the most far-reaching expansion of *Commerce Clause* regulatory authority over intrastate activity. 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. The plaintiff in that case, Roscoe Filburn, owned a small farm on which he raised and harvested wheat, among other things. When he exceeded his allotment by 12 acres (which yielded 239 bushels of wheat), he was penalized under the statute. Although the intended disposition of the crop involved in the case was not "expressly stated," [*id.* at 114], the Supreme Court assumed and analyzed the issue as though the excess wheat was "not intended in any part [*59] for commerce but wholly for consumption on the farm." See *id.* at 118. In holding that Congress had power under the *Commerce Clause* to regulate production intended for personal consumption, the Supreme Court stated:

[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, [*60] taken together with that of many others similarly situated, is far from trivial.

Id. at 125, 127-28. The latter statement is commonly known and described as the "aggregation principle." It allows Congress under the *Commerce Clause* to reach 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. From the New Deal period through the next five decades, not a single federal legislative enactment was struck down as exceeding Congress' power under the *Commerce Clause* power -- until *Lopez* in 1995.

In *United States v. Lopez* the Supreme Court considered the Constitutionality [*62] of the Gun Free School Zones Act of 1990, which criminalized the possession of a firearm in a school zone. In holding that the statute exceeded Congress' authority under the *Commerce Clause*, the Supreme Court began by recognizing the "first principles" behind the limitations on federal power as set forth in the Constitution. See *supra*, 514 U.S. at 552. Then, after detailing the history and transformation of *Commerce Clause* jurisprudence -- from *Gibbons*, to *A.L.A. Schechter Poultry*, and up through *Wickard* -- 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." See generally *id.* at 553-57. Consistent with those limits, the *Lopez* Court stated "we have identified three broad categories of activity that Congress may regulate under its commerce power." See *id.* at 558 (emphasis added). The "substantially affects" category [*63] was the one at issue there, and in holding that the statute did not pass muster thereunder, the Supreme Court focused on four considerations: (i) the activity being regulated (guns near schools) was not economic in nature; (ii) the statute did not contain jurisdictionally limiting language; (iii) Congress did not make any formal findings concerning the effect of the regulated activi-

ty on commerce; and (iv) the connection between that activity and its effect on commerce was attenuated. See generally *id. at 559-67*.

As for the fourth consideration, the Court impliedly conceded the claims by the government and the dissent that: (1) gun-related violence is a serious national problem with substantial costs that are spread throughout the population; (2) such violence has adverse effects on classroom learning (which can result in decreased productivity) and discourages traveling into areas felt to be unsafe; all of which, in turn, (3) represents a substantial threat to interstate commerce. The *Lopez* majority made a point to "pause to consider the implications" of such arguments, however. See *id. at 563-65*. It found that if such theories were sufficient to justify regulation under the *Commerce clause* [*64] (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." See *id. at 564*. 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.

The next significant *Commerce Clause* case to be decided by the Supreme Court was the 2000 case of *United States v. Morrison, supra, 529 U.S. at 598*, which involved a challenge to the Violence Against Women Act of 1994. The government argued in that case -- similar to what it did in *Lopez* -- that Congress could regulate gender-motivated violence based on a syllogistic theory that victims of such violence are deterred from traveling and engaging in interstate business or employment; they are thus less productive (and incur increased medical and other costs); all of which, in turn, substantially affects interstate commerce. See *id. at 615*. The Court emphasized that while the legal analysis of the *Commerce Clause* "has changed [*66] as our Nation has developed," which has resulted in Congress having "considerably greater latitude in regulating conduct and transactions under the *Commerce Clause* than our previous case law permitted," authority under the Clause "is not without effective bounds." See *id. at 607-08*. The Court then looked to the four "significant considerations" that were identified in *Lopez* and found that, "[w]ith these principles underlying our *Commerce Clause* jurisprudence as reference points, the proper resolution of the present cases is clear." See *id. at 610-13*. First, the statute at issue in *Morrison* did not regulate economic activity:

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.

Id. at 613. Further, the statute did not contain jurisdictionally limiting language; and while it was supported, in contrast to *Lopez*, with numerous congressional findings regarding the personal, [*67] familial, and economic impact of gender-motivated violence, those findings were insufficient to sustain the legislation as they relied on the same "method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers." *Id. at 615*. In other words, it would require the Court "to pile inference upon inference," and, in the process, run the risk of "completely obliterat[ing] the Constitution's distinction between national and local authority." See *id.*

In light of the circumscriptional rulings in *Lopez* and *Morrison*, many were surprised by the Supreme Court's subsequent decision in *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005), which was not only seen as a return to the more expansive *Commerce Clause* jurisprudence, but was, in fact, viewed by some as even going beyond and "displacing" *Wickard* as the most far-reaching of all *Commerce Clause* cases.

At issue [*68] 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." The marijuana at issue, which was being used by two seriously ill women for medicinal purposes pursuant to state law, had been neither bought nor sold and never crossed state lines. It was, and is, illegal in most states, and does not have a legal free market in interstate commerce, the normal attribute of any economic analysis. 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 [*69] interstate market in that commodity." *Id. at 17-18*. The Court held that Congress had a "rational basis" for finding that leaving home-consumed marijuana outside of federal control would affect the price and market conditions for that commodity because, as was noted in *Wickard*, 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." See *id. at 19*. Surprisingly, "[t]hat the market in *Raich* happened to be an illegal one did not affect the Court's analysis in the least." *Maxwell, supra*, 446 F.3d at 1214.

(c) Application of the Foregoing to the Facts of this Case

Unsurprisingly, the plaintiffs rely heavily on *Lopez* and *Morrison* in framing their arguments, while the defendants, of course, look principally to *Wickard* and *Raich*. These cases (along with the others discussed above) all have something to add to the discussion. However, while they frame [*71] the analysis, and are important from a historical perspective, they do not by themselves resolve this case. That is because, as Congress' attorneys in the Congressional Research Service ("CRS") and Congressional Budget Office ("CBO") 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 [*72] and residing in the United States.¹⁴

14 The individual mandate differs from the regulations in *Wickard* and *Raich*, for example, in that the individuals being regulated in those cases were engaged in an activity (regardless of whether it could readily be deemed interstate commerce in itself) and each had the choice to discontinue that activity and avoid penalty. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 130, 63 S. Ct. 82, 87 L. Ed. 122 (1942) (noting Congress "gave the farmer a choice" of several options under the statute). Here, people have no choice but to buy insurance or be penalized. And their freedom is actually more restricted as they do not even have a choice as to the minimum level or type of insurance to buy because Congress established the floor. A single twenty-year old man or woman who only needs and wants major medical or catastrophic coverage, for example, is precluded from buying such a policy under the Act.

