On First Anniversary, a Look at Challenges to Health Care Reform

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On its one-year anniversary, the sweeping health care reform law — referred to as the "Affordable Care Act" (ACA) if you like it, and "Obamacare" if you don't — is embroiled in litigation. Its fate, like that of the 2000 presidential election, is likely to be determined by the Supreme Court.

Five key decisions have been rendered in separate lawsuits — brought by a host of individual citizens, states, academic institutions and foundations — challenging the "mandate" that all individuals either must purchase "minimum essential coverage" (MEC) by Jan. 1, 2014, or pay a tax penalty (of approximately $695 per person). The nub of the commerce clause issue is whether regulating a decision not to purchase health insurance exceeds the outer bounds of congressional authority under the commerce clause (U.S. Const. art. 1 § 1 cl. 8). Alternatively, plaintiffs contend that the penalty provision is not a valid exercise of the taxing power and therefore does not survive independently as a tax enacted for the general welfare under the Constitution's taxing and spending clause (U.S. Const., Art. 1 § 8 cl. 3).

Two district court decisions by Republican appointees, *State of Florida v. Sebelius* (Judge Roger Vinson) and *Virginia ex rel Cuccinelli v. Sebelius* (Judge Henry E. Hudson), awarded summary judgment to plaintiffs. Three decisions issued by Democratic appointees for the federal district courts of Washington, D.C. (*Liberty Univ. v. Geithner*), the Western District of Virginia (*Mead v. Holder*), and the Eastern District of Michigan (*Thomas More Law Center v. Obama*), all dismissed plaintiffs' claims on the pleadings upon finding as a matter of law that the individual mandate, taken in the aggregate, substantially affects interstate commerce and is sustainable under evolving commerce clause jurisprudence.

The decisions ruling in favor of and against the ACA on commerce clause grounds are separated by a gaping doctrinal divide. The Florida and Virginia courts concluded, respectively, that requiring someone to buy insurance is not regulation of commerce, but rather "the regulation of a mental act" and "compel[ling] an involuntary act" — a result that could not have been envisioned by the framers of the Constitution (who, as set forth in James Madison's articles and essays in "The Federalist," intended to strictly limit enumerated federal powers and leave "residual"

powers in the hands of the people and the states). Both courts concluded that the statutory remedy for noncompliance is an unconstitutional "penalty" (as described, expressly, by the ACA) because the assessment levied for a failure to purchase MEC serves to enforce a statute that is not itself validly based on an "enumerated power." Because it is a "penalty" rather than a tax, the Florida and Virginia courts further held that assessments imposed for noncompliance with the individual mandate could not pass constitutional muster in the alternative as a tax levied for the general welfare. Plaintiffs also argued that if it was a tax, the assessment for noncompliance was not a properly apportioned direct tax. No court yet has seen the need to decide this issue.

A less publicized aspect of the Florida decision was the court's rejection of 10th Amendment and abuse-of-commerce clause challenges advanced by the states against provisions of the ACA that dramatically expanded Medicaid coverage. Notably, the Florida suit was brought on behalf of 26 states. For many, the challenge to the individual mandate may have been a stalking horse for contesting budget-busting provisions of the ACA that dramatically expanded the scope of, and the states' financial obligations for, new jointly funded Medicaid program entitlements. Thus, the ACA obligated states to maintain pre-existing levels of Medicaid eligibility and widely extended Medicaid benefits to include all people (including childless adults) with incomes under 133 percent of the federal poverty level. On this issue, Vinson sided with Kathleen Sebelius — the secretary of the Department of Health and Human Services and the defendant in the lawsuit — concluding that the "voluntary" nature of a state's Medicaid participation precludes a viable 10th Amendment claim, and that the ACA is not unlawful as a "coercive" exercise of commerce clause power under the test enumerated in *South Dakota v. Dole* .

Under the Florida decision, however, the states get to eat their cake without having it because Vinson also found the individual mandate too crucial to the overall purpose of the reform law to be "severed" from the remainder of the statute, and accordingly, declared the ACA invalid in its entirety. In contrast, Hudson concluded in the Virginia case that it was impossible to tell whether Congress would have enacted the remaining provisions of the law without the individual mandate. Accordingly, he followed the more traditional and well-beaten prudential path of severing the invalid provision, and leaving the remainder of the ACA intact.

While declaring the ACA invalid, Vinson declined to enter an injunction against its implementation, prompting some states to take matters into their own hands and proclaim their intentions not to comply with its other requirements or deadlines. This in turn prompted the Justice Department to seek a "clarification" — which Vinson treated as a request for a stay of his order. After berating the government for its intentional non-acquiescence in his declaratory order — albeit in the face of three decisions upholding the law, and the court's own prior declination to enjoin affirmatively its implementation — Vinson nevertheless stayed his own order, subject to the government's filing an immediate appeal and requesting expedition by the 11th U.S. Circuit Court of Appeals, or seeking immediate review under Supreme Court Rule 11. In so ruling, Vinson recognized the harm and widespread programmatic disruption that would attend an injunction. Most interestingly, the March 3 order concluded that defendants had a

"probability" of prevailing on the merits on appeal, given evolving and expanding concepts of commerce clause jurisprudence.

