

# LEGAL CHALLENGES TO HEALTH REFORM

## *An Alliance for Health Reform Toolkit*

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March 29, 2010

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### **Key Facts**

- The Patient Protection and Affordable Care Act (PPACA) was signed into law on March 23, 2010 by President Barack Obama.
- Almost immediately after the bill was signed, the attorneys general for 13 states jointly filed a lawsuit in U.S. District Court in Pensacola, Florida. The suit contends that PPACA violates Articles I and IV of the Constitution and the Tenth Amendment to the Constitution. Virginia's attorney general filed a separate suit on the same grounds.<sup>1</sup>
- Virginia's General Assembly passed legislation aimed at nullifying the federal individual mandate for citizens of that state. Legislatures in at least 33 other states are considering similar measures.<sup>2</sup>
- Many constitutional scholars believe that these challenges are mostly for political purposes<sup>3</sup>, unlikely to be taken up by the Supreme Court<sup>4</sup>, and unlikely to succeed if they were to reach there.<sup>5</sup>

### **Background**

The Patient Protection and Affordable Care Act (PPACA) has, since its introduction as H.R. 3590, provoked enormous opposition from its conservative opponents. With its passage into law, part of the resistance effort has moved from Congress to the courthouse.

Indeed, only seven minutes after the health reform bill was signed into law on March 23, a collection of 13 state attorneys general filed suit in Pensacola, FL, challenging PPACA's constitutionality and demanding that their states be exempt from its provisions.<sup>6</sup>

The Commonwealth of Virginia is mounting its own challenge. Virginia's General Assembly passed on March 4 the first state legislation attempting to directly nullify portions of the bill. Specifically, it "prohibits the federal government from forcing its citizens to purchase government-approved health insurance."<sup>7</sup> Virginia's attorney general filed a suit challenging the new reform law on these grounds. Legislators in 33 states have already filed or prefiled parallel challenges, based on the American Legislative Council's model legislation, and lawmakers in at least five other states have announced similar intentions.<sup>8</sup>

Given the hurdles a repeal effort would face, the greatest of which is President Obama's veto power, many Republicans now see the Supreme Court as their final hope. "I think there will be a lot of ongoing litigation for years to come," says Senator Jeff Sessions (R-Ala.).<sup>9</sup>

Many constitutional experts and health reform supporters believe the challenge movement is largely symbolic and unlikely to succeed in court. "I am prepared to say it's complete nonsense," said Charles Fried, who served as solicitor general under President Ronald Reagan.<sup>10</sup>

Beyond the legal rationale for these challenges, the Supreme Court would risk inviting a serious confrontation with Congress and the president if the court should invalidate any major portion of the health reform law, some experts claim.<sup>11</sup> In fact, federal judges in general have been historically unwilling to overturn congressional legislation.<sup>12</sup>

Critics of the health reform legislation point to several recent Supreme Court rulings curbing congressional power. David Rivkin, who provided counsel to the 13 attorneys general filing suit, cites *United States v. Lopez* and *United States v. Morrison* as cases in which the Supreme Court sought to limit congressional authority under the Commerce Clause of the Constitution, the first time it has done so since the New Deal.<sup>13</sup> "There are such significant issues that the court could very well declare the bill unconstitutional," said Senator Saxby Chambliss (R-Ga.).<sup>14</sup>

The lawsuits have generated considerable interest in the legal community. Reform opponents claim that PPACA improperly employs the Commerce Clause, which gives Congress the power "to regulate commerce...among the several states," as the basis for the federal insurance mandate.<sup>15</sup> <sup>16</sup> Reform supporters contend that this view misrepresents legal precedent surrounding congressional use of this clause.<sup>17</sup>

The lawsuits also claim that the Medicaid expansion outlined in the reform law constitutes an unlawful infringement of the states' sovereignty and solvency, and thereby violates the Tenth Amendment to the Constitution.<sup>18</sup> Reform supporters point to the Supremacy Clause of the Constitution, which establishes that the U.S. Constitution, and federal law generally, take precedence over state laws, and even state constitutions.<sup>19</sup>

A third charge levied in the lawsuits is that the tax penalty on uninsured persons violates the constitutional prohibition of unapportioned capitation or direct tax.<sup>20</sup> The federal government is only authorized to impose specific forms of taxation. Article I of the Constitution permits excise and capitation taxes, while the 16<sup>th</sup> Amendment created the income tax.<sup>21</sup> Although the tax penalty is structured in PPACA as an excise tax, reform critics charge that is actually a capitation tax, the revenues from which are constitutionally required to be apportioned to the states according to population. Given that PPACA does not apportion revenue this way, opponents claims the tax is illegal.