The mere fact that the defendants have tried to analogize the individual mandate to things like jury service, participation in the census, eminent domain proceedings, forced exchange of gold bullion for paper currency under the Gold Clause Cases, and required service in a "posse" under the Judiciary Act of 1789 (all of which are obviously distinguishable) only underscores and highlights its unprecedented nature.

However, unprecedented or not, I will assume that the individual mandate can be Constitutional under the *Commerce Clause* and will analyze it accordingly. This analysis requires the resolution of two essential questions.

(i) Is Activity Required Under the *Commerce Clause*

The threshold question that must be addressed is whether activity is required before Congress can exercise its power under the *Commerce Clause*. In every one of the cases -- 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*). On this point at least, the district courts that have reached opposite conclusions on the individual mandate agree. Compare *Thomas More Law Center*, *supra*, 720 F. Supp. 2d at 893 (noting that the Supreme Court "has never needed to address the activity/inactivity distinction advanced by plaintiffs because in every *Commerce Clause* case presented thus far, there has been some sort of activity"; then proceeding to uphold the individual mandate), with *Virginia*, *supra*, 728 F. Supp. 2d at 781 (noting that "every application of *Commerce Clause* power found to be constitutionally sound by the Supreme Court involved some form of action, transaction, or deed placed in motion by an individual or legal entity"; then proceeding to strike down the individual [*76] mandate).

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*. See Def. Mem. at 31 (maintaining that "there is no 'activity' clause in the constitution"). 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' commerce power, to hold otherwise would "break new legal ground" and be "novel" and "unprecedented." [*77] First, it is interesting that the defendants -- apparently believing the best defense is a good offense -- would use the words "novel" and "unprecedented" since, as previously noted, 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. See CBO Analysis (advising Congress during the previous health care reform efforts in 1994 that "[t]he government has never required people to buy any good or service as a condition of lawful residence in the United States."). 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."¹⁷

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 [*79] 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, supra, 514 U.S. at 564*], and we would have a Constitution in name only. Surely this is not what the Founding Fathers could have intended. If some type of already-existing activity or undertaking were not considered to be a prerequisite to the exercise of commerce power, we would go beyond the concern articulated in *Lopez* for it would be virtually impossible to posit anything that Congress would be without power to regulate.

Having found that "activity" is an indispensable part the *Commerce Clause* analysis (at least as currently understood, defined, and applied in Supreme Court case law), the Constitutionality of the individual mandate will turn on whether the failure to buy health insurance is "activity."

(ii) Is the Failure to Purchase Health Insurance "Activity"?

Preliminarily, based solely on a plain reading of the Act itself [*82] (and a common sense 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*." See Def. Mem. at 29. They offer two (somewhat overlapping) arguments why the appearance of inactivity here is just an "illusion."

(iii) The Purported "Uniqueness" of the Health Care Market

The defendants [*84] 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.¹⁸ First, as living and breathing human beings who are always susceptible to sudden and un-

predictable 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.¹⁹

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 [*86] 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, non-consumers of wheat bread adversely affect prices in the wheat market. 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 [*87] impacting commerce and a taxpayer-subsidized business.

I pause here to emphasize that the foregoing is not an irrelevant and fanciful "parade of horrors." Rather, these are some of the serious concerns implicated by the individual mandate that are being discussed and debated by legal scholars. For example, in the course of defending the Constitutionality of the individual mandate, and responding to the same concerns identified above, often-cited law professor and dean of the University of California Irvine School of Law Erwin Chemerinsky has opined that although "what people choose to eat well might be regarded as a personal liberty" (and thus unregulable), "Congress could use its commerce power to require people to buy cars." Therefore, the potential for this assertion of power has received at least some theoretical consideration and has not been [*88] ruled out as Constitutionally implausible.

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. If impact on interstate commerce were to be expressed and calculated [*93] 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, supra*, 514 U.S. at 567, and subsequently described in *Morrison* as "unworkable if we are to maintain the Constitution's enumeration of powers." *Supra*, 529 U.S. at 615.²¹

(iv) The "Economic Decision" to Forego Health Insurance

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 plaintiffs describe the defendants' argument on this point "Orwellian," because they seek "to redefine the inactivity of not having healthcare insurance as an affirmative economic activity of 'deciding' not to buy insurance, or deciding now how to pay (or not to pay) for potential future economic activity in the form of obtaining medical services." See Pl. Opp. at 10 (emphasis in original). This "economic decision" argument has been accepted by two district courts, *Liberty Univ., Inc.*, *supra*, 2010 U.S. Dist. LEXIS 125922, 2010 WL 4860299, at *15; *Thomas More Law Center*, *supra*, 720 F. Supp. 2d at 893-94. 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. 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.

Attempting to deflect this rather common sense rebuttal to their argument, the defendants emphasized during oral argument that it is not just the "economic decision" itself that renders the failure to buy insurance activity; rather, it is that decision coupled with the fact that the uninsured are guaranteed access to medical care in hospital emergency rooms as a "backstop," the use of which can and does shift costs onto third parties. 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 [*101] 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.

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.²⁵

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.

CONCLUSION

The existing problems in our national health care system are recognized by everyone in this case. There is widespread sentiment for positive improvements that will reduce costs, improve the quality of care, and expand availability in a way that the nation can afford. This is obviously a very difficult task. 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.

For the reasons stated, I must [*138] 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.

THE UNITED STATES CONSTITUTION

Article. I.

Section. 8.

Clause 3: [The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;



**LIBERTY UNIVERSITY, INC., a Virginia Nonprofit Corporation,
MICHELE G. WADDELL, DAVID STEIN, M.D., JOANNE V.
MERRILL, DELEGATE KATHY BYRON, and JEFF HELGESON,
Plaintiffs, v. TIMOTHY GEITHNER, Secretary of the Treasury of the
United States, in his official capacity, KATHLEEN SEBELIUS, Secre-
tary of the United States Department of Health and Human Services,
in her official capacity, HILDA L. SOLIS, Secretary of the United
States Department of Labor, in her official capacity, and ERIC
HOLDER, Attorney General of the United States, in his official capac-
ity, Defendants.**

CASE No. 6:10-cv-00015-nkm

**UNITED STATES DISTRICT COURT FOR THE WESTERN DIS-
TRICT OF VIRGINIA, LYNCHBURG DIVISION**

*2010 U.S. Dist. LEXIS 125922; 2010-2 U.S. Tax Cas. (CCH) P50,748;
106 A.F.T.R.2d (RIA) 7174*

**November 30, 2010, Decided
November 30, 2010, Filed**

DISPOSITION: Motion to dismiss granted.

