

# DORF ON LAW

MOSTLY LAW-RELATED MUSINGS BY CORNELL PROFESSOR MICHAEL DORF AND SOME OF HIS LAWYER/PROFESSOR FRIENDS

WEDNESDAY, MAY 26, 2010

## How the Constitutional Challenge to the Individual Mandate Could Win By Losing

By Mike Dorf

As I noted in my FindLaw column last week, the Supreme Court's recent decision in *U.S. v. Comstock* strengthens the already very strong case for upholding the individual mandate in the health insurance reform law as valid Commerce Clause legislation. I wrote in the column that nevertheless, "it is possible that five Justices could vote to invalidate the individual mandate to purchase health insurance. In my view, doing so would be very difficult to square with the rulings in *Raich* and *Comstock*, but predicting how the Supreme Court will rule on any issue is an inexact science at best." What I had in mind was the possibility that the Court could disregard or give an idiosyncratic interpretation to its precedents, in the fashion of *Bush v. Gore*. I did not mean to suggest that this is a close case on which reasonable minds could differ about how to faithfully apply the precedents.

What, then, explains the fact that Republican attorneys general around the country are pressing their extraordinarily weak case against the mandate? Here I'll explore three non-exclusive explanations.

1) Not every state AG is an expert in constitutional law. A casual reader of the federal Constitution could well think that the individual mandate--indeed, much of what the federal government does--is outside the scope of the powers delegated by the Constitution. And such a casual reader would only be wrong in the sense that his straightforward reading has been rejected by history and Supreme Court doctrine. But given political opposition to the health reform law, a relatively uninformed state AG might instruct his staff to file a challenge.

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He would hear that there is a difference of opinion on such matters, but he would chalk up that difference itself to ideology. Even if he were moderately informed, he could find Cato Institute white papers and other scholarly works arguing against the mandate's constitutionality. An only moderately informed AG would not realize that the government's contrary argument is much stronger.

2) Some number of the challengers to the individual mandate probably don't care whether they prevail in court. They could simply be seeking to rally the base. Or, more charitably, they may take a "departmentalist" view of constitutional interpretation. Under such a view (which I have elsewhere described as legitimate), members of Congress and state officials, no less than judges, are entitled to act on their own independent understanding of the Constitution. Certainly Republicans who thought the mandate was unconstitutional were entitled to vote against it as a bill. State AGs are likewise entitled to litigate against it. But absent a *Bush v. Gore*-esque bolt from the blue, they should expect to lose.

3) Finally, let me float a conspiracy theory which I do not believe to be causally explanatory at a fully conscious level: Losing a challenge to the mandate would be good for the Republican Party, especially if the case goes to the Supreme Court, and thus gains visibility. The current Supreme Court is basically conservative except in the roughly quarter of the ideologically divided cases when Justice Kennedy swings liberal. Nonetheless, some of those cases are very high profile, as would be a challenge to the individual mandate. If such a challenge were to fail by a vote of 8-1 (the outcome I would regard as most likely), that would reinforce a widely held view that the Court is substantially more liberal than it is. That, in turn, would further rally conservative voters and activists, and shift public debate over the Court even farther to the right. Thus, challengers to the mandate could win by losing.

POSTED BY MICHAEL C. DORF AT 12:15 AM 

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egarber said...

I find myself intrigued by the taxation dynamic.

Isn't the mandate as formed essentially the same thing as a deduction

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for say, mortgage interest? If you fail to buy a house, which the government encourages, you're penalized by paying higher taxes. How is the mandate not the same thing? Acquire healthcare (which the government encourages), and pay lower taxes.

I think the answer is that the whole framing centers on penalties -- vs. 1) first increasing taxes for everybody by the penalty amount, and 2) allowing deductions.

But still, that's really just a tactical thing, something up for debate in the political realm. Does that matter in constitutional interpretation?

9:00 AM



egarber said...

Or more simplified, I guess you could say it's the difference between subsidies and penalties.

9:05 AM



Raffles said...

"If such a challenge were to fail by a vote of 8-1 (the outcome I would regard as most likely), that would reinforce a widely held view that the Court is substantially more liberal than it is."