The resources below are arranged to help readers understand the legal challenges facing the Patient Protection and Affordable Care Act. The first section provides descriptions and links to news articles with background on these challenges and their overall prospects for success. Next, you will find descriptions and links to information on the legal arguments underpinning these challenges. Finally, we present descriptions and links to articles debating the merits of the challenges. You will also find a list of experts with contact information.

## **Selected Resources**

Please email [info@allhealth.org](mailto:info@allhealth.org) if you find that any of the links mentioned in this toolkit no longer work.

## **NEWS AND BACKGROUND**

**Virginia first state to challenge federal health insurance mandate**, March 5, 2010

Barbara Hollingsworth, *Washington Examiner*

[www.washingtonexaminer.com/opinion/blogs/beltway-confidential/Virginia-first-state-to-nullify-federal-health-insurance-mandate-86632032.html](http://www.washingtonexaminer.com/opinion/blogs/beltway-confidential/Virginia-first-state-to-nullify-federal-health-insurance-mandate-86632032.html)

Virginia is the first state to pass legislation that would forbid the implementation of an individual insurance mandate in that state. Such a mandate, which would require virtually all Americans to have health insurance or else pay a penalty, is a core provision of health reform legislation passed by the U.S. House and Senate. Legislators in more than 30 other states are considering similar bills. A constitutional amendment forbidding implementation has passed in Arizona, and is on the November ballot for voter approval or rejection.

**Health Care Overhaul and Mandatory Coverage Stir States' Rights Claims**, Sept. 28, 2009  
Monica Davey, *New York Times*

[www.nytimes.com/2009/09/29/us/29states.html?\\_r=2](http://www.nytimes.com/2009/09/29/us/29states.html?_r=2)

This article notes that discussion about state constitutional amendments forbidding an individual mandate began in 2006, after Massachusetts enacted a mandate as part of that state's comprehensive health reform law. Clint Bolick, litigation director of the Goldwater Institute, is quoted as saying that federal law doesn't always trump conflicting state law, and that states can prevail in challenging a federal individual insurance mandate.

**In Partisan Battle, Clashes over Health Lawsuits**, March 27, 2010

<http://www.nytimes.com/2010/03/28/us/politics/28govs.html>

Kevin Sack, *New York Times*

Discusses the legal battles being waged at the state level over the health reform legislation. In several states, conflict has erupted between governors and attorneys general on opposing sides of the aisle.

**Is there a legal case against the health-care bill?**, March 23, 2010

Ezra Klein, *Washington Post*

[http://voices.washingtonpost.com/ezra-klein/2010/03/is\\_there\\_a\\_legal\\_case\\_against.html?hpid=topnews](http://voices.washingtonpost.com/ezra-klein/2010/03/is_there_a_legal_case_against.html?hpid=topnews)

The author notes that approving the Senate reform plan in the House through the "deem

and pass” technique might have given conservatives something to work with in a court challenge, but the House leadership chose not to use that approach. Challenging the individual mandate is less promising. “So is this -- or any of the other challenges being contemplated by conservatives -- likely to work? The basic answer is that the Supreme Court does not like to invalidate important laws passed by Congress....To put it very simply: This is good politics for conservatives but an unlikely legal strategy.”

**13 attorneys general sue on health bill**, March 24, 2010

*Boston Globe*

[www.boston.com/news/health/articles/2010/03/24/13\\_attorneys\\_general\\_sue\\_on\\_health\\_care\\_bill/?rss\\_id=Boston.com+--+Health+news](http://www.boston.com/news/health/articles/2010/03/24/13_attorneys_general_sue_on_health_care_bill/?rss_id=Boston.com+--+Health+news)

Discusses the lawsuit filed minutes after President Obama signed the new health reform law, noting the filers’ contention that the law violates the 10<sup>th</sup> Amendment, which says the federal government has no authority beyond the powers granted to it under the Constitution.

**Experts say states’ health care lawsuits don’t stand a chance**, March 23, 2010

James Rosen, *McClatchy Newspapers*

[www.mcclatchydc.com/2010/03/23/90934/states-lawsuits-not-likely-to.html](http://www.mcclatchydc.com/2010/03/23/90934/states-lawsuits-not-likely-to.html)

Quotes several legal experts who say that “there are significant legal hurdles in establishing the states’ standing to challenge the health-care law and in persuading federal judges that it violates the Constitution.”

