



NATIONAL REFORMS ON SOLID LEGAL GROUND

CHALLENGES FROM UTAH LAWMAKERS UNLIKELY TO SUCCEED

A Utah Health Policy Project Issue Brief

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SUMMARY

Utah lawmakers, including, Attorney General Mark Shurtleff, have joined with Senator Orrin Hatch to launch a troubling new strategy for defeating national health reform. Instead of simply arguing against reform on specific policy grounds, they now claim that the reforms are also *unconstitutional* because of the following:

- (1) the mandate that citizens purchase insurance;
- (2) inequities in the state-by-state allotment of Medicaid dollars (touched off by a deal in which Nebraska's senator agreed to support the bill only if Nebraska received a more favorable federal match rate than other states);
- (3) the federal government's strong hand in establishing state based health insurance exchanges.

Utah lawmakers maintain that because of these factors, national reform *exceeds* Congress' constitutional authority and is therefore dead in the water. But, as constitutional scholars have argued, this is simply not the case.¹ Sadly, as has been the case throughout the health reform debate, the critics of reform base their claims on half-truths and, in some cases, outright distortion of what is actually included in the reform legislation. The truth is that when one examines the actual language in the legislation, it is clear that the provisions fall well within Congress' constitutional authority.

THE POWERS OF CONGRESS

Article 1 Section 8 of the United States Constitution defines the power of Congress to enact laws. Three clauses are particularly relevant to health reform:

1. "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all

CONSTITUTIONAL CHALLENGES

Art. 1, sect. 8 gives Congress the Authority to Tax & Spend for the General Welfare: Critics have argued that the Constitution does not provide Congress the authority to pass health reform legislation. *But Vermont Senator Patrick Leahy counters that Congress actually has a duty to tax and spend for the general welfare. Thanks to Congress' willingness to shoulder this duty, we have child labor laws, social security, and a health care safety net for seniors – Medicare.*²

The 10th Amendment: The powers of Congress *are* limited. The 10th Amendment clarifies that powers not delegated the federal government are reserved to states and the people. However, it's important to note that the powers delegated to Congress are broad – and this is by design. The *Taxing and Spending, Interstate Commerce, and Necessary and Proper Clauses* have consistently been interpreted by the courts as giving Congress great latitude to pass laws to promote the general welfare of the nation's citizens.

1st Amendment Challenges based on religious freedoms. *Federal reforms will either include exemptions on religious grounds or override federal legislation protecting religious freedom.*

Summary adapted from:
www.law.georgetown.edu/oneillinstitute/projects/reform.html

- duties, imposts and excises shall be uniform throughout the United States;”
2. “To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; (often called, “the Commerce Clause”);
 3. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”

The current health reform legislation’s provisions are constitutionally permitted through one or a combination of these three clauses.

1. THE MANDATE

Senator Hatch and Attorney General Shurtleff take issue with the fact that health care reform will mandate that individuals purchase insurance, which is why they claim that such a mandate exceeds Congress’ constitutional authority. As evidence, they point to Supreme Court cases in which mandates that focused on *non-economic* activity (such as carrying firearms within sight of a school) were ruled unconstitutional. Why? Because the Commerce Clause only permits Congress to regulate commerce, or actions that directly affect economic activity.³ But the mandate to purchase health insurance is unquestionably an economic activity and therefore falls well within the authority of the Commerce Clause. Furthermore, health care reform will be enforced through the tax code, another area of congressional lawmaking expressly permitted under Article 1, Section 8. The critics’ claims about the mandate are just plain wrong.

2. THE NEBRASKA COMPROMISE

Critics of health reform have criticized the fact that Nebraska will receive 100% federal funding for the proposed Medicaid expansion, calling it unconstitutional because no other state will receive such a favorable rate. But such discrepancies between states are “business as usual.” Although the Constitution requires Congress to collect taxes uniformly across states, Congress has great discretion around how it allocates or redistributes those tax dollars.⁴ There have always been huge discrepancies between states in their degree of federal Medicaid funding: Some receive a 50% match rate while others receive an 80% match rate, and senators fight hard to get the best possible deal for their state. Critics might well find Nebraska’s deal unsavory or imprudent, but it is absolutely constitutional.

3. STATE BASED EXCHANGES

Senator Hatch claims that national reforms are unconstitutional because they require states to operate health insurance exchanges. He is correct that *requiring* state governments to create such exchanges would exceed Congress’s constitutional authority, and similar provisions have been struck down by the Supreme Court in the past.⁵ But the reform legislation does *not* require states to create and operate exchanges within their state. While it may be in Utah’s best interest to take advantage of this particular option, under the reform legislation states can decline and leave the responsibility for operating

exchanges entirely up to the federal government. Thus, there's no constitutional problem here whatsoever.

Clearly, these "constitutional challenges" don't hold water. They are based on sloppy reasoning, blatant distortions, and outright mistakes. They are intended to stop health care reform by any means necessary. Of course, the critics are perfectly entitled to argue that these reforms involve too much government regulation, but as James Madison noted in Federalist No. 44, such political arguments are best resolved by the ballot box, not the courts.⁶ Utah state legislators should leave aside these flimsy constitutional distractions and return to the real policy debates. With Utah families and small businesses increasingly crushed by the growth in health care costs⁷, we simply do not have time for political parlor games. Unfortunately, the real policy debates in Utah are off to their own shaky start.

