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DOI: 10.1377/hlthaff.2010.0449
HEALTH AFFAIRS 29,
NO. 6 (2010): 1229–1233

PRO & CON

State Suits Against Health Reform Are Well Grounded In Law—And Pose Serious Challenges

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ABSTRACT This essay argues that the Patient Protection and Affordable Care Act exceeds Congress's authority to regulate interstate commerce and its taxing power, and infringes on state prerogatives. The lawsuits that have been filed by states and individuals arguing these points raise serious legal issues, not the least of which is whether there are any constitutional limits remaining on government power. Because the new law is unprecedented—in both its regulatory scope and its expansion of federal authority—it is difficult to predict how courts will react. However, a holding that these measures were in fact constitutional would fundamentally alter the relationship of the federal government to the states and the people, as there would seem to be no constitutional limits on federal power.

On the same day that President Barack Obama signed the Patient Protection and Affordable Care Act of 2010 into law, the attorneys general of Virginia and Florida filed separate lawsuits challenging the act's constitutionality, with twelve states joining Florida's suit. Since then, seven more states have joined the amended complaint that Florida filed in May. Along with that bipartisan coalition of states—four of the attorneys general who have brought suit are Democrats—executive officials elsewhere are also contemplating involvement, including some governors in states whose attorneys general have decided not to challenge the new law.

These are real lawsuits, with serious lawyers behind them. It's difficult to predict how the courts will react, however, because the new health care law is, quite literally, unprecedented—in both its regulatory scope and its expansion of federal authority.

The strongest legal argument attacks the constitutionality of the individual mandate to buy a health insurance policy. Never before has the federal government tried to force every man, woman, and child to buy a particular good or service. Never before has the government said that people face a civil penalty for declining to participate in the marketplace. And never before have courts had to consider such a breathtaking assertion of raw power under the commerce clause—not even during the height of the New Deal, when the Supreme Court ratified Congress's regulation of what people grew in their backyards on the awkward theory that such behavior affected interstate commerce.

Other constitutional issues include several tied to the Tenth Amendment, which reserves "to the states respectively, or to the people," all powers not specifically delegated by the Constitution to the federal government. The state lawsuits also argue that the individual mandate exceeds Congress's taxing power—which some supporters of the health care reform use as alternative constitutional authority. The mandate is also central to current and future lawsuits filed by individuals and nonstate plaintiffs.

Commerce-Clause Issues

The strongest constitutional criticism of the reform law is that the individual mandate exceeds Congress's power to "regulate commerce…among the several states."[1] The lawsuits

allege that an individual's choice not to purchase health insurance is not an economic activity and cannot have a substantial effect on commerce, interstate or otherwise.

During the first 150 years of American history, when Congress observed the line separating national matters from local ones, a mandate-like approach undoubtedly would have been deemed unconstitutional. In 1942, however, the Supreme Court for the first time upheld the federal regulation of local economic activity—and not just trade or exchange, as the traditional definition of *commerce* would have it. The Court ruled that Congress could stop farmers from growing wheat for personal consumption because allowing them to grow it would mean that they would not have to purchase it, which in the aggregate would depress wheat prices.[2]

The Court used a similar analysis five years ago, when it held that cultivation of marijuana for personal use was an economic activity that Congress could regulate.[3] It thus reaffirmed Congress's ability to reach purely local activity while regulating a national market. This power now extends to channels of interstate commerce; instrumentalities (persons or things) in interstate commerce; and economic activities that substantially affect interstate commerce.

Although the Court has rejected nearly all commerce-clause challenges since the New Deal, two have been successful. In 1995 the Court struck down a federal law prohibiting the possession of guns near schools because it was not "part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[4] In seeking to distinguish "between what is truly national and what is truly local," the Court limited the reach of the commerce power to exclude activity that is not directly economic in nature, even if it creates indirect economic effects.[5]

Similarly, in 2000 the Court struck down the Violence Against Women Act because the gender-specific violence it regulated had only an "attenuated" economic effect.[6] The Court rejected the idea that Congress could "regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."[6]

These cases demonstrate that the Court recognizes that some noneconomic activities are outside the commerce clause's scope. As Justice Anthony Kennedy explained, "Were the Federal Government to take over the regulation of entire areas of traditional state concern[,] ...the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."[7]

This precedent, taken at face value, suggests that courts should find the individual mandate to buy health insurance unconstitutional. To do otherwise would be to expand the commerce clause to regulate economic *inactivity*—something the Supreme Court has never done.