**GOP views Supreme Court as last line of defense on health reform**, March 29, 2010

Alexander Bolton, *The Hill*

<http://thehill.com/homenews/senate/89547-republicans-view-supreme-court-as-last-line-of-defense-on-healthcare-reform>

This article notes that part of the resistance to the health reform legislation has moved to the courts because of the significant hurdles facing a congressional repeal effort. It also contains analysis by constitutional experts on the legal prospects lawsuits might have.

## CHALLENGES BASED ON THE COMMERCE CLAUSE

**Individual Health Care Insurance Mandate Debate**, November 3, 2009

Erwin Chemerinsky and David Rivkin, *The Federalist Society*

<http://www.fed-soc.org/debates/dbtid.35/default.asp>

Includes a back-and-forth debate between a strong supporter of PPACA’s constitutionality and an ardent critic of the same. The authors provide different interpretations of relevant Supreme Court cases, and offer their prognoses for how PPACA will fare in court.

**Illegal Health Reform**, August 22, 2009

David Rivkin and Lee Casey, *The Washington Post*

<http://www.washingtonpost.com/wp-dyn/content/article/2009/08/21/AR2009082103033.html>

The authors discuss previous court cases that they believe limit Congress’ regulatory power under the Commerce Clause.

**Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional**, December 9, 2009

Randy Barnett, Nathaniel Stewart, and Todd Gaziano, *The Heritage Foundation*

<http://www.heritage.org/Research/Reports/2009/12/Why-the-Personal-Mandate-to-Buy-Health-Insurance-Is-Unprecedented-and-Unconstitutional>

Contends that PPACA it is unconstitutional for a range of reasons, including unlawful use of the Commerce Clause, the Takings Clause and the Tenth Amendment. Its primary argument is that, rather than regulating an economic activity with substantial impact on interstate commerce (as allowed under the Commerce Clause), the mandate seeks to regulate noneconomic “*inactivity*” that is expressly designed to avoid entry into the relevant market.”

**The “Individual Mandate” an Intrusion on Civil Society**, March 28, 2010

John Yoo, *American Enterprise Institute for Public Policy Research*

<http://www.aei.org/article/101845>

This article strongly attacks “Obamacare” as both unconstitutional and a threat to civil society. If the federal government is allowed to exercise its commerce powers as it now seeks to do, the author fears it will open a new frontier in national bureaucracy and regulation. As an alternative to the tax penalty found in PPACA, the author suggests a voucher to purchase a minimum standard of care.

**Does a Federal Mandate Requiring the Purchase of Health Insurance Exceed Congress’ Powers Under the Commerce Clause?**, September 20, 2009

Ilya Somin, *The Volokh Conspiracy*

<http://volokh.com/2009/09/20/does-a-federal-mandate-requiring-the-purchase-of-health-insurance-exceed-congress-powers-under-the-commerce-clause/>

The author, a noted libertarian legal scholar, states that current precedent established under *Gonzales v. Raich* makes it likely that PPACA will be found constitutional by the Supreme Court.

**Concurring Opinion in *Gonzales v. Raich***, June 6, 2005

Justice Scalia, *The Supreme Court of the United States of America*

<http://www.law.cornell.edu/supct/html/03-1454.ZC.html>

This opinion, offered in concurrence with the Supreme Court’s judgment in *Gonzales v. Raich*, provides clear and specific guidance as to the Court’s interpretation of Congress’ powers under the Commerce Clause, with particular reference to the regulation of noneconomic activity.

**CHALLENGES BASED ON FEDERALISM AND THE TENTH AMENDMENT**

**States Sue Over Overhaul That Will Bust State Budgets**, March 23, 2010

Pat Wechsler, *Bloomberg.com*

[www.bloomberg.com/apps/news?pid=20601087&sid=ajwSWE6H1kHM](http://www.bloomberg.com/apps/news?pid=20601087&sid=ajwSWE6H1kHM)

State leaders complain that they are having a hard enough time maintaining their current Medicaid programs without considering the additional costs that the new reform law will entail. This is one of the reasons states are challenging the law. Florida’s attorney general says that state will have to spend an additional \$1.6 billion for Medicaid and hire 1,000 new workers to accommodate the flood of new enrollees.

