

# On the Constitutionality of Health Care Reform

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**O**n March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (“Patient Protection Act”), promising that it “will set in motion reforms that generations of Americans have fought for and marched for and hungered to see.”<sup>1</sup> Minutes later, 14 state Attorneys General sued to prevent implementation of the Act, arguing that it is unconstitutional.<sup>a,2</sup>

The lawsuits might be considered the most recent chapter in the post-1965 health reform saga, in which intense political battles have stymied efforts to address the nation’s growing health care crisis. As this recent battle leaves Congress and heads to the courts, we are reminded of that famous quote: “The law is what the judge says it is.”<sup>b</sup> Similarly, the Constitution is what the Supreme Court says it is, or rather, what a majority of Supreme Court Justices says it is. This commentary describes both the Attorneys General claims and the legal framework in which they will be examined, should their claims proceed to a court’s scrutiny. It must be recognized, however, that any legal analysis of a dispute of this magnitude is inherently connected to the political context in which such a dispute arises. Accordingly, policy experts need to understand both the relevant law and the underlying politics, and any constitutional analysis of the Patient Protection Act rests, as a foundational matter, on the ultimate determination of nine Justices.

## Political Background

As is well known, the Patient Protection Act navigated through highly partisan currents and passed Congress on a narrow party-line vote. Despite repeated exhortations from both Republicans and Democrats that bipartisan consensus is both possible and desirable in any health care reform package,<sup>c</sup> and despite oft-repeated statements by leaders of both parties that Democrats and Republicans are primarily in agreement on most foundational matters,<sup>d</sup> the Act was approved amid highly contentious, and often vitriolic, accusations. Senate Minority Leader Mitch McConnell (R-Kentucky) called the bill “a monstrosity held together by special deals, a rejection of the clear will of the voters, and presidential appeals to put party first.”<sup>3</sup> Senator Jim DeMint (R-South Carolina) called it a “trillion dollar assault on our freedoms [and an] arrogant power grab [that] proves that the President and his party care more about government control than the will of the American people.”<sup>4</sup> Even months after passage, Republican campaign materials continue emphasizing the Act’s promotion of government largess, describing the Act as a “government takeover of health care.”<sup>5</sup> (Democrats, it must be noted, engaged in equally sharp and immoderate language, accusing Republicans of “[standing] with insurance companies and their Washington lobbyists and against reform.”<sup>6</sup>)

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- a. The Florida Attorney General filed a suit on behalf of 13 state Attorneys General, and the Virginia Attorney General filed a separate suit. Additional constitutional challenges against the Patient Protection Act were filed by the Association of American Physicians and Surgeons, Inc., New Jersey Physicians, Inc., and the Thomas More Law Center. The complaint filed by the Florida Attorney General was amended on May 14, 2010, to include two more state Attorneys General and five governors (plus the National Federation of Independent Businesses) bringing the total of state plaintiffs to 20.
  - b. This quote is sometimes attributed to Oliver Wendell Holmes, as emblematic of the philosophy of legal realism. See Brigham J, Harrington C. Realism in the authority of law. *Social Epistemology*. 1991;5(1):20-25 (describing quote as “Holmes’s dictum”). Other sources attribute the quote to Lord Reid, in: Reid L. The judge as law maker. *J Socy Pub Tchrs L*. 1972;12(22):22-29.
  - c. See, e.g., Chaddock GR. A bipartisan health care plan? ‘Yes we can,’ say former senate leaders. *Christian Science Monitor*. June 17, 2009 (describing a bipartisan proposal by former Senators Daschle, Dole, and Baker as “a counterpoint to the first Senate markup of health care legislation, which fell out along sharply partisan lines”).
  - d. See, e.g., Berger J. McCain nudges Obama toward his party’s health plans. *New York Times*. January 24, 2010 (reporting that Republican Senator John McCain, whom Obama defeated in the 2008 presidential election, urged Democrats to join Republicans in bipartisan negotiations, saying “[t]here are things we can agree on”); Obama BH. *Remarks at the Opening Session of a Bipartisan Meeting on Health Care Reform* [transcript]. <http://www.gpo.gov/fdsys/pkg/DCPD-201000122/pdf/DCPD-201000122.pdf>. Published February 25, 2010. (“[W]hen I look at the ideas that are out there, there is overlap. It’s not perfect overlap, it’s not a hundred percent overlap, but there’s some overlap.”)

