

## **STATE CHALLENGES TO HEALTH REFORM: A LOOK AT THE CONSTITUTIONAL ISSUES**

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## **THE CHALLENGED AND OTHER RELEVANT PROVISIONS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA)**

## **The Individual Mandate**

### **Section 1501(b) [IRC Sec. 5000A]**

**Each individual must maintain medical insurance coverage, including for dependents, for each month (starting in 2014)**

- Does not apply to non-citizens or unlawful aliens
- Does not apply to incarcerated individuals
- In effect, does not apply if premium exceeds 8% of income
- In effect, does not apply to individuals with income under 100% of poverty

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## **The Individual Mandate**

### **Section 1501(b) [IRC Sec. 5000A]**

**Monetary penalty imposed for failure to retain required coverage (with various caps)**

- Overall cap: Cost of a qualifying plan on an exchange
- Otherwise: Capped at about \$2100 or 2.5% of income (whichever is greater)  
[Section 1002(a) Reconciliation Bill]

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## The Individual Mandate

### Section 1501(b) [IRC Sec. 5000A]

**Guaranteed Issue** -- No exclusion on individual or group market for pre-existing conditions [Section 1201]

- Adverse Selection problem
- Unsustainability without revenue stream
- **Transition**: High risk pools [Section 1101]

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## The Health Exchanges Section

### 1311(b)

- “Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange” [“Exchange”] [Section 1311(b)(1)]
- “An Exchange shall be a governmental agency or nonprofit entity that is established by a State” [Section 1311(d)(1)]
- No federal funds for continued operation of Exchanges after December 31, 2015 [Section 1311(d)(5)]
- If a state chooses not to “elect” to set up an Exchange, then the federal government “shall... establish and operate” an Exchange within that state [Section 1321(c)]

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## The Expanded Medicaid Mandate

- Requires states to cover under Medicaid persons with incomes under 133% of poverty [Section 2001(a)(1)(C)]
- Federal matching for newly eligible Medicaid beneficiaries [Section 1201 Reconciliation Bill]
  - 2014 – 2016: 100%
  - 2017: 95%
  - 2018: 94%
  - 2019: 93%
  - 2020 (and thereafter): 90%

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## The Expanded Medicaid Mandate

- Newly eligible Medicaid beneficiaries include all adults under age 65 not previously eligible under state plan (or waiver) [Section 2001(a)]
- Enhanced federal matching for Expansion States
- Federal subsidies on Exchanges for those with incomes between 100% - 400% of poverty [Section 1401(c)(1)(A)]

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## The Expanded Medicaid Mandate

- No premium subsidy for persons with income under 100% of poverty
  - 100% - 133% of poverty: Maximum premium is 2% of income
  - 400% of poverty: Maximum premium is 9.5% of income
- Out-of-pocket expenses for plan cost-sharing are limited in general [Section 1302(c)(1)]

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## The Expanded Medicaid Mandate

- Maximum out-of-pocket cost-sharing expenses are reduced for persons with income in the range of 100% - 400% of poverty [Section 1402(c)(1)(A)]
  - 100% - 200% of poverty: 2/3 reduction in out-of-pocket expense
  - 200% - 300% of poverty: ½ reduction in out-of-pocket expense
  - 300% - 400% of poverty: 1/3 reduction in out-of-pocket expense
- No reductions in maximum out-of-pocket expenses for persons with income under 100% of poverty [Section 1402(c)(1)(A)]

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## **Constitutional Structure: Some Basics**

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## **Constitutional Structure: Some Basics**

- States have inherent authority to act under the police power
- The Federal Government is one of enumerated powers and must find a source of authority to enact legislation

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## Constitutional Structure: Some Basics

The Federal Government must respect aspects of state sovereignty and therefore may not “commandeer” states to enact legislation or administratively to enforce federal policies

- The Federal Government may provide financial incentives for states to participate in federal programs (cooperative federalism) and may impose conditions on how states implement federal programs in which they participate
  - States’ decisions to participate (or de-participate) in cooperative federalism programs must be made voluntarily and knowingly by each individual state on its own behalf [*New York v. United States*; *Printz v. United States*]
  - When financial inducements in federal spending programs cross the line from “pressure” to “coercion,” they violate the autonomy of states guaranteed in the structure of the Constitution [*South Dakota v. Dole*]

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## Constitutional Structure: Some Basics

- The relationship between the federal and state governments in cooperative federalism programs is loosely analogized to a contract between those governmental entities, controlled in broad stroke by contract principles
  - To protect state sovereign interests in deciding whether or not to participate in cooperative federalism programs, federal conditions (and state obligations) on federal programs must be unambiguously stated in advance [*Arlington Central School District v. Murphy*]
  - The conditions that govern cooperative federalism programs are generally those in place when the grant of federal funds is made [*Bennett v. New Jersey*]
  - The contractual relationship between the Federal Government and the states in cooperative federalism programs “cannot be viewed in the same manner as a bilateral contract governing a discrete transaction” but instead must be viewed as an “ongoing, cooperative program” and relationship [*Bennett v. Kentucky Department of Education*]

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## Constitutional Structure: Some Basics

