

# Legal Implications of Supreme Court Review of the Individual Mandate in the Patient Protection and Affordable Care Act

Mark B. Seidenfeld, J.D., Professor of Administrative Law, Florida

State University College of Law Tallahassee, Florida

for

NCSL Fall Forum - November 30, 2011

## Topics I Will Cover

- Commerce Clause Challenge
- Taxing Power Challenge
- Medicaid Expansion / Spending Power and 10<sup>th</sup> Amendment
- Anti Injunction Act (Internal Revenue Code)
- Severability of Individual Mandate

## Commerce Clause Doctrine

- Lopez Framework
  - Is the activity the statute regulates economic/commercial in nature?
  - If so, the courts are to defer to Congress's determination that the activity (or regulation of the activity) substantially affects interstate commerce
- PPACA – regulates purchase of health insurance which all agree is commercial in nature

## Significance of Enumerated Powers

- Enumerated powers seen as protection against federal encroachment on states' power not on individual liberties
  - Federalists opposed Bill of Rights claiming that the enumerated powers provided sufficient protection against incursions on liberty
  - Anti-Federalists did not see sufficient protection from limits of enumeration
  - The Constitution was ratified only with a promise of the Bill of Rights, which were ratified in 1791

## Ends – Means Distinction in Federal Powers

- Court, early on, distinguished between statutory ends and means
- *McCulloch v. Maryland* (1819):

“Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional”

## Requiring Purchases under the Commerce Clause

- This is regulation of ends not means
  - As noted, purchase of health insurance is commercial
- Judicial inquiry into legitimacy of ends would deviate from understanding since *McCulloch*
- If Court reverses on ground that requiring purchase of insurance is unconstitutional, it will be engaging in evaluation of statutory ends
  - Allowing Congress to require purchases would recognize power to regulate commerce in a way Congress has not done before
  - But method of regulation less onerous than raising and maintaining Armies by using a draft

## Taxing Power History

- Significant judicial activity during the “Lochner Era” (1890 – 1935)
  - During this era, Court imposed constraints on Congress’s exercise of Commerce Power
  - Congress tried to discourage or prohibit activities courts said it could not regulate by taxing them
  - Court doctrine from that era is still the basic inquiry for taxing power challenges today
    - But court construes legislative intent differently today than at the turn of the 20<sup>th</sup> century.

## Taxing Power

- Supreme Court has held that a statute falls within Congress’s taxing power when statute’s intent is to raise revenue
  - Court has recognized that all taxation has a regulatory impact
    - Raising revenue need be sole or even primary intent of statute to be within the taxing power
  - Since 1923, the Court has not struck down a revenue raising provision on grounds that it was solely regulatory

## Calling a “Tax” Something Congress Refused to Label a Tax

- Court has always ignored labels that Congress puts on statutes
  - In early 1900s, the Court recognized that “licensing” of “sinful” activities and requiring a license fee, was within taxing power
  - Court might deviate from these precedents on grounds that label was an attempt by Congress to avoid accountability
    - E.g. if Congress won’t call it a tax to avoid political repercussions, Court will not give it the benefit of coming within the taxing power

## Spending Power and Coercion of State Government

- Under the 10<sup>th</sup> Amendment, Congress cannot commandeer state government
- But, Congress can use its spending power to pressure state cooperation / regulation
  - As long as the use of spending power is not coercive
- Court in *South Dakota v. Dole* laid out the test for distinguishing between coercion and mere pressure / inducement

## Dole v. South Dakota Test

- Exercise of the spending power must be in pursuit of the general welfare
  - Courts should defer to Congress on this question
- Congress must condition states' receipt of federal funds clearly and unambiguously
- Conditions on federal grants might be illegitimate if they are unrelated to the spending for which grants are provided
- At some point, if pressure is great enough, it becomes coercion

## Relation of Conditions and Funded Program

- Past cases, especially some opinions by Sandra Day O'Connor, emphasized the relation of the condition to the use of funds
  - Congress can condition what funds are used for without limitation
  - But, if the condition is not directly on the use of funds, the greater the threat of losing funds, the greater the connection between the condition and the use of the funds might have to be

## Application to Medicaid Funding

- Can characterize the PP&AC Act as telling the states how to use Medicaid funding and hence threat of cutting off all funding may not be coercive
  - If Court characterizes the provision as a condition on how funds are spent and reverses it, that would be a major change in the breadth of Congress's spending power
- Possible that Court will divide Medicaid spending into that authorized before and after the PP&AC Act
  - Then the question will be whether the conditions of expanding Medicaid are sufficiently related to loss of money for existing Medicaid programs to justify states losing Medicaid funding entirely

## Anti-Injunction Act if the Internal Revenue Code

- AIA provides:
  - “no suit for the purposes of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.”
- If AIA applies, the Court will dismiss the case and the case will not be within the jurisdiction of the courts until the penalty for not buying insurance is due
  - Such dismissal would obviously prolong everyone's uncertainty, including that of the states about what their obligations under the PPACA

## Does the AIA Bar Suits by States

- In *Seven Sky v. Holder*, Judge Kavanaugh, dissenting from the holding that the AIA does not bar the suit, suggested that if states were parties to the suit, they may not be subject to the AIA
- But this issue was not presented because states were not parties and the majority found the penalty not to be a tax within the meaning of the AIA

## Severability of the Individual Mandate

- This issue is straightforward: the Court essentially asks whether, if the Court strikes part of a statute, the statutory scheme indicates that Congress would want the remainder of the statute to remain in force
- Although there are few legal implications that are likely to flow from any severability holding, Congress did indicate repeatedly the centrality of the individual mandate to the legislative scheme as whole.
  - Simultaneously, striking the statute on its face is fairly aggressive judicial action