A study in contrast, the three district court cases that rejected commerce clause challenges to the individual mandate eschewed the characterization of the mandate as "metaphysical" regulation of individual behavior, finding instead that refraining from purchasing insurance is inherently economic activity that, when "aggregated," materially affects interstate commerce. These courts assumed, based on the legislative findings and statistics enumerated in the ACA, that Congress had rationally concluded that individuals who refrain from purchasing health insurance nonetheless actively participate in the health services market by consuming hospital emergency services. As a result, refraining from buying insurance (i.e., intentional nonparticipation in the health insurance market) is itself a form of "economic activity" (i.e., a decision about how to pay for health care services that are likely to be consumed, with or without insurance). Aside from "shifting" the costs of unpaid health care services to health care providers and those actually paying for insurance, the courts finding a substantial impact on interstate commerce also agreed that, because the ACA precludes insurers from denying coverage based upon pre-existing illnesses, limiting lifetime benefits, or using community ratings to determine eligibility for coverage, the mandate to procure MEC or pay a monthly penalty for not doing so logically serves to prevent individuals (in the aggregate) from waiting to buy insurance until they are sick, and otherwise undermining the underwriting soundness of the health insurance market.

Expedited appeals presently are pending in the 4th, 6th and 11th Circuits. Having previously denied a request for direct interlocutory review of one court's dismissal of a challenge to the ACA on standing grounds, the Supreme Court currently has before it the state of Virginia's petition for direct review under Supreme Court Rule 11 of Hudson's decision to "sever" the individual mandate. On March 14, the solicitor general opposed Virginia's petition for direct review, citing the value of allowing the issues to be considered in the first instance by the courts of appeals and the fact that the individual mandate does not go into effect until 2014, by which time the issue will be subject to timely review the ordinary course following expedited consideration by several courts of appeals.

Whether a majority of the Supreme Court decides to grant immediate review, or declines to hear the case until after the passage of time during which the states are required to implement "insurance exchanges" and otherwise comply with a host of ACA requirements may itself speak volumes. (Of course, the implementation of the law also results in the immediate availability of small business tax credits and health care coverage for children.)

An intriguing aspect of the challenge to the ACA, whenever it is heard, is the role of prior commerce clause precedents with factual scenarios ranging from the regulation of private intrastate growth of marijuana, to gun control. The most prominent cases applying the aggregate impact theory include *Gonzales v. Raich* , a 2005 opinion in which the Supreme Court held, by a 6-3 vote, that provisions of the Controlled Substances Act prohibiting

the private growth of medical marijuana for individual personal consumption was a valid exercise of the commerce clause power. *Raich* was authored by Justice John Paul Stevens, and joined in by Justices Anthony Kennedy, David Souter, Ruth Bader Ginsburg and Stephen Breyer. Justice Antonin Scalia concurred in the result. He rejected the theory that activities that "substantially affect" interstate commerce are part of interstate commerce, but rested on the conclusion that Congress may regulate activities that solely affect intrastate commerce if they are "necessary and proper" to effectively regulate interstate commerce, and are authorized under Art. 1, § 8, cl. 18 of the Constitution.

Raich was built on the foundation of *Wickard v. Fulburn* , in a which a unanimous 1942 Supreme Court upheld a restriction under the Agriculture Adjustment Act on the growth of wheat for "personal consumption." Scalia framed the *Wickard* ruling as a case where controlling "unregulated production" for personal consumption was necessary and proper to avoid "diminished demand" in the regulated interstate market. By a similar token, the regulation of the "non-insurance buying market" could be characterized as ensuring necessary demand in the regulated interstate insurance market. That, of course, does not address the more fundamental philosophical question of whether the framers envisioned using the commerce clause to regulate what might be cast as "economic inactivity."

Two other relatively recent decisions in which the Supreme Court found commerce clause boundaries to have been crossed and that play prominently in the constitutional debate involved federal laws prohibiting the possession of firearms within school zones (*United States v. Lopez* , a 1995 decision by Chief Justice William Rehnquist, joined by Justices Sandra Day O'Connor, Scalia, Kennedy and Clarence Thomas; Kennedy concurring), and violence against women (*United States v. Morrison* , majority decision by Rehnquist, joined by O'Connor, Scalia, Kennedy and Thomas; Souter, Stevens, Ginsburg and Breyer, dissenting).

The gravamen of the majority decisions in these cases was that Congress was attempting to regulate local criminal activity that was not economic in nature and that had only the most attenuated, if any, commercial implications.

To sum up, the Supreme Court has firmly recognized Congress' authority under the commerce clause to regulate purely intrastate or even private economic activity that, indirectly, has a substantial affect on interstate commerce when taken in the aggregate. It is difficult to conceive that a mass failure to enter the insurance market, which results in annual health care cost shifting of $43 billion a year and inhibits the insurance industry from spreading risk, is not both substantial and "economic" in nature. At the same time, even the courts upholding the law acknowledge that the Supreme Court has yet to squarely decide whether the failure to purchase a product or service — even in the aggregate — is properly characterized as "economic activity." This being an issue that yielded 100 percent alignment of Republican jurists against Democratic jurists, one might expect a similar outcome before the Supreme Court. This could be yet another pivotal vote for Justice Kennedy! •