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Republican fears of unconstrained and corrupting government expansions of power are echoed in the state Attorneys' General suits.<sup>e</sup> The complaint filed by the Florida Attorney General, which was amended on May 14th and now is on behalf of 20 state plaintiffs, decries the Patient Protection Act as "an unprecedented encroachment on the liberty of individuals" and "an unprecedented encroachment on the sovereignty of the states."<sup>7</sup> Accompanying lawsuits challenging the Patient Protection Act's constitutionality

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further charged that the Act "imposes unprecedented government mandates that restrict the personal and economic freedoms of American citizens,"<sup>8</sup> "forc[es] the collectivization of health care and the establishment of a system of socialized health care in this country,"<sup>9</sup> and requires judicial relief "to preserve individual liberty and choice under Social Security, as well as to prevent...bankrupting the United States generally and Medicare and Social Security specifically."<sup>10</sup>

Behind the complaints' sweeping rhetoric are important legal issues that implicate nothing less than foundational

constitutional principles. The Constitution creates a federal government of only limited authority, and thus any federal action must rest on one of the enumerated powers listed in the Constitution. But the Constitution also places additional independent limits on federal powers, and any federal action that transgresses these limits is unconstitutional even if it is otherwise within one of the enumerated powers. Accordingly, a constitutional analysis of the Patient Protection Act will proceed in two parts: (1) does the authority to implement the Act reside within one of the federal government's enumerated powers? And if so, (2) does the implementation of the Act transgress one of the Constitution's independent limits on federal power? The constitutional provisions that will be interpreted and applied in this analysis are the provisions intended to preserve the nation's federalist system.

The constitutional challenges to the Patient Protection Act rest primarily on two arguments, each corresponding to one of the steps in the above constitutional analysis.<sup>f</sup> The first argument charges that the Patient Protection Act relies on federal powers that are beyond those enumerated in the Constitution. The second argument claims that the Act encroaches upon the sovereignty of the states and thereby transgresses independent constitutional limits on federal power. Thus, two related and fundamental constitutional principles—limits to federal power and protections of state sovereignty—serve as the foundations to the legal attacks on the Patient Protection Act. They also have been the focus of what were likely the Rehnquist Court's<sup>g</sup> most significant decisions. All of the Rehnquist Court's seminal cases that delineated its federalism jurisprudence were divisive five-to-four decisions, and even though four of the Rehnquist Court's nine Justices have since retired, the Court's current make-up (assuming Elena Kagan is confirmed as the next Justice and

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e. Additional partisan tension has erupted within individual states. Four Democratic governors promptly distanced themselves from their own Attorneys General, stating their support for health reform and calling the Act "the single most important reform of our health care system in decades." Pennsylvania Office of the Governor. Governor Rendell joins other governors in offer to help US Attorney General defend legality of new national health care act [press release]. Published March 26, 2010. [http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS\\_0\\_789728\\_0\\_0\\_18/Governor%20Rendell%20Joins%20Other%20Governors%20in%20Offer%20to%20Help%20U.S.%20Attorney.doc](http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS_0_789728_0_0_18/Governor%20Rendell%20Joins%20Other%20Governors%20in%20Offer%20to%20Help%20U.S.%20Attorney.doc) (reprinting governors' letter to US Attorney General Eric Holder). Meanwhile in Georgia, the Democratic Attorney General refused the request of the state's Republican governor to challenge the federal health reform law. See Baker TE. *Letter to Governor Sonny Perdue*. Published March 24, 2010. [http://law.ga.gov/vgn/images/portal/cit\\_79369762/157880827Response%20to%20Perdue.pdf](http://law.ga.gov/vgn/images/portal/cit_79369762/157880827Response%20to%20Perdue.pdf). ("This litigation is likely to fail and will consume significant amounts of taxpayers' hard-earned money in the process.")

