

The 7th Amendment Advocate

"In Suits at common law, where the value in controversy shall ex

The Hand Grenade in GOP Sequester Bills

By Andrew Cochran on October 5, 2012 10:42 AM | [0 Comments](#)

Republicans are searching for ways to avoid automatic cuts of hundreds of billions of dollars in defense spending, and [many are turning to the Simpson-Bowles Commission report for ideas](#). But deep inside the Simpson-Bowles recommendations and many Republican bills to avoid the sequester is an idea which could render any bill unconstitutional. That idea is a federal cap on damages in medical malpractice lawsuits. Anti-Obamacare legal experts such as Prof. Randy Barnett and Virginia AG Ken Cuccinelli are convinced that such a law is unconstitutional. Last year, Prof. Barnett [wrote in May](#), and [again in November](#), that tort law belongs to the states, and thus is beyond the reach of federal authority.

Recently Prof. Barnett took his opposition further, vowing to lead a court challenge to any enacted federal medical law. He participated in a post-Obamacare teleforum run by the Federalist Society on July 17. I called in and asked Prof. Barnett about the impact of the decision on federal tort reform bills, and specifically on the federal medical limits pushed by many GOP leaders.

Prof. Barnett responded by saying that the jurisdictional basis for federal tort reform can now be "easily challenged," He added, *"I will help lead that challenge if ever enacted, and I think we would actually have an easier time defeating that than defeating the (Obamacare) mandate... In fact, this court would strike that down (referring to federal medical limits)... I'll be involved in the lawsuit."*

Attorney General Cuccinelli [also promised in 2011 to sue to stop federal caps on medical damages](#). *"This legislation expands federal power, tramples the states and violates the Constitution. And if it were ever signed into law -- by a Republican or Democratic president -- I would file suit against it just as fast as I filed suit when the federal health-care bill was signed into law in March 2010 (15 minutes later)."*

They're not alone among conservative and libertarian legal experts and Members of Congress. On July 27, Rob Natelson of the Independence Institute and the Tenth Amendment Center posted, [Obamacare Decision Suggests U.S. Malpractice Bill Unconstitutional](#), in which he wrote, *"Chief Justice Roberts' health care opinion strongly suggests that the Necessary and Proper Clause is simply not broad enough to include the kind of control over state courts that H.R.*

5 would impose... It seems clear that the Supreme Court will not tolerate efforts by Congress to dictate rules and procedures to state courts. In light of this new information, the sponsors of H.R. 5 should honor their oath to support the Constitution by promptly withdrawing the bill."

Other libertarians and conservatives opposing federal medmal caps on constitutional grounds include Senators [Tom Coburn](#) and [Mike Lee](#); Prof. [John Baker](#); Ms. [Carrie Severino](#) of the Judicial Action Network; Prof. [Ilya Somin](#) of George Mason Law School; and even [Walter Olson](#) and [Ted Frank](#), who criticize the plaintiffs' bar at every opportunity. [State legislators of both parties](#) have repeatedly condemned Republican votes for a federal takeover of state tort law through medmal caps.

The SCOTUS Obamacare decision highlighted the limits of federal authority over states' and individual rights. Over and over again, Chief Justice Roberts wrote of the Constitution's enumerated powers for the federal government and of the need to protect states from an overreaching federal government. He defined states' rights in terms of the inherent "police power" which is reserved for the states.

So what is included under the umbrella of the constitutional "police power?" In May of 2011, Randy Barnett wrote, "*Tort law is at the heart of what is called the 'police power' of states... Indeed, if Congress now can regulate tort law, which has always been at the core of state powers, then Congress, and not the states, has a general police power.*"

So any law which includes federal caps on medmal damages WILL face a lawsuit, led by Prof. Barnett and Attorney General Cuccinelli, and supported by many or most of the anti-Obamacare Legal Dream Team. And that law has a decent chance of being struck down as an unconstitutional exercise of the Commerce Clause and the Necessary & Proper Clause.

That's no way to avoid a sequester.