



## Ideas Changing the World

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### Daily Policy Digest

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#### Health Issues

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#### **A Primer on the Constitutionality of Health Reform**

The legal battles over ObamaCare present the fundamental questions of where government gets its powers and what the constitutional limits to those powers are, say Ilya Shaprio, a senior fellow in constitutional studies, and Trevor Burrus, a legal associate, at the Cato Institute.

The strongest constitutional criticism of the legislation is that the individual mandate to buy health insurance exceeds Congress's power to "regulate commerce ... among the several states."

- Never before has the federal government required every man, woman and child to buy a particular good or service -- or pay a civil penalty for declining to do so.
- Never before have courts had to consider such a breathtaking assertion of raw power under the Commerce Clause.
- The lawsuits thus allege that an individual's choice not to purchase health insurance is not an economic activity that Congress can regulate.

While the Court has rejected nearly all Commerce Clause challenges since the New Deal, two such lawsuits have been successful, say Shapiro and Burrus.

- In 1995, the Court struck down a law prohibiting the possession of guns near schools because it was not "part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activities were regulated."
- Similarly, in 2000, the Court struck down the Violence Against Women Act because the gender-motivated violence it regulated had only an "attenuated" economic effect.

With the Commerce Clause justification facing a credible challenge, the government began to argue that the fine levied on those who fail to comply with the individual mandate is a "tax" authorized under Congress's power to tax for the general welfare. However, Congress specifically changed the term from "tax" to "penalty" in the last iteration of the bill and identified no revenue that would be raised from the "tax."

Finally, even if the individual mandate and its accompanying fine are deemed a tax, it would be an unconstitutional one, say Shapiro and Burrus.

Source: Ilya Shapiro and Trevor Burrus, "A Primer on the Constitutionality of Health Reform," Cato Institute, November 3, 2010.

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