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Can States Say "No Thanks" to ObamaCare's Health Insurance Mandate?

Peter Suderman | March 9, 2010

Nancy Pelosi may be convinced that we have to pass health care reform in order to find out what's in it, but if it passes, there's at least one provision we can already count on: an individual mandate to buy health insurance. Polling shows that this requirement is one of the bill's least popular features, so it's not exactly surprising to find that states are taking action to allow individuals to bypass such requirements. More than 30 states are considering such laws, and a ban on mandatory insurance has already passed in the Virginia Senate.

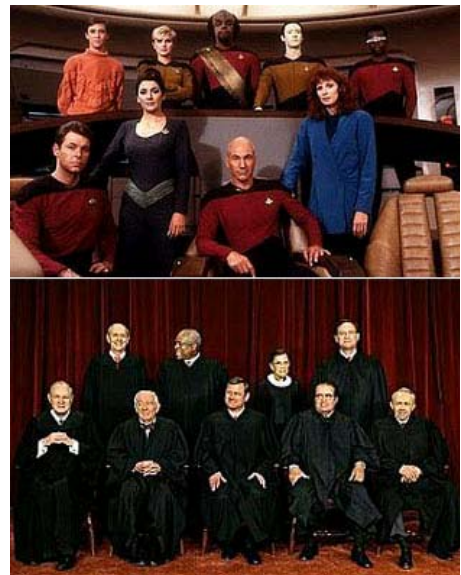
Will these individual protections work? An article in TPM yesterday says that Virginia's law is "almost certainly unconstitutional" because "the Constitution's federal supremacy clause makes clear that when federal and state law conflict, federal law takes precedence."

I asked a couple of legal and constitutional scholars what they thought, and the consensus seems to be that though state laws barring mandatory insurance shouldn't be unconstitutional, it's likely that if health reform were passed and they were challenged, the Supreme Court would rule that they are. However, we don't actually know for sure, and there is legal precedent for the Supreme Court to side with a state in a federal/state dispute.

All of them also noted that, regardless of whether or not these laws and amendments eventually stand up to challenge, they're strong political signals of opposition against the insurance mandate—which is arguably the centerpiece of the Democrats' federal health care overhaul (the other key regulations don't work without a mandate).

On the constitutional question, Roger Pilon of the Cato Institute says, "It isn't simply the Supremacy Clause that would make the state law unconstitutional, but rather the constitutionality of the federal statute together with the Supremacy Clause and the inconsistent state law." In other words, the Supremacy Clause alone wouldn't render Virginia's law unconstitutional. Instead, it would be struck down only if and when a federal individual mandate was passed and ruled constitutional.

Like many of those I got in touch with, Pilon thinks the better bet is that, should a mandate be



enacted, it would be ruled constitutional—though he also thinks it probably shouldn't be. (For more on that, see [here](#) and [here](#).)



There is, however, some question over whether such a ruling would actually invalidate state law. As [this *Wall Street Journal* piece](#) notes, "If Congress passes some version of health legislation, the federal law may preempt these state laws. But states do have the right to provide extra protections beyond what federal law guarantees. Many states, for example, have freedom of speech protections that go beyond federal law."

In Arizona, which will vote on a constitutional amendment that preserves the freedom of individuals to decline to participate in any health care system this November, the Goldwater Institute's Clint Bolick has prepared a Q & A on the issue. In it, he [notes](#) several legal precedents which suggest that states might be able to preserve individual protections. In particular, he singles out a case involving a "right-to-die" law in Oregon:

In the case most closely on point, *Gonzales v. Oregon* (2006), the Court upheld the state's "right-to-die" law, which was enacted by Oregon voters, over the objections of the U.S. Attorney General, who argued that federal law pre-empted the state law. Applying "the structure and limitations of federalism," the Court observed that states have great latitude in regulating health and safety, including medical standards, which are primarily and historically a matter of local concern. Holding that the attorney general's reading of the federal statute would mark "a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality," the Court interpreted the statute to allow Oregon to protect the rights of its citizens.

In other words, though perhaps unlikely, it's not impossible that state laws preserving an individual right to opt out could survive legal challenge. And no matter what, the existence of these laws send a fairly powerful political signal—one that will almost certainly factor into the decisions now being made by undecided House members.