Damnit, I nearly spat out my water when I read that. Wouldn't liberals then respond by pointing out that their argument was so outlandish that even conservative heros Roberts, Alito, and Scalia didn't buy it?

BTW, the liberal version of what you said would be the Court rejecting the challenge to Prop 8 on a vote of 8-1 and then having liberals decry the Court as too conservative.

9:49 AM



Michael C. Dorf said...

Eric: The relevant doctrinal distinction is between a tax that is designed to raise revenue and one that is simply regulation. Because just about any revenue component will be enough to validate a provision, in practice this means that the government can and does regulate through taxation.

Raffles: I don't understand your point. Is it that the Court is only

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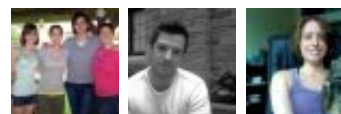
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Justice Scalia, the Court held tl

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Leslie

Jason

Nikki

regarded as conservative by liberals like myself? If so, there's a sense in which that's true: Everything depends on one's baseline. But there's also a sense in which it's false: Polls show a sizable fraction of Americans think the Supreme Court is too liberal. E.g., an April Rasmussen poll: <http://tinyurl.com/2uv6ccb>

To be sure, these numbers bounce around, so a more recent Rasmussen poll has Americans evenly divided on whether the Court is too liberal, too conservative or just right:

<http://tinyurl.com/lq8zry>

But the very bouncing around is part of my point: Americans' view of the Court tends to be very much driven by the news cycle, and a strong victory for the constitutionality of the individual mandate would make the Court-is-too-liberal meme salient for a while, potentially long enough to have an electoral benefit for Republicans.

My points here are positive, not normative. Liberals can score political points when the Court rules against, e.g., abortion rights. The dynamic is complicated though: Sometimes there's backlash; sometimes the Court is a catalyst.

10:55 AM

 michael a. livingston said...

I think #2 is it. But purely on the basis of speculation, my guess is the case will prove closer than many think it will. The obvious question for a conservative is, when we have we done something like the individual mandate before? The answers I've gotten to this question so far have been less than convincing, and it may provide grounds for a negative holding from those so inclined to begin with.

4:31 PM

 Eduardo said...

Of course the challenge is made for political reasons and of course the republicans want to lose it. They know that winning will be a political nightmare but just the idea of debating it will make the 'politicos" look like "in touch with the base"

1:37 AM

 Sam Rickless said...

I agree that #2 is the most plausible explanation.

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I haven't looked at constitutional challenges to the individual mandate. But here is something an opponent of the mandate might say. Although it is true that the lack of a mandate will serve as an incentive for healthy folks to game the system, the mandate applies both to those who are, and to those who are not, prepared to game the system. Imagine someone who insists (indeed, promises) that he will not sign up for health insurance once he gets sick. He even grants companies the legal right to refuse to take him on as a subscriber if he becomes ill. As I understand it, the mandate law still requires such a person to purchase insurance or suffer a tax penalty. The law therefore appears to violate the right to liberty protected by the fifth amendment.

One could argue that people should not have the legal right to prevent their future selves from signing up with pre-existing conditions. But on what grounds? Don't we allow people to bind their future selves legally in all sorts of cases?

Am I missing something?

2:01 AM



Michael C. Dorf said...

Sam:

1) The core of the constitutional challenge is that the law falls outside Congress's enumerated powers, not that it violates due process. But under traditional commerce clause doctrine, it doesn't matter that one can find individuals to whom the law's rationale is inapplicable. E.g., *Wickard v. Filburn*; *Raich*.

2) Various libertarians have raised the liberty argument you make, but they are arguing for a radical change in constitutional doctrine. Under that doctrine, the general 5th Amendment due process right to liberty does not lead to a requirement of a close means-ends fit, absent a "fundamental right" or other special ground. The liberty not to purchase health insurance has not been--and is highly unlikely to be--recognized as a fundamental right. Thus, again, it doesn't matter that the law is overinclusive with respect to its background rationale.

7:52 AM

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