JUDGES: NORMAN K. MOON, UNITED STATES DISTRICT JUDGE.

OPINION BY: NORMAN K. MOON

OPINION

MEMORANDUM OPINION

On the day the President signed into law the Patient Protection and Affordable Care [*2] Act of 2009, Plaintiffs filed this action, contesting the law's validity on constitutional and statutory grounds. Defendants (several government officials named in their official capacities) moved to dismiss the suit for lack of jurisdiction and for failure to state a claim on which relief can be granted. The parties' arguments have been fully briefed and heard, and for the reasons stated in this memorandum, I will grant Defendants' Motion to Dismiss (docket no. 25).

I. BACKGROUND

Plaintiffs Liberty University, Inc., Michele G. Waddell, David Stein, M.D., Joanne V. Merrill, Delegate Kathy Byron, and Council Member Jeff Helgeson (collectively "Plaintiffs") challenge the legality of certain provisions of the Patient Protection and Affordable Care Act of 2009, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010) (collectively, the "Act"). Plaintiffs seek a declaration that the Act is unconstitutional and invalid and an order enjoining its enforcement. Defendants in this action are the following government officials, named in their official capacities: Timothy Geithner, [*3] Secretary of the Treasury; Kathleen Sebelius, Secretary of the United States Department of Health and Human Services; Hilda L. Solis, Secretary of the United States Department of Labor; and Eric Holder, Attorney General of the United States. This is not the first judicial ruling on a challenge to the Act. ¹

IV. CONGRESSIONAL AUTHORITY UNDER ARTICLE I

Plaintiffs allege in Count One of the complaint that the employer and individual coverage requirements are beyond the scope of Congress' authority provided by Article I of the Constitution. In response, Defendants identify three sources of constitutional authority for the provisions in question: the *Commerce Clause*, the General Welfare Clause, and the Necessary and Proper Clause. For the reasons provided below, I hold that Congress acted in accordance with its constitutionally delegated powers under the *Commerce Clause* when it passed the employer [*39] and individual coverage provisions of the Act, and I will dismiss Count One. Because I find that the employer and individual coverage provisions are within Congress' authority under the *Commerce Clause*, it is unnecessary to consider whether the provisions would be constitutional exercises of power pursuant to the General Welfare Clause or the Necessary and Proper Clause.

A. Individual Coverage Provision

The Constitution grants Congress the power to "regulate Commerce . . . among the several States . . ." *U.S. CONST. art. I, § 8, cl. 3*. "In assessing the scope of Congress' authority under the *Commerce Clause*," the Court's task "is a modest one." *Id. at 22*. The Court need not itself determine whether the regulated activities, "taken in the aggregate, [*40] substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.*

In question here is the Act's requirement that all individuals not exempted under the Act purchase and maintain minimum essential health care coverage. Plaintiffs make two interrelated arguments for finding that the individual coverage provision exceeds the authority granted to Congress under the *Commerce Clause*. According to Plaintiffs, the conduct regulated by the [*42] provision--the failure to purchase health insurance--is a decision not to engage in interstate commerce, and consequently it is not a form of activity; rather, it is better characterized as inactivity, or "simply existing." (Pls.' Opp'n 23.) Further, Plaintiffs charge that the failure to purchase health insurance is not commercial in nature, and does not "result in substantial direct economic effects" on interstate commerce. (Second Am. Compl. ¶ 100.) In contrast, Defendants argue that decisions to forego health insurance coverage *are* economic and substantially affect the interstate health care market because the uninsured, when sick, are able to obtain emergency room care for little or no money, shifting the costs for that uncompensated care on to health care providers, the insured population in the form of higher premiums, and the government. (Defs.' Mem. Supp. Mot. Dismiss 30-31.) ¹⁴ Defendants contend that the costs of providing health care are multiplied by individuals who make the

economic calculation not to purchase health insurance during the years when they are healthy but opt back into the health insurance system later when they need care. (*Id.* 32.) It is Defendants' stance [*43] that every individual must choose a way to finance the health care services that he or she will inevitably require, and that by making these choices one becomes an active market participant, not a passive bystander. (*Id.* 32-33.)

Plaintiffs contend that the individual coverage provision is similar to the statutes struck down in *Lopez* and *Morrison*, in that those statutes [*44] and the provision of the Act here all involved regulation of non-commercial activity or inactivity, and those cases should govern. Defendants respond that an individual's decision not to purchase health insurance is a form of economic activity, and the Court's decisions in *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942) and *Raich* should dictate the result in the present matter.

I will examine the congressional findings contained in the Act because they can be helpful in reviewing a statutory scheme, *see Raich*, 545 U.S. at 21, but I pause to observe that such findings are not sufficient, by themselves, to sustain the constitutionality of the Act, *see Morrison*, 529 U.S. at 614. In the congressional findings set forth in § 1501(a)(2), Congress explained that the national market in health insurance and health care services amounted to \$2.5 trillion in 2009 and consumed 17.6 percent of the annual gross domestic product. It recognized that administrative costs for private health insurance were \$90 billion in 2006 and constituted 26 to 30 percent of premiums in the individual and small group insurance markets. [*48] In addition, the costs of providing uncompensated care for the uninsured amounted to \$43 billion in 2008 and were passed on to consumers in the form of substantially higher premiums. In order to reduce these significant costs and make coverage more affordable for consumers, Congress required non-exempted individuals to obtain health insurance coverage, which, together with the other provisions of the Act, Congress found would add millions of new consumers to the health insurance market and increase the number of insured individuals. Without an individual coverage requirement, Congress found that healthy individuals would wait to purchase health insurance until they needed care, driving up the cost of health insurance premiums. Congress stated that the individual coverage requirement "is essential to creating effective health insurance markets" with broad health insurance pools including healthy individuals. Act § 1501 (a)(2)(I).