**The Legal Assault on Health Reforms**, March 28, 2010

Editorial, *New York Times*

<http://www.nytimes.com/2010/03/29/opinion/29mon1.html?hp>

Discusses the various legal challenges facing PPACA, and concludes that they are unlikely to succeed because the bill was drafted to overcome just such issues. The article notes that there is no requirement for states to participate in the Medicaid program, despite the impracticality of dropping out.

**Federalism is no bar to health care reform**, Nov. 2, 2009

Robert A. Shapiro, *Atlanta Journal-Constitution*

[www.ajc.com/opinion/federalism-is-no-bar-182808.html?printArticle=y](http://www.ajc.com/opinion/federalism-is-no-bar-182808.html?printArticle=y)

The author states that although reform opponents use “federalism” as an argument against national reform, in fact the term favors reform. “The health care plans build on the interaction of state and federal power than is central to federalism,” he writes.

**Can the States Nullify Health Reform?**, March 11, 2010

Timothy Jost, *New England Journal of Medicine*

<http://content.nejm.org/cgi/content/full/362/10/869>

This article states flatly that “State law cannot nullify federal law.” Blocking the implementation of a federally required individual insurance mandate “is constitutionally impossible,” the author says, because of the supremacy clause of the U.S. Constitution.

**McCulloch v. Maryland – Case Brief Summary**

[www.lawnix.com/cases/mcculloch-maryland.html](http://www.lawnix.com/cases/mcculloch-maryland.html)

Briefly summarizes an 1819 case confirming that federal law trumps state actions when the federal government is within its “sphere of action.”

## CHALLENGES BASED ON TAKINGS AND TAXATION

**The Constitutionality of the Individual Mandate for Health Insurance**, Feb. 11, 2010

Jack M. Balkin, J.D., Ph.D., *New England Journal of Medicine*

<http://content.nejm.org/cgi/content/full/362/6/482>

The author concludes that “constitutional challenges are unlikely to succeed.” A short, readable summary of the main arguments raised by reform opponents on constitutional grounds.

**Mandate insurance is unconstitutional**, October 20, 2009

Ken Klukowski, *Politico*

<http://www.politico.com/news/stories/1009/28463.html>

This article provides a number of reasons the Senate bill might have been considered unconstitutional, including unlawful taxation, unjustifiable use of police power by the federal government, and the improper use of the Commerce Clause.

## Impermissible Ratemaking in Health-Insurance Reform: Why the Reid Bill is Unconstitutional, December 18, 2009

Richard Epstein, *PointofLaw*

<http://www.pointoflaw.com/columns/archives/2009/12/impermissible-ratemaking-in-he.php>

The author contends that PPACA violates the Fifth Amendment, which protects against the taking of property without compensation and without due process of law, because it transforms insurance companies into virtual public utilities that must operate below the competitive rate of return.

### Selected Experts

<b>Randy E. Barnett</b> , Georgetown Law.....	202/662-9936
<b>Gregg Bloche</b> , Georgetown Law.....	<a href="mailto:bloche@law.georgetown.edu">bloche@law.georgetown.edu</a> 202/662-9123
<b>Clint Bolick</b> , Goldwater Institute.....	602/462-5000
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<b>Thomas E. Woods Jr.</b> , Ludwig von Mises Institute.....	<a href="http://www.thomasewoods.com/about/">www.thomasewoods.com/about/</a>

<sup>1</sup> Globe staff. 13 attorneys generals sue on healthcare bill. Boston Globe. 03/24/2010.

[http://www.boston.com/news/health/articles/2010/03/24/13\\_attorneys\\_general\\_sue\\_on\\_health\\_care\\_bill/?rss\\_id=Boston.com+--+Health+news](http://www.boston.com/news/health/articles/2010/03/24/13_attorneys_general_sue_on_health_care_bill/?rss_id=Boston.com+--+Health+news)

<sup>2</sup> State Legislators Last Line of Defense Against Obamacare. American Legislative Exchange Council.

[http://www.alec.org/AM/Template.cfm?Section=ALEC\\_s\\_Freedom\\_of\\_Choice\\_in\\_Health\\_Care\\_Act&Template=/CM/HTMLDisplay.cfm&ContentID=12820](http://www.alec.org/AM/Template.cfm?Section=ALEC_s_Freedom_of_Choice_in_Health_Care_Act&Template=/CM/HTMLDisplay.cfm&ContentID=12820)

<sup>3</sup> Monica Davey. Health Care Overhaul and Mandatory Coverage Stir States' Rights Claims. New York Times. 09/28/2009. [www.nytimes.com/2009/09/29/us/29states.html?\\_r=2](http://www.nytimes.com/2009/09/29/us/29states.html?_r=2)

<sup>4</sup> Orin Kerr. More on the Chances Courts Would Strike Down Individual Mandates. The Volokh Conspiracy.