f. The collection of legal challenges to the Patient Protection Act include other legal arguments in addition to these two constitutional claims, including the Thomas More Center's claims that the Patient Protection Act violates the Equal Protection Clause, the Due Process Clause, and the Free Exercise Clause, and additionally amounts to an unconstitutional tax; the Association of American Physicians and Surgeons' claims that the Act was passed in violation of federal officials' fiduciary duties to the United States; and the New Jersey Physicians, Inc.'s claim that the Act "denies the republican nature of our system of government."

g. Chief Justice William Rehnquist; member of USSC from September 26, 1986-September 3, 2005.

votes similarly to President Obama's first selection) appears to be unchanged on matters of federalism. It might even be said that on these contentious matters, the Supreme Court has been as partisan as Washington's other politicians.

Thus, there is an ideological parallel between the legislative politics that surround passage of the Patient Protection Act and the judicial politics underlying the Rehnquist Court's new federalism. However, perhaps unlike the nation's elected officials, the Supreme Court features the admirable quality that even when bitterly divided, the Court's majorities and dissents must justify their votes on principled and detailed legal arguments. The Court puts on an intellectually transparent process, and any judicial action is expected to relate to current law and be attendant to values that reflect the foundation of our system of government. Accordingly, those legal principles and political values deserve serious discussion.

### Enumerated Powers

The search for enumerated constitutional powers that authorize Congress to pass the Patient Protection Act includes a clever lawyer's trick: the matter of characterization. The lawsuits aimed at the Act include a challenge to the "individual mandate," the requirement that each American (subject to certain exceptions and subsidies) is required to purchase health insurance. Congress' authority to require such a mandate would fall under Congress' power to regulate interstate commerce. However, some cleverly observe that the so-called individual mandate is merely a tax (and, at a maximum of \$2,250 per family per year, not a very large tax) that is assessed on those who opt not to purchase health insurance, much like a fine the Environmental Protection Agency might impose on those who fail to comply with certain environmental regulations. If the "mandate" is nothing more than a tax, then Congress' power to impose such a mandate-cum-tax falls under its general taxing powers. Accordingly, how one characterizes what Congress has done can meaningfully determine whether Congress has the power to do it.

### The Commerce Clause

The Commerce Clause grants the federal government the power "to regulate commerce with foreign nations and among the several States."<sup>11</sup> The Supreme Court in the previous century took the Commerce Clause on a jurisprudential rollercoaster, first reading the Clause narrowly to authorize Congress to regulate strictly commercial matters that indisputably involved interstate transactions, and then reading the Clause broadly to authorize Congress to regulate any conduct that indirectly affected interstate prices and commercial exchange (which is virtually everything). The

Rehnquist Court pulled the pendulum back in the 1995 seminal case *United States v. Lopez*,<sup>12</sup> both reasserting limits to Congress' commerce power and reiterating that the federal government is endowed only with enumerated powers.

In *United States v. Lopez*, the Court ruled that Congress did not have the authority under the Commerce Clause to pass the Gun Free School Zones Act of 1990, which prohibited the possession of a firearm in a school zone. Writing for the five-member majority, Chief Justice Rehnquist concluded that "[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."<sup>13</sup> The Court went on to rule that unless a disputed congressional action squarely regarded a channel or instrument of interstate commerce, then Congress' authority under the Commerce Clause is limited to activities that "substantially affect" interstate commerce.<sup>14</sup>

*Lopez*, much more than invalidating the Gun Free School Zones Act of 1990, reestablished limits to Congress' commerce power,<sup>h</sup> and it accordingly holds great appeal to conservative jurists and politicians who object to laws that restrain or dictate economic conduct. Many opponents of the Patient Protection Act invoke these conservative principles in objecting to the Act's "individual mandate" for the purchase of health insurance, arguing that requiring individuals to purchase any good or service infringes on economic liberties and amounts to a government intrusion into the personal sphere. Accordingly, invoking *Lopez*, they argue that such a government mandate is beyond the powers allocated to Congress by the Constitution. Georgetown Law Professor and libertarian jurist Randy Barnett argues that the Commerce Clause authorizes Congress to regulate only commercial activities, and that "the health care mandate does not purport to regulate or prohibit activity of any kind, whether economic or noneconomic. To the contrary, it purports to 'regulate' inactivity."<sup>15</sup> Conservative legal commentator David Rivkin offers a more existential argument, decrying that "the problem with an individual insurance purchase mandate...is that it does not regulate any transactions at all. It regulates human beings, simply because they exist."<sup>16</sup> And John Yoo, who served as Deputy Attorney General under President George W. Bush, puts it in blunt and colloquial terms: "the Court has never upheld a federal law that punishes Americans for exercising their God-given right to do absolutely nothing."<sup>17</sup>