### Potential sources of federal authority to enact PPAVA

- Commerce Clause  
“The Congress shall have Power... To regulate Commerce... among the several States” [Art. I, Sec. 8, Cl. 3]
- Necessary and Proper Clause  
“The Congress shall have Power... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States [Art. I, Sec. 8, Cl. 18]

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## Constitutional Structure: Some Basics

### Potential sources of federal authority to enact PPAVA

- Spending Power  
“The Congress shall have Power To... provide for the common defence and general Welfare of the United States” [Art. I, Sec. 8, Cl. 1]
- Taxing Power
  - “The Congress shall have Power To lay and collect Taxes... and Excises...; but all... Excises shall be uniform throughout the United States” [Art. I, Sec. 8, Cl. 1]
  - “No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken” [Art. I, Sec. 9, Cl. 4]
  - “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration” [Amendment XVI]

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## THE INDIVIDUAL MANDATE

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## The Commerce Clause as a Potential Source of Authority

### The Commerce Clause as a potential source of authority

- Is this a “regulation” of “commerce,” even though it mandates the purchase of insurance from a private carrier when an individual chooses not to purchase that insurance?
- Some doctrinal background
  - Substantial effect on commerce doctrine
  - Cumulation principle [*Wickard v. Filburn*]
  - Does the regulation of an individual’s refusal to participate in a commercial transaction push this expansive doctrine too far?

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## The Necessary and Proper Clause as a Potential Source of Authority

- The individual mandate is necessary in order to make the Guaranteed Issue policy sustainable
- Without the individual mandate, “many individuals would wait to purchase health insurance until they needed care,” making the mandate “essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.” [Section 1501(a)(2)(I) as amended by Section 10106(a)]

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## The Necessary and Proper Clause as a Potential Source of Authority

- Rationale: Congress has authority under the Commerce Clause to enact Guaranteed Issue and under the Necessary and Proper Clause to implement Guaranteed Issue
- Does the individual mandate go too far so as not to make it “proper” in light of existing alternatives that are available?
  - Could make individuals without coverage ineligible for Guaranteed Issue to avoid “free rider” problem
  - Could rely on high-risk pools not only for transition period but as a permanent solution for assuring coverage for persons with poor health status (pre-existing conditions)

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## THE “PENALTY” TO ENFORCE THE INDIVIDUAL MANDATE

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### The “Penalty” to Enforce the Individual Mandate

- Commerce Clause – Is this a regulatory measure that is incidental to enforcement of the individual mandate?
- Necessary and Proper Clause – Is this sufficiently linked to the enforcement of the Guaranteed Issue provision, even though it is twice removed from the Guaranteed Issue provision? [*United States v. Comstock*]
- Should the “penalty” be treated as a “tax”?
  - The Justice Department defends the penalty as a tax
  - Should there be a truth-in-labeling requirement imposed so that a statutory “penalty” cannot be transformed into a “tax” in the context of litigation?

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## The “Penalty” to Enforce the Individual Mandate

- If the penalty is a tax, what kind of a tax is it?
  - An Excise Tax?
    - An excise tax is usually imposed on the (i) use of property, (ii) a transaction associated with property (e.g., the transfer of property), or (iii) an activity
    - Is this a tax on an “activity” or “use” of wealth? – a “decision” not to purchase health insurance and to spend that money on other things?
    - Critics claim the tax is on inactivity – failure to purchase health insurance
    - If this is an “excise” tax, it must be “uniform.” Is it?

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## The “Penalty” to Enforce the Individual Mandate

- If the penalty is a tax, what kind of a tax is it?
  - A Capitation or other form of Direct Tax?
    - Critics contend that a flat dollar tax, like a portion of the PPAVA, is a “direct” tax or a “capitation” tax because, like a “head” tax, it taxes at a fixed amount of \$695 per person (up to a maximum of about \$2100)
    - Defenders contend (i) that the PPAVA provision is not a tax of or linked to the taxation of real or personal property by reason of ownership and (ii) that the tax amount depends ultimately on household income and personal hardship and therefore is not a “direct” tax but a permissible income tax under the Sixteenth Amendment
    - Defenders reject the “capitation” tax label because the tax is linked to an individual’s circumstances
    - If the tax is a Direct Tax (other than an income tax), it must be apportioned by state, according to population, which the PPAVA tax is not

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## The Exchanges

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## The Exchanges

- The Statutory Tension
  - “Each State shall, not later than January 1, 2014, establish an American Health Benefit Exchange” [“Exchange”] [\[Section 1311\(b\)\(1\)\]](#)
  - If a state chooses not to “elect” to set up an Exchange, then the Federal Government “shall... establish and operate” an Exchange within that state [\[Section 1321\(c\)\]](#)

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## The Exchanges

- The Commandeering Issue
  - Section 1311(b)(1) requires states to establish an exchange, which is forbidden commandeering, especially as federal support for the Exchange expires at the end of 2015
  - But Section 1321(c) indicates that states have a choice – and that the Federal Government will set up an Exchange if a state chooses not to do so
  - A potential technical problem, as the Federal Government can sue a state to require it to establish an Exchange
  - Such a lawsuit would run afoul of the anti-commandeering principle and would be unlikely
  - Congress seemed to recognize its vulnerability and set up an alternative mechanism under federal authority for establishing an Exchange in an unwilling state