To be sure, there are situations in which the government may force individuals to engage in a transaction or activity. Most notably, it can require hotels and restaurants to serve all patrons.[8,9] But nobody has to operate a hotel or restaurant, or purchase lodging or food, and individuals are not commercial enterprises. This reasoning may arguably support requiring insurers to insure people without regard to preexisting conditions—with the likely effect that all health insurance companies will instantly cease operations (and thus nationalization of health care)—but it does not support forcing individuals to buy health insurance policies.

As for the oft-invoked car insurance analogy, being required to buy insurance if you choose to drive is different from having to buy it because you are alive. And as the Georgetown University law professor Randy Barnett notes, "Regulating the auto industry or paying 'cash for clunkers' is one thing; making everyone buy a Chevy is another. Even during World War II, the federal government did not mandate that individual citizens purchase war bonds."[10]

Tenth Amendment Issues

Twice in the past fifty-five years, the Supreme Court has struck down laws for violating the Tenth Amendment. In 1992 it invalidated a requirement that states not complying with a radioactive waste management provision assume liability for waste produced within their borders.[11] Five years later it struck down a requirement that county sheriffs conduct background checks on gun purchasers.[12] "The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States," the Court explained.[13] The federal government can encourage states to adopt certain regulations by attaching conditions to federal funds, as described below, or by preempting state law under the commerce power. However, it cannot compel states to enforce federal regulations.

Critics have raised numerous complaints regarding the federal infringement of state prerogatives, which can be summarized as concerns about state sovereignty, commandeering state officials, and abusing the spending power by forcing states into coercive Medicaid contracts.

STATE SOVEREIGNTY The basic Tenth Amendment argument in the lawsuits against the

The courts have been reluctant to label any congressional conditions "coercive."

Patient Protection and Affordable Care Act is that the regulation of health care is a power "not delegated to the United States by the Constitution" and therefore is reserved to the states. In its lawsuit, Virginia also refers to its interest in enforcing its recently enacted Health Care Freedom Act, which provides that no state resident can be compelled to purchase health insurance. Both of these arguments raise the question: Does Congress have the power to do what it is doing? If it does, then federal law trumps state concerns via the supremacy clause, Article VI. If it does not, then the Tenth Amendment argument is superfluous. Although this type of state sovereignty claim—and the Health Care Freedom Acts being enacted around the country—crystallizes the political debate over the scope of federal power, it does not add anything as a matter of law.

COMMANDEERING STATE OFFICIALS Florida argues that the expansion of Medicaid, as well as various unfunded mandates, constitutes federal commandeering of state officials. The state will have to cover more than one million more people and spend billions of dollars that will come from elsewhere in its budget. For example, it will be forced to oversee a new insurance exchange, review and report premium increases, and establish a health insurance consumer assistance office.

The problem with that argument is that Medicaid is a voluntary program; states may choose to receive federal funding for their public health insurance programs, but then those programs become subject to federal regulation. While withdrawal from Medicaid would leave millions without coverage—and is thus infeasible—the federal government can attach conditions to federal funds, even after previously providing those funds without conditions.[14] As to the exchanges, the federal government will create and run them in states that decline to do so themselves, which is not comparable to ordering state sheriffs to run background checks. Thus, this provision does not represent a "forced participation of the State's executive in the actual administration of a federal program."[13]

ABUSING THE SPENDING POWER Among the limitations on Congress's power is that federal program incentives must not be so significant that they amount to coercion.[15] As Justice Lewis F. Powell Jr. wrote in the 1981 Supreme Court decision in *Pennhurst State School & Hospital v. Halderman*, "Legislation enacted pursuant to the spending power is much in the nature of a contract: In return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress's power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"[16] Although this language suggests that radically altering the terms of a state-federal bargain might be unconstitutional, courts have been extremely reluctant to label any congressional conditions "coercive."[17–19] Still, forcing a state to choose between withdrawing from a major, long-standing program like Medicaid and taking on a host of new mandates and liabilities may fail the Court's coercion test. Moreover, the health reform act ignores states' reliance on Medicaid's long-static requirements: Florida has participated in Medicaid since 1970, and the program's federal funding has led the state to avoid developing an independent system to cover indigent residents.