Jurists supportive of the Patient Protection Act are predictably both more sympathetic to exercises of federal power and more expansive in interpreting what federal powers are authorized under the Commerce Clause. Some, such as the American Constitutional Society's Simon

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h. The Supreme Court, in another bitter five-to-four decision, reaffirmed these limits on Congress' commerce power in *United States v. Morrison* (2000), which invalidated certain provisions of the Violence Against Women Act of 1994.

Lazarus, argue that even under *Lopez*, the individual mandate is squarely within the powers authorized by the Commerce Clause. Since insurance markets often require regulation to facilitate risk pooling, avoid adverse selection, and organize efficient claims administration, Lazarus concludes that the individual mandate is an “eminently lawful” exercise of the Commerce Clause’s power.<sup>18</sup> Noted liberal scholar and dean of the University of California Irvine School of Law, Erwin Chemerinsky, frames the conservative argument in terms of individual rights rather than on limits on federal power, and argues that “there is no constitutionally protected freedom to be able to refuse to be insured or to avoid paying for the benefits provided.”<sup>16</sup>

Within the debates interpreting the scope of *Lopez* and the meaning of the Patent Protection Act’s individual mandate, an ideological divide emerges that parallels the divide among the legislators who debated it in Congress. Although legal analysis is often depicted as a technical and non-ideological enterprise, it should not be surprising that one’s political philosophy—and perhaps one’s opinion of the underlying legislation—shape one’s legal analysis.<sup>i</sup> What might distinguish this constitutional debate from typical political clashes, however, is how necessarily forward-looking it is. It is—or should be—recognized that whatever the Constitution authorizes a Democratic Congress to do today, it theoretically authorizes a Republican Congress to do tomorrow.

### **The General Welfare Clause**

Congress’ power to tax falls within the General Welfare Clause, which empowers Congress “To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States.”<sup>19</sup> If the “individual mandate” is little more than a tax (that can be avoided if insurance is purchased), then the constitutionality of the mandate-cum-tax is assessed under the General Welfare Clause.<sup>j</sup>

The General Welfare Clause has not (yet) undergone the same jurisprudential swings as the Commerce Clause. Although the Supreme Court in the 1930s and 1940s concurrently expanded Congress’ authority under both clauses, the Rehnquist Court pulled back only on the

Commerce Clause power. In contrast, the Court has not departed from its New Deal rulings that granted Congress broad authority and discretion to tax under the General Welfare Clause.

The leading authority continues to be the 1936 case of *United States v. Butler*,<sup>20</sup> in which the Court, echoing Alexander Hamilton during the Constitutional Convention, ruled that the General Welfare Clause gives Congress “a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.”<sup>21</sup> The Court later gave Congress additional latitude under the Clause, ruling that Congress also had the discretion to decide whether certain taxes or expenditures advance “the general welfare.”<sup>22</sup> This constitutional threshold is much more easily satisfied than the *Lopez* test, and thus current interpretations of the General Welfare Clause likely support Congress’ authority for instituting the tax embedded within the Patient Protection Act’s insurance mandate.<sup>k,23</sup>

Of course, what the Supreme Court giveth it can also taketh away. Some have advocated that *Lopez* and the Rehnquist Court’s other federalism watershed decisions should be extended to *Butler*, and thereby limit Congress’ authority under the General Welfare clause.<sup>24</sup> It certainly is possible that the Court might reign in Congress’ other powers, including those under the General Welfare Clause, and continue the Rehnquist Court’s reconceptualization of federalism. While such a ruling would likely expose many laws to new constitutional scrutiny, it also would reduce the sometimes artificial distinction between mandates from taxes.

