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Yousef Omar, Manager, Commercial Bank, North Texas, Citi

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Mar. 24, 2010

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State AG's lawsuit against health care

Do they have a case?

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Roger Pilon

Vice President for Legal Affairs, Cato Institute :

Do the 13 state attorneys general have a case against ObamaCare?

Absolutely. It will be an uphill battle, because modern "constitutional law" is so far removed from the Constitution itself, but a win is not impossible. There are three main arguments. (1) Under the Constitution, as properly interpreted, Congress has no power to enact such a plan. (2) The plan conscripts state governments into carrying out and paying for federal mandates. And (3) the individual mandate amounts to an unlawful capitation or direct tax.

The first argument will almost certainly lose, because under post-1937 readings of the Commerce Clause, Congress can regulate anything that "affects" interstate commerce, which at some level is everything. Under modern "constitutional law," that's what we've come to - under the pressure of FDR's infamous Court-packing scheme, a Constitution authorizing only limited government has been turned into one that authorizes effectively unlimited government.

The second argument has promise: In *New York v. United States* (1992) and *Printz v. United States* (1997) the Court held that the federal government could not dragoon state legislatures or executives into carrying out and paying for federal programs. Yet that is just what's at issue here with the "exchanges" that states are required to establish. To be sure, the states can

"opt out," but as yesterday's suit argues, with so many people already on the Medicaid rolls, that option is effectively foreclosed. Indeed, the new bill will force millions more on to the Medicaid rolls, which is one of the main reasons these states, already strapped by Medicaid expenditures, have brought suit. Florida alone estimates that the added costs will grow from \$149 billion in 2014 to \$938 billion in 2017 to over one trillion dollars by 2019.

The third argument holds the most promise. ObamaCare compels individuals to buy insurance from a private company (why stop there? why not cars from GM?), failing which they will be required to pay a tax (fine?). This is an unprecedented expansion of Congress's power "to regulate interstate commerce." But even if it were to pass the modern Commerce Clause test, the tax should fail because it's not apportioned among the states in accordance with their population.

Let's be clear, however. This suit was brought because the 13 states (and I predict more will follow) see the handwriting on the wall. ObamaCare will mark the effective end of federalism as we've known it, will bankrupt the states, and, because of that - here's the clincher - is but a stalking horse for federal single-payer health care in America. This suit will keep the issue alive until November, when the American people will have a chance to weigh in.

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