CHALLENGES TO NATIONAL REFORM ON *POLICY* GROUNDS--MOSTLY

THE STATES' RIGHTS CASE AGAINST NATIONAL REFORM: HB67

A number of state legislators *are* advancing legitimate, legally-sound attempts to exempt Utah from the provisions of national reform, though these are without merit on policy grounds. Rep. Carl Wimmer has introduced legislation ([HB 67, Health System Amendments](#)) which would essentially tie the hands of the Utah executive branch, making it illegal to implement any of the reforms without direction from the Legislature. This approach is legal, but costly, since any state which "drops out" of national health care policy would be "dropping out" of federal Medicaid dollars. For Utah, that amounts to \$1.2 billion annually. Forgoing these funds will have dire economic consequences for Utah businesses and families.⁸

THE RESOLUTION APPROACH: [HOUSE CONCURRENT RESOLUTION 2](#)

Rep. Julie Fisher (R-Fruit Heights) takes a different approach. She has introduced a softer resolution (HCR 2) urging the federal government and Congress to repeal laws infringing upon states' rights under the Tenth Amendment to the Constitution. While the argument starts with the same unfounded constitutional objections, the focus quickly pivots to the policy front and the same shaky claims about Utah's success on reform. It is almost as if Rep. Fisher and her bill co-sponsors know the constitutional objections will not sustain the case against national health reform. At the very least, Rep. Fisher's resolution may be helpful for giving state lawmakers an opportunity to voice their objections with federal reform.

CONCLUSION

IF THERE IS A CASE AGAINST FEDERAL REFORM, IT STARTS WITH STRONGER STATE REFORMS

The core argument of Senator Hatch, Attorney General Shurtleff, Rep. Wimmer, and Rep. Fisher is that *health reform is best left to the states*. They claim that Utah doesn't need the government telling it what to do, since Utah is already making progress toward meaningful reform. To be sure, Utah has several promising initiatives underway, including payment and delivery system reforms, greater transparency, and even bolder steps are now under consideration, like modified community rating for the entire small group market. But these will not be enough to achieve the broader goals of reform.⁹ Utah and other states have been trying for decades to "fix this ourselves," and we have failed. We cannot sacrifice Utah families and businesses to another round of half-solutions. They desperately need full-blown, comprehensive change, and they need it now. Instead of fighting national reform with far-fetched constitutional arguments, Utah's lawmakers would be better served by getting down to brass tacks and making sure that the federal (and state) reforms work well for Utah businesses and families.

¹ O'Neill Institute for National and Global Health Law (2009). The Constitutionality of Mandates to Purchase Health Insurance. Georgetown University. www.law.georgetown.edu/oneillinstitute/projects/reform.html

² Statement of Senator Patrick Leahy Chairman of the Senate Judiciary Committee, on the Constitutionality of the Health Insurance Reform Legislation (December 22, 2009).

³ In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court held that Congress had no authority under the Commerce Clause to pass a federal criminal statute that forbids individuals from carrying a firearm within 1,000 feet of a school because such action had no direct effect on interstate commerce; In *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court held that a federal law that provided a civil remedy to victims of gender-motivated violence (e.g. domestic violence) unconstitutional because such violence had no direct effect on economic activity.

⁴ U.S. Const. Art. 1. Sect. 8. cl. 1.

⁵ In *New York v. United States*, 505 U.S. 144 (1992), the Supreme Court held that a federal law requiring states to either comply with a federal regulatory plan to dispose of radioactive waste or 'take title' and assume liability of the radioactive waste within their state exceeded Congress' constitutional authority because both options forced states to participate in a federal regulatory scheme; In *Printz v. United States*, 521 U.S. 898 (1997), the Supreme Court held that the Brady Act's requirement that local law enforcement officials conduct background checks on individuals wishing to purchase firearms as exceeding Congress' constitutional authority because it required state officials to enforce a federal law.

⁶ The Federalist Papers are a series of essays written by James Madison, Alexander Hamilton, and John Jay describing the deliberations that occurred during the Constitutional Convention. In Federalist No. 44, James Madison justifies many parts of the Constitution, including those sections which limit the powers of the states and gives Congress authority to execute its powers. James Madison (1788). Federalist Paper No. 44. Library of Congress Online Version: <http://thomas.loc.gov/home/histdox/fedpapers.html>.

⁷ Small Business Majority (2009). *Utah Small Business Survey*. http://www.healthpolicyproject.org/Publications_files/Business/Utah_research_report_062209.pdf. Also see Utah Health Policy Project's (UHPP) summary: http://www.healthpolicyproject.org/Publications_files/Business/UHPPSmallBizSurveySummary7-14-09postJK.pdf.

⁸ UHPP (2009). *2009 Update of the Medicaid Economic Impact Calculator*. http://www.healthpolicyproject.org/Publications_files/Medicaid/FY2010Calculator.pdf.

⁹ UHPP (2009). *Strengthening Utah's Health Insurance Exchange*: http://www.healthpolicyproject.org/Publications_files/USHARE/StrengtheningTheExchangeFinal.pdf. This paper outlines the changes needed to implement true reform in Utah.