### **Independent Limits to Federal Power—Anti-Commandeering and the 10th Amendment**

Even if the power to pass the Patient Protection Act does fall within Congress’ enumerated powers, independent constitutional limits on federal authority might nonetheless make the Act unconstitutional. The state Attorneys General invoke a number of constitutional provisions—including Article 1 Sect. 1, Article 1 Sect. 2, and Amendments 5, 9, and 10—that, they claim, are designed to preserve their states’ sovereignty against overreaching federal policy.

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i. This phenomenon might be related to “cognitive biases” exhibited by other professionals, such as how environmental forces and preexisting beliefs have been shown to frequently shape physician diagnoses. See, for example, Wennberg D, Dickens J Jr, Soule D, et al. The relationship between the supply of cardiac catheterization laboratories, cardiologists and the use of invasive cardiac procedures in northern New England. *J Health Serv Res Policy*. 1997;2(2):75-80.

j. Perhaps the leading commentator who characterizes the mandate as a tax (for constitutional purposes) is Jack Balkin, a professor at Yale Law School and creator of the popular Balkinization blog for constitutional legal analysis.

k. Even if the individual mandate is, for constitutional purposes, merely a tax, some of the complaints allege that it is an unconstitutional tax, prohibited by Article I, Sect. 2 and Sect. 9. These constitutional provisions prohibit direct capitation taxes on individuals, such as head taxes, if they are not apportioned by the states. Critics of the Patient Protection Act argue that the mandate-cum-tax is a direct capitation tax because it is assessed on each individual. Defenders say it is a penalty tax, not a capitation tax, because it does not tax the general population but rather a subset of individuals based on their conduct. The Supreme Court has narrowly defined direct taxes and thus limited the taxes that would require state apportionment, but it has spoken very infrequently on the distinctions among permissible and impermissible taxes since the 16th Amendment, authorizing Congress to impose an income tax, was ratified in 1913.

The length of this list of constitutional provisions suggests that the argument in defense of state sovereignty is based as much on the structure of the Constitution as it is on any single clause. But more than any competing provision, the 10th Amendment represents the Constitution's protections of state sovereignty, and the leading cases that protect that authority are derived primarily from that Amendment.

The 10th Amendment, in its entirety, reads "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>25</sup> Justice Story<sup>l</sup> famously described the Amendment as "a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution," and saying little more than "what is not conferred, is withheld, and belongs to the state authorities."<sup>26</sup> Nonetheless, the 10th Amendment has come to represent the "Court's consistent understanding [that] 'the States unquestionably do retain a significant measure of sovereign authority.'"<sup>27</sup>

The 1992 case of *New York v. United States*<sup>28</sup> is a modern and seminal expression of the Court's recent 10th Amendment jurisprudence. The case arose when New York State objected to its obligations under the Level Radioactive Waste Policy Amendments Act of 1985, in which Congress required states to devise plans to dispose of waste generated within their borders. After conceding that "the Court's jurisprudence in this area has traveled an unsteady path,"<sup>29</sup> a five-member Supreme Court majority ruled that the 10th Amendment prohibited full implementation of the 1985 Act. The Court concluded that the 10th Amendment restricts how the federal government may "use the States as implements of regulation," and that it specifically proscribes Congress from "commandeer[ing] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."<sup>30</sup> The Act accordingly violated the 10th Amendment by "commandeering" the states' legislatures to implement the federal waste disposal policies. The Supreme Court, in an identical and equally contentious five-to-four decision, reiterated the 10th Amendment's "anti-commandeering" protections of state sovereignty in *Printz v. United States* (ruling, in 1997, that the 10th Amendment prohibits Congress from commandeering state executives to implement federal policy) and *Alden v. Maine* (ruling, in 1999, that the 10th Amendment similarly prohibits the commandeering of state courts).