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## THE EXPANDED MEDICAID MANDATE

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## The Expanded Medicaid Mandate

### The Spending Power

- Very broad federal power to attach conditions to cooperative federalism programs [*South Dakota v. Dole*]
- Only two significant constraints on Federal Government to attach conditions to spending programs
  - Federal Government must state conditions on federal program unambiguously in the statute when the grant of federal funds is made
  - Conditions on federal grant invalid if they cross the line by going beyond “pressure” to “coercion”

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## The Expanded Medicaid Mandate

### Contract Principles

- Ongoing federal-state relationship (relational contract)
- Contract modification considerations
  - The “lock-in” problem – the states face a different reality at the beginning of a program than they do when the program has been in existence
    - *E.g.*, some states in litigation will assert that they would not accept Medicaid as an initial matter if the terms were as now presented
  - Medicaid aimed at more than patient care; includes improving infrastructure of delivery of health care to eligible beneficiaries [Cf. *Fischer v. United States* (Medicare)]
  - Reliance by states – beneficiaries; administrative infrastructure; providers (doctors, hospitals, nurses and other staff, pharmaceuticals, devices)
  - Requirement of fairness and reasonableness when a party to an ongoing, relational contract substantially modifies the terms of the ongoing relationship
  - Predatory subsidization based on “lock-in” effect?

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## The Expanded Medicaid Mandate

### Clear Statement Considerations

- PPAVA's expanded Medicaid mandate clearly states what obligations a state incurs under modified Medicaid
- Is that sufficient, or (given concerns about state autonomy and "lock-in") must there be a consideration of clear statement concerns when a state originally signs up for an ongoing, relational program such as Medicaid?
  - Foreseeability issue – *e.g.*, moving benefits well beyond the poverty-level eligibility when Medicaid originally was founded and was linked to categorical eligibility under existing public assistance programs (AFDC)
  - Concerns about bait and switch – the displacement of political accountability (the Medicaid history of interaction between state and federal governments)
  - Protecting the integrity of a state's political process
    - Other claimants for state funds
    - Concerns about the role of money from external sources in influencing a state's political process (*e.g.*, limits on campaign contributions and expenditures)

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## The Expanded Medicaid Mandate

### Coercion

- Amorphous term in this context – hard to define
- No court has invalidated a federal spending program on grounds of coercion in over 75 years
- But the category exists – and one might ask whether it can exist if the expanded Medicaid mandate of PPAVA does not fit inside
- Different ways of viewing "coercion"
  - Process-focused concepts of coercion – *e.g.*, forced confessions, personal threats or duress in contracting or wills
  - Choice-set coercion – *e.g.*, forcing inappropriate choices
- Choice-set coercion – *Lee v. Weisman* (Establishment Clause)

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## The Expanded Medicaid Mandate

### Coercion

- Application
  - Lock-in considerations once Medicaid already in existence – choices are very different than in original decision to participate
  - Context – No federal subsidy on Exchanges for individuals with incomes under 100% of poverty, but subsidies for individuals with incomes from 100% - 400% of poverty
    - Role of states with expanded Medicaid built into the very architecture of PPAVA
    - Less justification for cooperative federalism since states have much reduced role in determining eligibility and scope of benefits (under traditional Medicaid, states' plans differed, as long as a state met the floor requirements and lived under the ceiling set by Medicaid)
    - All-or-nothing feature of choice for states under PPAVA – excessive leverage in context of contract modification?
    - Assumption that states cannot terminate Medicaid, especially given federal subsidies for near-poor
    - States as involuntary cash cows to support near-universal coverage plan
      - Functional “commandeering”?
      - Evidence of imposing cash cow role on states to avoid political pitfalls at federal level (budget scoring)
    - Predatory subsidization?

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## The Expanded Medicaid Mandate

### Remedy

- Restore integrity of political process
- Where a modification of an ongoing federal spending program such as Medicaid occurs and affects a substantial portion of a state's budget (as in Medicaid), the Federal Government may not use its leverage to impose the new conditions as a program modification

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## The Expanded Medicaid Mandate Remedy

### Options available to Federal Government

- Allow states to accept or reject the newly imposed conditions
- Where the Federal Government is unwilling to continue a program in existence under the pre-existing terms, the Federal Government must rescind the entire program and take the political responsibility for so doing
- States should not have to opt out of the pre-existing program, but instead the Federal Government should be required to terminate the pre-existing program
- States would have an opportunity, as an original matter, to opt into the modified program (rather than having to opt out, as is now the case under PPAVA)

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## The Expanded Medicaid Mandate Remedy

This political process approach reserves ultimate authority for appropriating federal funds to the Federal Government while restoring autonomy and political integrity to state decisionmaking

- The Federal Government must take political responsibility for its own actions
- The integrity of the states' political process is supported (as in the anti-commandeering principle) as the states must **opt in not opt out** of federal programs where modifications are substantial and the impact on state budgets is substantial

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