Are State Challenges to the Legality of the Patient Protection and Affordable Care Act Likely to Succeed?

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The new federal coverage mandate rests on firm legal precedent, yet resistance could prove troublesome if the Supreme Court wants change or if weak enforcement tools cannot deter noncompliance.

Can the federal government require individuals to have health coverage? During congressional health reform debates, opponents occasionally claimed that such a mandate is unconstitutional. Supporters countered that the individual mandate is an integral part of health insurance reform, and is supported by clear authority to regulate interstate commerce and to enact federal taxes. Since enactment, attorneys general in Florida and Virginia have sued in federal court to block implementation of the Patient Protection and Affordable Care Act (PPACA).[1] The suit in Florida has been joined by officials from numerous other states. The act's opponents see courts as their "last line of defense," as noted by a headline in congressional news daily *The Hill*.[2]

In lay terms, there are three main legal arguments against PPACA[3]: First, once implemented, reform will unconstitutionally compel individuals to buy insurance who don't want it. Second, starting immediately, federal reform unconstitutionally makes states administer and support expansions. Third, PPACA will ultimately make the federal government too powerful, threatening unlimited federal control over American life, and constitutional interpretation needs to stop such expansion.

Do either individuals or states have a strong constitutional argument against health reforms? The short answer is no, particularly not the state challengers. A longer answer is that the Constitution ultimately means what the Supreme Court says it means, and that even seemingly settled interpretations of constitutional law are subject to its rare paradigm shifts—which is what the third argument appears to seek. Another answer is that these legal arguments may seek more to influence the political climate of enforcement than the judicial review of PPACA.

The Constitutionality of Requiring Individuals to Have Coverage

It is axiomatic that the Constitution gives the federal government delimited powers, but it also allows laws that are "necessary and proper" for effective implementation. The two powers most relevant to PPACA are control over interstate commerce and the authority to tax and spend to promote the general welfare.[4] In contrast, states inherently enjoy broad "police power" to regulate and promote public health, safety, and morals. The breadth of state authority explains why challenges are raised against the federal mandate but not against the similar Massachusetts mandate.

(1) Federal power to regulate interstate commerce is fundamental to the Constitution, a key part of moving from a confederation of states to a national union. The Supreme Court ruled in 1944 that insurance is such commerce, and states continue to regulate coverage only by virtue of a 1945 federal enabling statute. PPACA lays out numerous ways that health insurance—and the lack of health insurance—involves or affects commerce[5]:

The sheer size of spending on health care and insurance constitutes a large and growing share of the national economy. The ability to enforce prior (and new) federal insurance regulations is affected by individual insurance choices. For example, guaranteed issue of coverage and mandated coverage for pre-existing conditions by insurers are bolstered by the mandate on individuals to participate in insurance pools. In addition, the impacts of not obtaining coverage go beyond the individual decisionmaker. The uninsured suffer worse health, which reduces productivity in the economy; they impose uncompensated care costs on providers, affecting insurance and

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program costs for others; and they raise risks of bankruptcies.

Opponents suggest that inaction—failure to obtain coverage—cannot possibly constitute interstate commerce. Proponents emphasize instead that refusal or neglect to buy coverage is a proper subject of federal regulation either because it has material effects on commerce or because its regulation is a necessary part of the multifaceted approach PPACA takes to create a nearly comprehensive social safety net from competing private insurance plans, or both.

(2) Federal taxing authority is very broad. Creating more secure funding for the federal government was another key reason for replacing the Articles of Confederation with a national Constitution. PPACA imposes a tax on uninsurance, which encourages the purchase of insurance and helps finance the public support given to providers of uncompensated care. A reviewing court could thus look to the taxing power as a source of federal authority for PPACA. Opponents say that the federal government cannot tax behavior that it could not regulate directly. This argument, however, relies upon precedent from a pre-New-Deal Supreme Court, whereas supporters cite more recent decisions.[6]

Even staunch opponents of national health insurance concede that the federal government could constitutionally tax all Americans to provide a public health plan for all. The precedents of Social Security and Medicare are quite robust. Opponents have legal objections, however, to the federal rules needed to create a less nationalized system based on private coverage. This position may seem politically ironic, but it is not legally inconsistent.