While the unique nature of the market for health care and the breadth of the Act present a novel set of facts for consideration, the well-settled principles expounded in *Raich* and *Wickard* control the disposition of this claim. I hold that there is a rational [*49] basis for Congress to conclude that individuals' decisions about how and when to pay for health care are activities that in the aggregate substantially affect the interstate health care market.

The conduct regulated by the individual coverage provision--individuals' decisions to forego purchasing health insurance coverage--is economic in nature, and so the provision is not susceptible to the shortcomings of the statutes struck down by the Court in *Lopez* and *Morrison*. Nearly everyone will require health care services at some point in their lifetimes, and it is not always possible to predict when one will be afflicted by illness or injury and require care. The "fundamental need for health care and the necessity of paying for such services received" creates the market in health care services, of which nearly everyone is a participant. *Thomas More Law Ctr.*, 2010 U.S. Dist. LEXIS 107416, at *28. Regardless of whether one relies on an insurance policy, one's savings, or the backstop of free or reduced-cost emergency room services, one has made a choice regarding the method

of payment for the health care services one expects to receive. Far from "inactivity," by choosing to forgo insurance, [*50] Plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now, through the purchase of insurance. *Id.* at *26. As Congress found, the total incidence of these economic decisions has a substantial impact on the national market for health care by collectively shifting billions of dollars on to other market participants and driving up the prices of insurance policies.

The conclusion that decisions to pay for health care without insurance are economic activities follows from the Supreme Court's rulings in *Wickard* and *Raich*. Plaintiffs' preference for paying for health care needs out of pocket rather than purchasing insurance on the market is much like the preference of the plaintiff farmer in *Wickard* for fulfilling his demand for wheat by growing his own rather than by purchasing it. Plaintiffs do not consider themselves to be engaging in commerce, but as in *Wickard*, economic activity subject to regulation under the *Commerce Clause* need not involve transacting business in the marketplace. See *Wickard*, 317 U.S. at 128 ("[T]he power to regulate commerce includes the power to regulate . . . *the practices affecting*" the prices of commodities [*51] in interstate commerce.) (emphasis added). In *Wickard*, the plaintiff argued that his production of wheat was "not intended in any part for commerce but wholly for consumption on the farm." *Id.* at 118. The Court rejected that argument, stating that one effect of Congress' regulation was to "forestall resort to the market by producing to meet [one's] own needs." *Id.* at 127. Because of the nature of supply and demand, Plaintiffs' choices directly affect the price of insurance in the market, which Congress set out in the Act to control.

The conduct regulated by the individual coverage provision is also within the scope of Congress' powers under the *Commerce Clause* because it is rational to believe the failure to regulate the uninsured would undercut the Act's larger regulatory scheme for the interstate health care market. See *id.* at 18; cf *Wickard*, 317 U.S. at 128-29 ("Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."). As Congress stated in its findings, the individual coverage provision is "essential" to this larger regulatory scheme because without it, individuals would postpone health insurance until they need substantial care, at which point the Act would obligate insurers to cover them at the same cost as everyone else. This would increase the cost of health insurance and decrease the number of insured individuals--precisely the harms that Congress sought to address with the Act's regulatory measures.

For these reasons, the individual coverage requirement is a valid exercise of federal power under the *Commerce Clause*, even as applied to the facts of this case.

1 of 2 DOCUMENTS

**COMMONWEALTH OF VIRGINIA EX REL. KENNETH T. CUC-
CINELL, II, in his official capacity as Attorney General of Virginia,
Plaintiff, v. KATHLEEN SEBELIUS, SECRETARY OF THE DE-
PARTMENT OF HEALTH AND HUMAN SERVICES, in her official
capacity, Defendant.**

Civil Action No. 3:10CV188-HEH

**UNITED STATES DISTRICT COURT FOR THE EASTERN DIS-
TRICT OF VIRGINIA, RICHMOND DIVISION**

*728 F. Supp. 2d 768; 2010 U.S. Dist. LEXIS 130814; 2011-1 U.S. Tax
Cas. (CCH) P50,104; 106 A.F.T.R.2d (RIA) 7333*

**December 13, 2010, Decided
December 13, 2010, Filed**

PRIOR HISTORY: *Commonwealth ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 2010 U.S. Dist. LEXIS 77678 (E.D. Va., 2010)

DISPOSITION: The court granted plaintiff's motion for summary judgment and denied defendant's motion for summary judgment. The court severed § 1501 from the balance of the ACA and denied plaintiff's request for injunctive relief.

OPINION BY: Henry E. Hudson

OPINION

[*770] **MEMORANDUM OPINION**

(Cross Motions for Summary Judgment)

In this case, the Commonwealth of Virginia (the "Commonwealth"), through its Attorney General, challenges the constitutionality of the pivotal enforcement mechanism of the health care scheme adopted by Congress in the Patient Protection and Affordable Care Act ("ACA" or "the Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010). At issue is Section 1501 of the Act, commonly known as the Minimum Essential Coverage Provision ("the Provision"). The Minimum Essential Coverage Provision requires that every United States citizen, other than those falling within specified exceptions, maintain a minimum level of health insurance coverage for each month beginning

in 2014. Failure to comply will result in a [**6] penalty included with the taxpayer's annual return. As enacted, Section 1501 is administered and enforced as a part of the Internal Revenue Code.

[*771] In its Complaint, the Commonwealth seeks both declaratory and injunctive relief. Specifically, the Commonwealth urges the Court to find that the enactment of Section 1501 exceeds the power of Congress under the *Commerce Clause* and General Welfare Clause of the United States Constitution.

As this Court previously cautioned, this case does not turn on the wisdom of Congress or the public policy implications of the ACA. The Court's attention is focused solely on the constitutionality of the enactment.

III.

Turning to the merits, this Court previously noted that the Minimum Essential Coverage Provision appears to forge new ground and extends the *Commerce Clause* powers beyond its current high water mark. Critical to the Secretary's argument is the notion that an individual's decision not to purchase health insurance is in effect "economic activity." (Del.'s Mem. Supp. 35.) The Secretary rejects the Commonwealth's implied premise that a person can simply elect to avoid participation in the health care market. It is inevitable, in her view, that every individual--today or in the future--healthy or otherwise--will require medical care. She adds that a large segment of the population is uninsured and "consume[s] tens of billions of dollars in [*776] uncompensated [**21] care each year." (Def.'s Mem. Opp. 14.) The Secretary maintains that the irrefutable facts demonstrate that "[t]he conduct of the uninsured--their economic decision as to how to finance their health care needs, their actual use of the health care system, their migration in and out of coverage, and their shifting of costs on to the rest of the system when they cannot pay--plainly is economic activity." (Def.'s Mem. Opp. 16-17.)