Tax Issues

Florida alleges that the penalty for noncompliance with the individual mandate to buy health insurance is an improperly levied direct tax. Direct taxes are either capitations—a fixed tax on each person—or assessments on property.[20,21] The new penalty is not imposed based on property ownership; it can most charitably be characterized as attaching to the nonownership of health insurance. But it is also not a capitation because its amount differs based on income, location, and other factors, nor is it levied on everyone. In short, the penalty is either not a direct tax—in which case the whole taxation-power discussion is irrelevant—or it is some type of tax never before seen by the courts.

Even if a court holds that the penalty is a direct tax, however, the Constitution requires that all such taxes be apportioned evenly on states based on population.[22] Obviously, the individual mandate penalty is not calculated in this way. Although the penalty is applied on a per person basis, it does not set a revenue amount to be raised or even assign a percentage to each state. Indeed, if the mandate achieves 100 percent compliance, no revenue is generated. Thus, the penalty cannot be a constitutional direct tax because it cannot be apportioned.

Critics of the individual-mandate penalty

alternatively claim that it exceeds Congress's taxing power because it is not designed to raise revenue and so is really a civil fine, not a tax.[23] But courts are extremely deferential to Congress's use of the taxing power. The Supreme Court last struck down a federal tax in 1922, finding a penalty for employing an underage boy to be not a tax but rather a regulation of child labor because the challenged law's "prohibitory and regulatory effect and purpose are palpable."[24] This holding prohibits Congress only from regulating through the tax power spheres that it cannot reach through any other power, however, so we have to return to the individual mandate issue.

The U.S. government could maintain that the mandate penalty is an excise tax, not a direct tax, and therefore still falls under its taxing power, as did the Social Security payroll tax.[25] Excise taxes are levied on the performance of an act or the enjoyment of a privilege—but they now cover virtually every internal revenue tax except the income tax. Unlike Social Security, however, the mandate penalty is not a tax on employment or any other act—it "taxes" inaction—so whether or not it is an excise is an unanswered question. And in any event, the Constitution requires that "excises shall be uniform throughout the United States"[26] rather than varying by location.

But even if the taxing power somehow authorizes the penalty, it cannot justify the requirement that someone purchase health insurance from a third party. When Congress uses its power constitutionally, however, a related tax "does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed."[27] The Court would thus likely find that the new penalty exceeded Congress's taxing power *only if the individual mandate is unconstitutional.* Thus, the penalty's validity under the taxing power turns on the mandate's constitutionality under the commerce clause.

Conclusion

All legal challenges to the Patient Protection and Affordable Care Act ultimately boil down to Congress's authority to require people to buy private insurance. Finding the mandate constitutional would be the first interpretation of the commerce clause ever to permit the regulation of inactivity—in effect, requiring an individual to engage in an economic transaction. The federal government would then have wide authority to require that Americans engage in activities of its choosing, from eating spinach and joining gyms—in the health care realm—to buying cars from General Motors. Such an expansive holding by the courts would fundamentally alter the relationship of the federal government to the states and the people; nobody would ever again be able to claim plausibly that the Constitution limits federal power.

But will the Supreme Court strike down such a significant piece of legislation, the cornerstone of the president's domestic policy? On the one hand, the Court refrained from striking down such arguably unconstitutional pieces of fundamental legislation as Social Security. On the other hand, that legislation was largely popular and came during a time of great social upheaval. If, as the saying goes, "the Court follows the election returns," a rebuke to the Democrats at the polls this fall could strengthen the spines of justices inclined to hold the government's feet to the fire.