03/23/2010. <http://volokh.com/2010/03/23/more-on-the-chances-courts-would-strike-down-the-individual-mandate/>

<sup>5</sup> James Rosen. Experts say states' health care lawsuits don't stand a chance. McClatchy Newspapers. 03/23/2010.

<http://www.mcclatchydc.com/2010/03/23/90934/states-lawsuits-not-likely-to.html>

<sup>6</sup> Globe staff. 13 attorneys generals sue on healthcare bill. Boston Globe. 03/24/2010.

[http://www.boston.com/news/health/articles/2010/03/24/13\\_attorneys\\_general\\_sue\\_on\\_health\\_care\\_bill/?rss\\_id=Boston.com+--+Health+news](http://www.boston.com/news/health/articles/2010/03/24/13_attorneys_general_sue_on_health_care_bill/?rss_id=Boston.com+--+Health+news)

<sup>7</sup> Barbara Hollingsworth. Virginia first state to challenge federal health insurance mandate. Washington Examiner.

03/05/2010. [www.washingtonexaminer.com/opinion/blogs/beltway-confidential/Virginia-first-state-to-nullify-federal-health-insurance-mandate-86632032.html](http://www.washingtonexaminer.com/opinion/blogs/beltway-confidential/Virginia-first-state-to-nullify-federal-health-insurance-mandate-86632032.html)

<sup>8</sup>State Legislators Last Line of Defense Against Obamacare. American Legislative Exchange Council.

[http://www.alec.org/AM/Template.cfm?Section=ALEC\\_s\\_Freedom\\_of\\_Choice\\_in\\_Health\\_Care\\_Act&Template=/CM/HTMLDisplay.cfm&ContentID=12820](http://www.alec.org/AM/Template.cfm?Section=ALEC_s_Freedom_of_Choice_in_Health_Care_Act&Template=/CM/HTMLDisplay.cfm&ContentID=12820)



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- <sup>9</sup> Alexander Bolton. GOP views Supreme Court as last line of defense on health reform. The Hill. <http://thehill.com/homenews/senate/89547-republicans-view-supreme-court-as-last-line-of-defense-on-healthcare-reform>
- <sup>10</sup> Ibid.
- <sup>11</sup> Ilya Somin. The Supreme Court, the Election Returns, and Mandatory Health Insurance. The Volokh Conspiracy. 09/21/2009. <http://volokh.com/2009/09/21/the-supreme-court-the-election-returns-and-mandatory-health-insurance/>
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- <sup>13</sup> Individual Healthcare Insurance Mandate Debate. The Federalist Society. 11/03/2009. <http://www.fed-soc.org/debates/dbtid.35/default.asp>
- <sup>14</sup> Alexander Bolton. GOP views Supreme Court as last line of defense on health reform. The Hill. <http://thehill.com/homenews/senate/89547-republicans-view-supreme-court-as-last-line-of-defense-on-healthcare-reform>
- <sup>15</sup> Individual Healthcare Insurance Mandate Debate. The Federalist Society. 11/03/2009. <http://www.fed-soc.org/debates/dbtid.35/default.asp>
- <sup>16</sup> Ken Klukowski. Individual Mandate Insurance is Unconstitutional. The Politico. 10/20/2009. <http://www.politico.com/news/stories/1009/28463.html>
- <sup>17</sup> Individual Healthcare Insurance Mandate Debate. The Federalist Society. 11/03/2009. <http://www.fed-soc.org/debates/dbtid.35/default.asp>
- <sup>18</sup> Lawsuit filed by the 13 Attorneys Generals. 03/23/2010. <http://media.mcclatchydc.com/static/pdf/Thomma-healthcarelawsuit.pdf>
- <sup>19</sup> Supremacy Clause. Cornell University School of Law. [http://topics.law.cornell.edu/wex/supremacy\\_clause](http://topics.law.cornell.edu/wex/supremacy_clause)
- <sup>20</sup> Lawsuit filed by the 13 Attorneys Generals. 03/23/2010. <http://media.mcclatchydc.com/static/pdf/Thomma-healthcarelawsuit.pdf>
- <sup>21</sup> Ken Klukowski. Individual Mandate Insurance is Unconstitutional. The Politico. 10/20/2009. <http://www.politico.com/news/stories/1009/28463.html>