The Secretary relies on what is commonly referred to as an aggregation theory, which is conceptually based on the hypothesis that the sum of individual decisions to participate or not in the health insurance market has a critical collective effect on interstate commerce. Congress may regulate even intrastate activities if they are within a class of activities that, in the aggregate, substantially affect interstate commerce. In support of this argument, the Secretary relies on the teachings of the Supreme Court in *Gonzales*, wherein the Court noted that "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Gonzales*, 545 U.S. at 17, 125 S. Ct. at 2205-06 (citing *Perez*, 402 U.S. at 154, 91 S. Ct. at 1361). [**22] In other words, her argument is premised on the theoretical effect of an aggregation or critical mass of indecision on interstate commerce.

The core of the Secretary's primary argument under the *Commerce Clause* is that the Minimum Essential Coverage Provision is a necessary measure to ensure the success of its larger reforms of the interstate health insurance market.⁵ The Secretary emphasizes that the ACA is a vital step in transforming a currently dysfunctional interstate health insurance market. In the Secretary's view, the key elements of health care reform are coverage of those with preexisting conditions and prevention of discriminatory premiums on the basis of medical history. These features, the Secretary maintains, will have a material effect on the health insurance underwriting process, and inevitably, the cost of insurance coverage. Therefore, without full market participation, the financial foundation supporting the health care system will fail, in effect causing the entire health care regime to "implode." Unless everyone is required by law to purchase health insurance, or pay a penalty, the reve-

nue base will be insufficient to underwrite the costs of insuring individuals [**23] presently considered as high risk or uninsurable. Therefore, under the Secretary's reasoning, since Congress has the power under the *Commerce Clause* to reform the interstate health insurance market, it also possesses, under the Necessary and Proper Clause, the power to make the regulation effective by enacting the Minimum Essential Coverage Provision. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19, 62 S. Ct. 523, 525-26, 86 L. Ed. 726 (1942).

The Secretary seeks legal support for her aggregation theory in the Supreme Court's holding in *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942) and *Gonzales*.

Because the Minimum Essential Coverage Provision is the linchpin which provides financial viability to the other critical elements of the overall regulatory scheme, the Secretary concludes that its adoption is within congressional *Commerce Clause* powers. She emphasizes that Congress "rationally found that a failure to regulate the decision to delay or forego insurance--i.e., the decision to shift one's costs on to the larger health care system--would undermine the `comprehensive regulatory regime.'" (Def.'s Mem. Supp. 27 (quoting *Gonzales*, 545 U.S. at 27, 125 S. Ct. at 2211).) Therefore, the Secretary posits that because the guaranteed coverage and rate discrimination issues are unquestionably within the *Commerce Clause* powers, the mechanism chosen by Congress to effectuate those reforms, the Minimum Essential Coverage [**28] Provision, is also a proper exercise of that power--either under the *Commerce Clause* or the associated Necessary and Proper Clause.

IV.

Although the Necessary and Proper Clause vests Congress with broad authority to exercise means, which are not themselves an enumerated power, to implement legislation, it is not without limitation. As the Supreme Court noted in *Buckley v. Valeo*, "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, . . . so long as the exercise of that authority does not offend some other constitutional restriction." 424 U.S. 1, 132, 96 S. Ct. 612, 688, 46 L. Ed. 2d 659 (1976) (internal citation omitted). The Commonwealth argues that the Provision offends a fundamental restriction on *Commerce Clause* powers.

In their opposition, the Commonwealth focuses on what it perceives to be the central element of *Commerce Clause* jurisdiction--economic [**30] activity. The Commonwealth [*779] distinguishes what was deemed to be "economic activity" in *Wickard* and *Gonzales*, namely a voluntary decision to grow wheat or cultivate marijuana, from the involuntary act of purchasing health insurance as required by the Provision. In *Wickard* and *Gonzales*, individuals made a conscious decision to grow wheat or cultivate marijuana, and consequently, voluntarily placed themselves within the stream of interstate commerce. Conversely, the Commonwealth maintains that the Minimum Essential Coverage Provision compels an unwilling person to perform an involuntary act and, as a result, submit to *Commerce Clause* regulation.

V.

Despite the laudable intentions of Congress in enacting a comprehensive and transformative health care regime, the legislative process must still operate within [**35] constitutional bounds. Salutatory goals and creative drafting have never been sufficient to offset an absence of enumerated powers. As the Supreme Court noted in *Morrison*, "[e]ven [our] modern-era of precedents which have expanded congressional power under the *Commerce Clause* confirm that this power is subject

to outer limits." *Morrison*, 529 U.S. at 608, 120 S. Ct. at 1748-49 (quoting *Lopez*, 514 U.S. at 556-57, 115 S. Ct. at 1628).

In surveying the legal landscape, several operative elements are commonly encountered in *Commerce Clause* decisions. First, to survive a constitutional challenge the subject matter must be economic in nature and affect interstate commerce, and second, it must involve activity. Every application of *Commerce Clause* power found to be constitutionally sound by the Supreme Court involved some form of action, [**38] transaction, or deed placed in motion by an individual or legal entity. The constitutional viability of the Minimum Essential Coverage Provision in this case turns on whether or not a person's decision to refuse to purchase health care insurance is such an activity.

In her argument, the Secretary urges an expansive interpretation of the concept of activity. She posits that every individual in the United States will require health care at some point in their lifetime, if not today, perhaps next week or even next year. Her theory further postulates that because near universal participation is critical to the underwriting process, the collective effect of refusal to purchase health insurance affects the national market. Therefore, she argues, requiring advance purchase of insurance based upon a future contingency is an activity that will inevitably affect interstate commerce. Of course, the same reasoning could apply to transportation, housing, or nutritional decisions. This broad definition of the economic activity subject to congressional regulation lacks logical limitation and is unsupported by *Commerce Clause* jurisprudence.