(3) Conflicts with fundamental rights like those guaranteed by the Bill of Rights can invalidate even an authorized federal exercise of power. Eventually, individuals affected by the law may make such claims, but for now the state lawsuits have not. It can be noted that PPACA took pains to exempt categories of people who would be unfairly hit by a mandate, including those with religious objections, overseas Americans, and people who cannot afford coverage because they are poor or because they would have to spend a high share of income to pay for it.

(4) Conflicts between federal and state legislation. Virginia legislation is the leading example here. Just before federal reform, the state enacted a provision that "No resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage."[7] Such statutes have minimal chance of enforcement in court. States gave up the power to override federal action by ratifying the Constitution as "the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[8]

The attorney general of Virginia's lawsuit asserts that despite this Supremacy Clause, states *can* block a federal law if it is unconstitutional.[9] This is implausible, as determinations of constitutionality are for courts to make, and state lawmakers' views are not relevant. Nonetheless, states have passed similar laws in a number of areas, not only in health care. Such enactments appear to be less consistent with a viable legal strategy to bar federal action than with helping to build political pressure on federal authorities to back off on enforcement. For example, states seem to have blunted federal efforts to upgrade the security of state personal identification documents and to enforce federal drug laws against medical marijuana users.

(5) State assertion of individual rights is a centerpiece of the Florida attorney general's lawsuit as well.[10] Normally, individuals must sue on their own behalf and must also wait to do so until they are actively affected by enforcement. The Florida lawsuit says that the state can assert those rights even before the mandate is enforced, adding also that the state is affected because PPACA will lead many more people to enroll in Medicaid. The Virginia case has the additional argument that its statute creating an individual right *not* to buy coverage gives it standing to resist the federal law now. Courts could logically postpone consideration of these individual rights, but might not do so.

The Constitutionality of Involving States in Implementation of Federal Reform

The lawsuit from Florida objects that federal expansions of Medicaid, along with calls for states to run exchanges and perform other administrative functions under health reform, essentially force a state to act against its principles and also erode its tax base. PPACA thus infringes state sovereignty, they say, in violation of the Tenth Amendment's reservation of rights to states.

The main problem with this claim is that these state activities are voluntary, not required. Many states have already declined to run new high risk pools, defaulting to federal

operations. States will be free not to run exchanges as well. As for Medicaid, the centerpiece of states' coverage role, states have no obligation to participate; they do so as a way to get federal funding that helps their residents and their health care providers.

The Florida lawsuit implicitly recognizes that the states could drop out of Medicaid, but argues at some length that the growth of the program has made this impossible. Florida agreed to participate in Medicaid under less stringent rules, the legal filing argues, and now remains trapped as rules have grown less favorable to the state. As a practical matter, federal inducements may be too great to resist; no state has dropped out despite all the program expansions since the last state joined in 1982. Yet legally, states are always entitled to just say no. To invalidate PPACA on these grounds, a court would have to conclude that this latest Medicaid expansion "commandeers" states, making them mere agents of federal authority rather than sovereign governments. The Florida and Virginia challenges cite no judicial precedent from any prior expansion to support such a strong finding about this latest expansion.

The "Just Too Far" Argument

Finally, PPACA opponents say that upholding the act would simply expand federal powers too far. There must be some limits on federal power, they note, and if the federal government can penalize inaction on health insurance, they reason, there will be no behavior it cannot regulate. They say that there is no precedent for a federal mandate on individuals to buy private goods or services. Even some PPACA supporters acknowledge uneasiness about the novelty of requiring private coverage. Such arguments begin to sound more like political philosophy than like constitutional doctrines as expressed in court precedents.

Supporters of PPACA's validity—not all of whom support PPACA's policy decisions—have ready doctrinal answers for each legal complaint. For example, one riposte to the "no limits" claim is that limits do exist: Federal law can only regulate activity (or inactivity) that is not in itself commercial if such regulation is a necessary component of an overall scheme of economic regulation. A literature scan of current commentary and legal assessments suggests that PPACA will readily survive constitutional challenge if reviewing courts follow long-standing judicial interpretations. Even astute conservative analysts, including some opponents of the legislation, generally stop short of predicting that the Supreme Court will overturn health reform.