It is this resistance to being "commandeered" by federal policy, and the anti-commandeering principles embedded in *New York* and related 10th Amendment cases, that motivate

the state Attorneys' General second species of constitutional challenges to the Patient Protection Act. This same inclination to assert state autonomy motivated the State of Virginia to enact a "nullification statute" stating that "no resident of this Commonwealth...shall be required to obtain or maintain a policy of individual insurance coverage."<sup>31</sup> (Idaho and Utah have enacted similar statutes, and at least 33 states are reportedly considering other measures.)<sup>32</sup> The constitutional challenges to the Patient Protection Act arise from the states' attempts to assert sovereignty over their own health policy.

The state Attorneys' General complaints specifically protest the Patient Protection Act's charging states to establish local insurance exchanges, in which state residents can purchase, and the state's insurance companies can market, health insurance policies. The complaints allege that setting up these exchanges will require state budgetary and personnel resources, and that the Patient Protection Act's expansion of Medicaid benefits will burden already-strained state Medicaid programs. These requirements amount, according to the complaint drafted by the Florida Attorney General, to "effectively co-opting the Plaintiffs' control over their budgetary processes and legislative agendas through compelling them to assume costs they cannot afford, and ...depriv[ing] them of their sovereignty and their right to a republican form of government."<sup>7</sup>

Defenders of the Patient Protection Act first observe that Medicaid is a voluntary program from which states may opt out, if they are willing to forgo their share of the very substantial federal Medicaid funds.<sup>m</sup> Moreover, they observe that states are merely invited to set up their exchanges, and that the federal government will set one up for them if they fail to do so. These legislative provisions might reflect what the *New York Times* described as the Patient Protection Act's "careful" drafting process, designed for the new law "to withstand just this kind of challenge."

Perhaps a larger legal obstacle to these assertions of state autonomy is the Supremacy Clause, which states that Congressional Acts "shall be the supreme Law of the Land."<sup>34</sup> Writing in the *New England Journal of Medicine*, Timothy Jost, a professor at Washington and Lee University School of Law, cites unsuccessful examples of state nullification laws throughout history, suggesting that "although the [Virginia] bill is phrased in the passive voice, its intent is clearly to block the implementation of a federal mandate requiring all individuals to carry health insurance. But achieving this aim is constitutionally impossible."<sup>35</sup> Accordingly, the federal government's authority is supreme so long as it operates

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l. Chief Justice Joseph Story; member of USSC from November 18, 1811–September 10, 1845.

m. The Supreme Court in *New York* reiterated that Congress retains broad authority to induce certain action from states by placing conditions on federal funding. 505 US 144, 166-67. It has been observed that the growth of the federal government might mean that giving Congress broad "spending power" could undermine any remaining federalism limit on federal authority, and thus the Supreme Court might ultimately reign in this broad authority as well. See Siegel NS. Dole's future: a strategic analysis. *Sup Ct Econ Rev*. 2008;16:165-204.

within its enumerated powers and does not encroach upon an independent constitutional limit, and just as the federal government might be limited from making state policy, the states are prevented from making (or blocking) federal policy. Thus, although parts of the Constitution are clearly designed to protect state sovereignty, other—arguably more potent—parts clearly limit it.

### Next Steps? Political Rhetoric, Legal Parsing, and Substantive Policy

Some conservative legal scholars have said publicly that the Attorneys' General suits (and likewise similar arguments by conservative jurists) are politically motivated and are unlikely to garner judicial sympathy. Charles Fried, who served as Solicitor General under President Ronald Regan, was quoted for saying of the legal challenge, "I am prepared to say it's complete nonsense."<sup>36</sup> But most Court watchers were surprised when the Court handed down *Lopez*, the first judicially-imposed limit on Commerce Clause authority since the New Deal, and the Court's recent expansion of the 10th Amendment similarly reversed prior constitutional trends and expectations. Given the Court's often unpredictable penchant for leveraging a five-member majority to achieve potent and far-reaching constitutional shifts, the legislative significance of the Patient Protection Act might attract, rather than deter, Supreme Court scrutiny.<sup>n</sup> Of course, since most of the Patient Protection Act's provisions won't go into effect until 2014, the identity and proclivity of that five-member majority remains unknown.