The power of Congress to regulate a class of activities that [**39] in the aggregate has a substantial and direct effect on interstate commerce is well settled. *Gonzales*, 545 U.S. at 22, 125 S. Ct. at 2209. This even [*782] extends to noneconomic activity closely connected to the intended market. *Hoffman v. Hunt*, 126 F.3d 575, 587-88 (4th Cir. 1997). But these regulatory powers are triggered by some type of self-initiated action. Neither the Supreme Court nor any federal circuit court of appeals has extended *Commerce Clause* powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market.⁷ In doing so, enactment of the Minimum Essential Coverage Provision exceeds the *Commerce Clause* powers vested in Congress under Article I.

Because an individual's personal decision to purchase--or decline to purchase--health insurance from a private provider is beyond the historical reach of the *Commerce Clause*, the Necessary and Proper Clause does not provide a safe sanctuary. This clause grants Congress broad authority to pass laws in furtherance of its constitutionally-enumerated powers.

X.

In the final analysis, the Court will grant Plaintiffs Motion for Summary Judgment and deny Defendant's similar motion. The Court will sever Section 1501 from the balance of the ACA and deny Plaintiffs request for injunctive relief.

An appropriate Order will accompany this Memorandum Opinion.

/s/ Henry E. Hudson

United States District Judge

Date: Dec. 13, 2010

Richmond, VA

Source 5

Individual Health Care Insurance Mandate Debate

November 3, 2009

The Federalist Society; <http://www.fed-soc.org/debates/dbtid.35/default.asp>

This debate will focus on the following question:

Would a federally-imposed individual mandate to require health insurance be constitutional?

The participants of this installment of *Originally Speaking* are **Erwin Chemerinsky** and **David B. Rivkin**.

Erwin Chemerinsky

There is no constitutional problem with Congress requiring that individuals purchase health care or pay a penalty. There is much to debate over health care reform and how to achieve it, but I have no doubt that the proposals would be constitutional.

The constitutional objection that I have heard most often is that Congress lacks the authority under Article I of the Constitution to do this. But such a mandate clearly falls within the scope of Congress's authority to regulate commerce among the states.

Over many cases, the Supreme Court has held that Congress can regulate economic activities that taken cumulatively across the country have a substantial effect on interstate commerce. Purchasing health insurance is an economic transaction. Taken cumulatively those who do this, or who don't do it, have a substantial effect on interstate commerce.

In 2007, healthcare expenditures amounted to \$2.2 trillion, or \$7,421 a person, and accounted for 16.2% of the gross domestic product. These statistics leave no doubt that regulating health insurance is regulating interstate commerce.

Those who argue that this is unconstitutional maintain that those not purchasing health insurance, by definition, are not part of interstate commerce. There are numerous flaws with this argument. First, Congress can regulate activities that themselves are not part of interstate commerce if they have a substantial effect on interstate commerce. For example, in *Wickard v. Filburn*, the Supreme Court held that Congress could regulate wheat that farmers grew for their own home consumption.

More recently in *Gonzales v. Raich*, the Court ruled that Congress could prohibit cultivating and possessing small amounts of marijuana for personal medicinal use. Even though the individuals were not personally engaged in commerce, the matter still fit within the commerce power.

Second, not engaging in economic transactions is a form of commercial behavior that Congress can regulate. The Supreme Court held that Congress could require that hotels and restaurants provide services to African-Americans. Their refusal to engage in commerce still was deemed to be within the scope of Congress's commerce clause power.

Third, the likelihood is that everyone will require medical care at some point. An uninsured person in an automobile accident will be taken to the emergency room for treatment. An uninsured person with a communicable disease will be treated. Congress can ensure that there is an adequate fund to pay for everyone's medical needs.

In other words, the health care system is part of interstate commerce. Providing care for all unquestionably has a substantial economic effect. Congress, then, can use its authority under the necessary and proper clause to make sure that the system that it is creating is viable and capable of providing health care for all.

Nor is there any individual right violated by a mandate for purchasing health care. There is no constitutionally protected freedom to be able to refuse to be insured or to avoid paying for the benefits provided.

There are many close constitutional questions. But this is not among them. Congress clearly has the legal authority to require individuals to have health insurance.

David B. Rivkin.

There is no doubt that Congress can regulate an entire array of economic activities, large and small, inter- and intra-state. Thus, for example, there is no problem, Constitution-wise with having Congress regulate health care insurance purchase transactions. The problem with an individual insurance purchase mandate, however, is that it does not regulate any transactions at all. It regulates human beings, simply because they exist, and orders them to engage in certain types of economic transactions.

The cases cited by Professor Chemerinsky – *Wickard v. Filburn* and *Gonzales v. Raich* – do not support his position. In both of these cases, Congress sought to regulate individuals engaged in tra-

ditional agricultural/economic activities, growing wheat and marijuana. The fact that they did so for personal consumption did not detract from the underlying economic nature of these activities, especially since Congress sought to regulate them as a part of a comprehensive inter-state regulatory scheme.

It is also true that a refusal to serve a particular customer, the conduct in issue in the *Heart of Atlanta Motel* case, is a form of an economic behavior, fully reachable under the Commerce Clause.

However, what Professor Chemerinsky conveniently overlooks is that this form of conduct – refusal to serve – took place in the context of an operating commercial establishment. It is this fact and this fact alone that made the refusal to serve an economic transaction. If Professor Chemerinsky feels otherwise, he would have to accept the notion that Congress can, under the Commerce Clause, regulate the entirely private, non-commercial behavior of an individual who chooses whom to invite for dinner to his house, and who discriminates against some of his neighbors.

Professor Chemerinsky also overlooks the existence of two major cases – *United States v. Lopez* and *United States v. Morrison* – in which the Supreme Court, in 5 to 4 decisions, has specifically rejected the notion that Congress can regulate non-commercial behavior merely because, arguably, such behavior can have an impact on Commerce. The Court's overarching reason for doing so was its compellingly articulated belief that the Commerce Clause is a limited grant of power and one that cannot be infinitely capacious. This reasoning is unassailable.

Indeed, the vertical separation of powers, under which the federal government possesses limited and enumerated powers, while the States wield general police powers, is the key part of our constitutional architecture. Far from being an 18th century affectation, these structural limitations on government powers were designed to protect individual liberty. In the Framers' view, these structural limitations on the ability of the federal government to exercise authority were the primary ways of ensuring that no single government entity would grow too powerful. They were viewed by the Framers as the most important way of protecting liberty, far more important than even the provisions of the Bill of Rights.

