

# Constitutional Challenges to Health Care Reform

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# Constitutional Challenges

## 1) States' rights

- Forced to implement

## 2) Individual rights

- Economic liberties & Substantive due process

## 3) Federal powers

- Commerce & Tax

# Jurisdictions

- Virginia: 4<sup>th</sup> Circuit
- Florida: 11<sup>th</sup> Circuit
- Michigan: 6<sup>th</sup> Circuit
- Etc.

# Will Supreme Court Decide?

- If any appellate court strikes the law, the Sup. Ct. will almost certainly hear the case. If all app. Courts uphold the law, the Sup. Ct. might take a pass.
- We'll know in a year or two. 6<sup>th</sup> & 4<sup>th</sup> Cir. appeals already underway. Others may take longer.

# Individual Rights

- Economic Liberty = Substantive Due Process
  - “Substantive due process” = “Oxymoron”
  - No fundamental right to be uninsured
- Not forced to receive treatment
  - Religious opt-out
- More freedom/choice than forced public ins.
  - Medicare is valid

# States' Rights

- “Commandeering” – conscripting sovereign
- State options:
  - Medicaid withdrawal
  - Exchange opt-out
- Supremacy Clause. Harvard’s Charles Fried
  - states’ claims are “preposterous” “One is left speechless by the absurdity of it.”

# Federal Power

- Tax power
- Commerce power
- “Necessary and Proper” clause

# Tax Power

- Broad powers for excise or income tax
  - “Regulatory taxes” are permissible
- Congress clearly COULD have taxed people who opt not to purchase insurance, just as they tax employers who don’t offer insurance
- But DID Congress do this?
  - Mandate penalty is assessed through tax reporting, and based in part on income level
  - But, the mandate penalty is not referred to as a tax. It’s not simply a “play or pay” option.
  - Not everything in the tax code is a “tax.” (E.g., late-filing penalties.)
- So far, no court has accepted this argument. Appears likely to fail.



# Commerce Clause

- Insurance is sold in interstate commerce
- But, does a mandate to purchase constitute “regulation” of commerce?
  - Purchase mandate is unprecedented, unless conditioned on some actual engagement in commerce
- One argument: those who don’t purchase are self-insuring, choosing to pay for health care out of pocket. So this simply prohibits the commercial activity of self-insurance
  - Accepted by Detroit and Lynchburg District Courts
- Counter argument: If that reasoning is accepted, then there are no limits to commerce power, and there must be some limits
  - Richmond Ct., and probably Pensacola

# “Necessary & Proper”

- “Congress shall have power to make all laws which shall be necessary and proper for carrying into execution . . . all other Powers vested by this Constitution”
- Purchase mandate is necessary for insurance regulations to work.
  - Insurance regulations are clearly within Commerce power.

# Is a Mandate “Proper”

- No reason why a mandate would be improper.
  - Violates no individual rights
  - Other mandates are proper under other powers
- Justices Scalia, Roberts, Kennedy and Alito have all indicated willingness to read N&P clause fairly broadly
- Conservative scholars agree this is the strongest defense
  - Richmond judge never came to grips with this argument

# Effects of Finding Unconstitutional

- No immediate effects; ruling “stayed” pending appeal
- Dilemma of whether to strike only the mandate, or some or all of the Act
  - Richmond judge struck only the mandate, even though both sides agreed that some or all of Act must also fall
- If only mandate is struck
  - How bad would “adverse selection” be?
  - Would Congress amend/repeal?

# Odds-making

- States rights and individual rights arguments, almost certainly will fail
- Tax power defense probably will fail
- Commerce Clause argument: too close to call
- Necessary and Proper defense: very likely to succeed
  - Very hard to reject this defense under existing principles, precedents. Would have to create entirely new doctrine with major implications for other areas of established regulation
  - Only 1 of 5 conservatives needed to keep that from happening