Summary

In sum, PPACA's legal authority is strong but has two vulnerabilities. One is that the opponents' arguments will strike a philosophical chord with a majority of the Supreme Court, and that five justices could use a PPACA challenge to establish a new constitutional paradigm in place of past precedent. This is a long shot. The other vulnerability is that the opponents' passionate legal arguments will encourage noncompliance with the individual mandate and blunt PPACA's practical enforcement. The act's enforcement tools are weak, so this development may be more plausible.

Notes

[1] The Patient Protection and Affordable Care Act, Public Law 111-148, 124 Stat. 119-1025, March 23, 2010, accessible online from http://www.gpo.gov.

[2] Alexander Bolton, "GOP Views Supreme Court as Last Line of Defense on Health Reform," *The Hill*, March 29, 2010, http://thehill.com/homenews/senate/89547-republicans-view-supreme-court-as-last-line-of-defense-on-healthcarereform.

[3] This necessarily simplified issue brief reviews arguments made in the ongoing policy debates. Key sources are listed as further reading at the end of this brief.

[4] U.S. Constitution, Art. I, sec. 8, clause 1 (taxation), clause 3 (interstate commerce), accessible from http://topics.law.cornell.edu/constitution.

[5] PPACA sec. 10106, amending PPACA sec. 1501(a)(2).

[6] See for example the University of Pennsylvania debate in further reading. In another argument on taxation, opponents also hark back to the Constitution's original provision that any federal capitation tax or other direct levy on people or their property should be apportioned among states according to population (with slaves counted as 3/5th of a person). These arguments are not strong, but their complexity exceeds the scope of this brief.

[7] Virginia Acts of Assembly, chap. 106 (March 10, 2010), adding § 38.2-3430.1:1 to the Virginia Code, accessible at http://leg1.state.va.us/cgi-bin/legp504.exe?101+ful+CHAP0106+pdf

[8] U.S. Constitution, Article VI, clause 2.

[9] Virginia v. U.S. Department of Health and Human Services, No. 3:10−cv−00188−HEH (U.S. District Court, E. Dist. of Virginia, filed March 23, 2010); U.S. response filed May 24, 2010; both complaint and response are accessible from http://www.oag.state.va.us/press_releases.

[10] Florida v. U.S. Department of Health and Human Services, No. 3:10-cv-91 (U.S. District Court, No. Dist. of Florida, filed March 23, 2010). Thirteen other states initially joined Florida in seeking to block PPACA. Materials on the case are available on at the Florida Attorney General's website of http://www.healthcarelawsuit.us/. The Florida Attorney General filed an amended complaint on May 14, 2010. The amendment added six more states as plaintiffs, along with a national small business association and two named individuals resident in Florida and in Washington state. Whether a business association and individuals have standing to assert state claims and are proper parties to this action go beyond the scope of this brief. Other amendments somewhat modify the specific causes of action stated, but appear to fall within the constitutional categories discussed in this brief.

Further Reading

Columbia Law School, "The Constitutionality of National Health Reform Law" [many links: articles, commentaries, other materials] https://www.law.columbia.edu/center_program/ag/policy/health/reformarticles.

"The Federalist Society Online Debate Series: Individual Health Care Insurance Mandate Debate," November 6, 2009 [two opposed views] http://www.fed-soc.org/debates/dbtid.35/default.asp.

"Individual Mandate Controversy: Pro and Con," *Health Affairs*, 29(6):1225-1233 [two contrasting articles in the June 2010 issue] http://www.healthaffairs.org.

"Is the Health Care Law Unconstitutional?" *New York Times* blog, March 28, 2010 [contrasting commentaries from leading experts] http://roomfordebate.blogs.nytimes.com/2010/03/28/is-the-health-care-law-unconstitutional/.

Jennifer Staman and Cynthia Brougher, "Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis" (Washington, DC: Congressional Research Service, CRS Report for Congress # R40725, July 24, 2009) [nonpartisan assessment] http://assets.opencrs.com/rpts/R40725_20090724.pdf.

University of Pennsylvania Law Review, "A Healthy Debate: The Constitutionality of an Individual Mandate" [debate between leading authorities] http://www.pennumbra.com/debates/debate.php?did=23.

About the Author and Acknowledgements

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