Professor Chemerinsky's vision of a Commerce Clause on steroids would fundamentally warp our constitutional architecture. Because every single decision by individual Americans, be it buying health insurance, cars, health club memberships or any other good or service, has some impact on

the economy, it could be subject to regulation by Congress. Indeed, Congress would be able to compel how individuals would dispose of every penny of whatever monies they have left after paying taxes, transforming Americans into virtual serfs. Meanwhile, because, under the Supremacy Clause, any constitutional federal legislation trumps exercises of state power, an infinitely capacious Commerce Clause would rob States of any remaining authority. This point was ably articulated by Justice Kennedy in his concurring opinion in *Lopez*. Accordingly, there is a great deal at stake here. No matter how important the cause of health care reform might be, it is not consequential enough to destroy the very sinews of our constitutional system.

Erwin Chemerinsky

It is firmly established that Congress may regulate economic activities that have a substantial effect on interstate commerce. Purchasing insurance, by definition, is economic activity. Congress mandating that individuals have insurance is obviously regulating economic activity. There is no denial that this has a substantial effect on interstate commerce. Once this is established, and I cannot imagine how it can be disputed, then Congress can enforce this under the necessary and proper clause by penalizing those who violate the mandate. Under current and long-standing constitutional doctrines it is not a close question that this is within the scope of Congress's commerce clause power.

Mr. Rivkin says that if Congress can do this, there will be no limit to Congress's power. He says that this is the commerce clause "on steroids" and that Congress will be able to regulate everything, even who people have over to their homes for dinner. He says that the system of dual federalism will be at an end. Such hyperbole and apocalyptic predictions are familiar in this area. In 1918, in *Hammer v. Dagenhart*, the Supreme Court declared unconstitutional a federal law that prohibited the shipment in interstate commerce of goods made by child labor. The Court concluded its opinion by declaring: "[I]f Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government practically destroyed." For more than 70 years Congress has prohibited child labor and none of these dire predictions came true. Nor would allowing Congress to mandate the purchase of health insurance mean that Congress could regulate who people invite to their homes for dinner or end our

system of federalism.

As a matter of constitutional law, there are two relevant questions in assessing whether Congress's mandate of health insurance fits within the scope of its commerce power. First, is Congress regulating economic activity? Certainly, compelling the purchase of health insurance is regulating economic activity in its most obvious sense. Mr. Rivkin points to *United States v. Lopez* and *United States v. Morrison* to support his position. But neither involved economic transactions. *Lopez* concerned the federal Gun Free School Zone Act which made it a crime to have a firearm within 1,000 feet of a school. *Morrison* involved the Violence Against Women Act, which created a civil cause of action for money damages for victims of gender-motivated violence. Neither involved economic activity. But purchasing or not purchasing insurance is an economic transaction.

Nor is Mr. Rivkin's distinction of *Wickard v. Filburn* and *Gonzales v. Raich* persuasive. In these cases, the Supreme Court held that Congress could regulate the amount of wheat that farmers grew for home consumption and prohibit the cultivation or possession of marijuana for personal medicinal use. Mr. Rivkin says that these cases involved economic activity. But in making that argument Mr. Rivkin makes a crucial conception: a person can be involved in economic activity even if there is no economic transaction or commercial activity. In *Wickard*, it was a farmer growing wheat for his family to eat. In *Raich*, it was a person growing marijuana for personal medicinal use. If this is economic activity, then certainly the purchase of health insurance (or a refusal to do so) is economic activity.

The second question is whether the activity has a substantial effect on interstate commerce. This, of course, Mr. Rivkin does not question because it cannot be denied that the purchase of insurance has an enormous effect on interstate commerce. Likewise, taken cumulatively those who refuse to purchase insurance also have a significant impact on interstate commerce. If the wheat that a farmer grows for his family to eat or the marijuana that a person grows for home consumption have this effect, there can be no dispute that a national mandate to purchase health insurance meets this requirement.

There are many valid and important issues to debate concerning how to implement health care

reform. But constitutionality is not among them. Congress clearly has the power to use its power to regulate commerce among the states to mandate the purchase of health insurance.

David B. Rivkin.

There is no question that purchasing insurance is an economic activity which Congress can regulate. To be sure, even so, the regulation can be properly imposed only on the commercial entities that are in the business of selling insurance, i.e., insurance companies. The government can regulate what insurance products they sell, what prices they can charge, what disclosures they make to the purchasers and all other aspects of their activities. Directly regulating the purchasing public is a much dicier proposition, from a constitutional perspective. When Congress wanted to ban purchases of liquor, it needed a constitutional amendment to do so. When Congress regulates gun sales, the onus of the regulations fall on gun sellers and not on gun buyers.

However, there is an even more fundamental problem with Professor Chemerinsky's analysis. What lies at the heart of my disagreement with him is his view that a decision by a private individual not purchase insurance is also a form of economic activity. Let's stipulate here that any purchasing decision by a consumer in a market economy has some economic impact. But to call a decision not to purchase, when undertaken by a private person not engaged in a commercial activity, an economic transaction is a fundamental misnomer. In this regard, under Professor Chemerinsky's definition of economic activity, every aspect of consumer behavior, or, for that matter, any aspect of individual behavior, would become an economic activity.

It is worth reflecting that, under the same kind of logic, the *Lopez* and *Morrison* cases were wrongly decided. Both involved activities by individuals – carrying guns and engaging in gender-motivated violence – that quite logically and plausibly could be expected to have, in the aggregate, an adverse impact on the economy. (Indeed, the government cobbled together such an argument to defend the underlying laws.) I fail to understand the distinction between the decision not to purchase insurance – which, according to Professor Chemerinsky, in the aggregate, will have an adverse impact on the economy – and a decision to carry guns near school which, in the aggregate, will also have an impact on the economy. Under Professor Chemerinsky's logic, both of these decisions amount to an

economic activity, subject to regulations under the Commerce Clause.

By contrast, the *Lopez* and *Morrison* cases are perfectly reconcilable with the *Wickard* and *Gonzales* cases. This is because growing agricultural products or plants, whether for resale or personal consumption, is inherently an economic activity. Choosing not to go to a movie, or not buy a car, or not buy insurance, is not an economic activity.

But, let's try to get beyond the verbal gymnastics. Professor Chemerinsky is not impressed by my argument about the constitutional consequences of adopting his vision of the Commerce Clause, calling it hyperbolic and apocalyptic. This is not, unfortunately, a credible rejoinder.