The only specific prediction I will make is that the Court will not issue a decision ratifying a more expansive use of federal power than it has before. It will either strike down the reform or find a technical way to avoid ruling on the constitutional merits and thus allow the law to stand. ■

NOTES

1 U.S. Const. art. I, sec. 8, cl. 3.
2 Wickard v. Filburn, 317 U.S. 111, 127–8 (1942).
3 Gonzales v. Raich, 545 U.S. 1, 16–7 (2005).
4 United States v. Lopez, 514 U.S. 549, 561 (1995).
5 United States v. Lopez, 514 U.S. 567, 567–8 (1995).
6 United States v. Morrison, 529 U.S. 598, 615 (2000).
7 United States v. Lopez, 514 U.S. 567, 577 (1995).
8 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
9 Katzenbach v. McClung, 379 U.S. 294 (1964).
10 Barnett R. Is healthcare reform unconstitutional? Washington Post. 2010 Mar 21:B2.
11 New York v. United States, 505 U.S. 144 (1992).
12 Printz v. United States, 521 U.S. 898 (1997).
13 Printz v. United States, 521 U.S. 898, 922 (1997).
14 South Dakota v. Dole, 483 U.S. 203 (1987).
15 South Dakota v. Dole, 483 U.S. 203, 211 (1987).
16 Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).
17 West Virginia v. U.S. Dep't of Health & Human Svcs., 289 F.3d 281 (4th Cir. 2002).
18 Texas v. United States, 106 F.3d 661 (5th Cir. 1997).
19 California v. United States, 104 F.3d 1086 (9th Cir. 1997).
20 Fernandez v. Wiener, 326 U.S. 340 (1945).
21 Murphy v. Internal Revenue Service, 493 F.3d 170 (D.C. Cir. 2007).
22 U.S. Const. art. I, secs. 2, 9.
23 U.S. Const. art. I, sec. 8.
24 Bailey v. Drexel Furniture Co., 259 U.S. 20, 27–28 (1922).
25 Helvering v. Davis, 301 U.S. 619, 645 (1937).
26 U.S. Const. art I, sec. 8, cl. 1.
27 United States v. Sanchez, 340 U.S. 42, 44 (1950).

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Timothy Stoltzfus Jost is the Robert L. Willet Family Professor of Law at Washington and Lee University School of Law and is the coauthor of a widely used health law textbook, *Health Law: Cases, Materials, and Problems*, now in its sixth edition. He earned his law degree at the University of Chicago, where he graduated cum laude, Order of the Coif.

Jost has had a long-standing interest in comparative health law and policy. He has twice received Fulbright scholarships to study other countries' health systems. He has conducted research and lectured about health law and policy on nearly every continent. "All health care systems have their faults," he says, "but we in the United States could do much better than we are now doing." Jost says that the recently enacted Patient Protection and Affordable Care Act represents a significant step toward the "much better" that is necessary.

Jost was born and raised as a Mennonite, in a Christian tradition that teaches that "we are obligated to work for justice for those who lack it," he says. His current views were also heavily influenced by his father, who was the first mental hospital administrator to be elected president of the California Hospital Association and who was a "passionate advocate for the chronically mentally ill," Jost says.

A recent experience involving Jost's wife, Ruth Stoltzfus Jost, drove home his belief that the United States has much to learn from other countries' health systems. Ruth lost a finger in an accident in 2009 while they were in Germany, where Jost was attending a comparative health law conference. She was in the hospital for two weeks and required four separate surgeries to partially reconstruct the finger. Yet, says Jost, she received "excellent care and the total bill was [only] $10,000."

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Shapiro holds a master of science degree from the London School of Economics, and, like Jost, a law degree from the University of Chicago. He is an adjunct professor at the George Washington University Law School.

Shapiro believes that the challenges to the health reform law raise serious issues that go to the heart of our theory of government. In his view, the new law and its individual mandate constitute "the most far-reaching domestic policy reform ever attempted by the federal government and are clearly beyond its constitutional powers." He continues, "If we ignore the Constitution here or anywhere—for whatever reason, good or bad—then we cease to live under the rule of law."

Shapiro emigrated with his family from the Soviet Union to Canada, where he "witnessed firsthand the rationing and corruption inherent to a single-payer medical system." Shapiro feels strongly that government should be strong enough to protect the rights of its citizens but not so vast as to redistribute the fruits of their labors according to political whim.

Although Shapiro believes that our health care system needs significant overhaul, he says that the way to do this should involve "more, not less, individual choice and freedom." He notes, "The United States spends more taxpayer dollars per capita on health care than most countries with national single-payer systems. The issue isn't money or insufficient government involvement, but regulatory design and economic incentives."