Yet there remain at least two tragic disconnects in this rhetorical debate over federal power. The first is the irony between the states' assertions of sovereignty and the states' true potential to shape health care policy. The real source of frustration to advocates of state sovereignty in health policy is that, at least since 1965, American health policy has been largely federal policy. It has become conventional policy wisdom that meaningful health reform requires federal action, whereas state action is sought primarily by those pursuing incremental reform or experimental tinkering. Yet state law governs a host of important implements of health policy—including professional licensure, medical torts, insurance regulation, and the administration of Medicaid—

that arguably exceeds the significance of federal policy. Because the size and influence of the federal budget swamps what states can afford, it is predictable and understandable that the federal government has the oversized influence on health policy (and most policies) that it does. But this need not be so. To the contrary, it might be in state experiments—particularly the fusion of health policy with the instruments of other policy, such as education and public safety—that holds the greatest promise for redressing America's health crisis. The nation continues to invest in health care expenditures without recouping returns in improved health, so perhaps it is the non-medical and ground-level reforms—which are in the domain of the states—that will have the greatest impact.<sup>o</sup> Thus, those seeking to assert state sovereignty in making health policy both have a broad menu of meaningful policy options available and should be encouraged to thoughtfully exercise that sovereignty.

The second disconnect is between the rhetoric and reality of the Patient Protection Act, which is commonly presumed to be (even if constitutional) an expansive exercise in federal power. In budgetary terms, and perhaps in constitutional terms, it arguably is. But it can barely be expected to put a dent into America's growing and consuming health care crisis. The nation's health care system is commonly characterized as a three-dimensional crisis of insufficient access, excessive costs, and inadequate quality. The Patient Protection Act might amount to a meaningful expansion in health care access, but it does nothing to reduce the costs of health care or improve the quality of health care services. For a nation that now spends over 17% of its gross domestic product on health care and over twice the per capita average of the 10 richest nations,<sup>37</sup> yet exhibits health outcomes that are worse than nearly all of its OECD colleagues,<sup>p</sup> laurels cannot rest following an expansion of access. Far from being either "reforms that generations of Americans have fought for"<sup>1</sup> or a "trillion dollar assault on our freedoms,"<sup>4</sup> the Patient Protection Act is more likely a mere first step in a desperately needed overhaul of our health care system. Unless health care expenditures are contained, and unless our health care system can more efficiently improve the nation's health, then the Act's expansion of access to health insurance will mean little more than accelerating

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n. Shortly after the Bill's passage, Georgia's Republican Senator Saxby Chambliss insisted, "There are such significant issues that the court could very well declare the bill unconstitutional." See, "Healthcare reform may reach high court." UPI.com website. [http://www.upi.com/Top\\_News/US/2010/03/29/Healthcare-reform-may-reach-high-court/UPI-22701269882434/](http://www.upi.com/Top_News/US/2010/03/29/Healthcare-reform-may-reach-high-court/UPI-22701269882434/). Published March 29, 2010. But George Washington University Law professor Orin Kerr took a pragmatic view of the chances a challenge would actually make it to the Supreme Court: "there would first need to be a circuit court that would vote to strike down the mandate. Presumably you'd have to bring the challenge...; pray you get a panel with at least two of the circuit's more aggressive conservatives; and then hope you can get past a rehearing vote. But the odds of that are pretty low. There's a chance, I think, but it's a relatively low one." Kerr O. More on the chances courts would strike down individual mandates. The Volokh Conspiracy website. <http://volokh.com/2010/03/23/more-on-the-chances-courts-would-strike-down-the-individual-mandate/>. Published Mar. 23, 2010.

o. My own foray into this topic is: Richman B. Behavioral economics and health policy: understanding Medicaid's failure. *Cornell L Rev.* 2005;90(3):705-768.

p. Some health statistics detailing how the United States compares to other OECD nations are available at: <http://stats.oecd.org/Index.aspx?QueryName=254&QueryType=View>.

overspending and squeezing out other social investments. Hopefully any debate over the constitutionality of the Patient Protection Act will not distract the public from the substantial work that remains. **NCMJ**

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