The importance of having a limiting principle associated with the use of the Commerce Clause isn't something that only I care about; this was precisely the concern expressed by the five Justices of the United States Supreme Court in *Lopez* and *Morrison*. Are they also being hyperbolic and apocalyptic? Even more fundamentally, I would respectfully urge Professor Chemerinsky to give serious consideration to answering my question – how does his vision of an infinitely capacious Commerce Clause, endowing Congress with the authority to regulate every single purchasing and life style decision of all Americans reconcile with the notion of the federal government being a government of limited and enumerated powers? Professor Chemerinsky appears comfortable with Congress exercising its power under the Commerce Clause unencumbered by any limiting principle. The upshot of this argument has Congress saying, "you can trust us not to go too far." That is distinctly not the structure of the Constitution, and the prospects of such a limitless exercise of power would likely have led states to reject its ratification. Indeed, I can imagine no constitutional law scholar who would not recoil from this expansive view of power in any other context, especially those involving individual liberties.

Erwin Chemerinsky

Mr. Rivkin and I agree that under well-established law that Congress can regulate economic activity that has a substantial effect on interstate commerce. He also appears to agree that under this power Congress can mandate that individuals purchase health insurance. Buying health insurance, by defi-

nition, is commercial activity. Taken cumulatively across the country, there is quite obviously a substantial effect on interstate commerce.

The only apparent area of disagreement is whether Congress can impose some penalty on those who do not purchase health insurance. Mr. Rivkin says that they are not engaging in commerce so Congress cannot regulate them. First, if Congress can require the purchase of health insurance as an exercise of the commerce power, then surely under "the necessary and proper clause" it can enforce that mandate by punishing those who refuse to do so. Long ago in *McCulloch v. Maryland*, the Supreme Court held that the necessary and proper clause authorizes Congress to adopt any means to carry out its powers. Punishing those not purchasing health insurance is the means to enforcing the constitutional requirement for purchasing insurance.

Second and independently, the choice whether to purchase or not purchase health insurance is an economic decision and constitutes economic activity. If I decide to buy or not buy something, that is economic activity. Those not purchasing health insurance have a substantial effect on interstate commerce.

As I mentioned earlier, the Court allowed Congress, under its commerce power, to require that hotels and restaurants serve racial minorities. It was no defense for the hotels and restaurants to say that they were not engaging in commerce. Mr. Rivkin says that it is different because hotels and restaurants were commercial enterprises. That misses the point: the refusal to engage in an economic transaction is deemed economic. Even growing crops for personal use is economic despite the lack of any transaction.

Mr. Rivkin again resorts to hyperbole and says that my view of the commerce clause would give unlimited powers to Congress. That's simply wrong: all I am defending is that Congress under the commerce clause can require an economic transaction and enforce that requirement as appropriate. This gives Congress no power to regulate outside of the area of economic transactions. It does not call into question the Supreme Court's decisions in *Lopez* and *Morrison* which had nothing to do with economic transactions.

Given the size of the health care industry and the enormous resources being spent, it is inconceivable to me that a court would find that regulation is beyond the scope of Congress's commerce clause power. It is not a close question: Congress is regulating commerce among the states when it mandates that individuals purchase health insurance.

David B. Rivkin.

It appears that Professor Chemerinsky and I are no closer to an agreement at the end of this exchange than at the beginning. Unfortunately, it also seems that Professor Chemerinsky has misconstrued what I said in my previous post. I agree that purchasing health insurance or any other good or service is an economic activity, which Congress can regulate under the Commerce Clause. My previous post also makes it abundantly clear that a decision not to purchase insurance or not to acquire any other good or service is not an economic activity at all and, as such, is not subject to regulation under the Commerce Clause.

Just to demonstrate how all-encompassing Professor Chemerinsky's definition of an economic activity really is, let's reflect on the fact that a decision not to marry or not to have children makes it considerably more likely that the individuals making such decisions will be unable to draw on family support in their declining years and, hence, quite likely to become burdens on our medical system and other forms of social/societal support networks. In fact, I frankly cannot think of anything that a human being can do that would not, under Professor Chemerinsky's logic, be an economic activity, especially when individual impacts are aggregated, as courts looking at Commerce Clause cases have done.

In this regard, since the conduct at issue in *Lopez* and *Morrison* was projected to have adverse consequences for the economy – and, by the way, these projections were not particularly fanciful – it, under Professor Chemerinsky's own definition of an economic activity, was an economic transaction, subject to regulation under the Commerce Clause. This, by the way, is precisely what the Department of Justice lawyers argued in these cases and this is precisely the position rejected by the Supreme Court.

Professor Chemerinsky's three rounds of posts make much mention of the size of the health care industry and the resources that we, as a society, spend on health care. But, this is not a constitutionally-meaningful factor. As Professor Chemerinsky well knows, and case law makes abundantly clear, if something is in principle within the scope of congressional authority to regulate under the Commerce Clause, the particulars of such a regulation are reviewed by the courts under the rational basis test. To state the obvious, this is not a very exacting basis for judicial review. And, in general,

if a failure to join health clubs is an economic activity – as it will be under Professor Chemerinsky's definition of economic activity – then I would be the first one to admit that it would not be irrational for Congress to mandate health club membership. Indeed, it would be quite plausible for Congress to conclude that a vigorous physical exercise by all Americans would save hundreds of billions of dollars in medical costs and produce all sorts of other positive economic impacts.

This brings me back to the limiting factor issue and, what I suppose, would be my last bit of hyperbole in this debate. In a world where every human decision and activity amounts to an economic transaction, Congress' Commerce Clause power is indeed infinitely capacious. To say that Congress has "no power to regulate outside of the area of economic transactions", as Professor Chemerinsky does, isn't to say much if everything is an economic transaction. This would be an interesting world and one that the Framers of the Constitution would not recognize.

I would close by noting that Professor Chemerinsky strongly supports the Supreme Court's post-September 11 jurisprudence, which whatever one thinks of it – and I don't think much of it – evidences a profound conviction that granting the two political branches of the federal government power, above and beyond that to which they are constitutionally entitled, cannot be countenanced, no matter how compelling the imperatives of public safety might be. Why is it that the very same people who applaud *Hamdan* and *Boumediene* cases are not at all troubled by the prospect of Congress exercising an unlimited power to regulate every aspect of the lives of all Americans, restrained only by the provisions of the Bill of Rights?