

Overview of the Affordable Care Act Litigation

Sara Rosenbaum
Harold and Jane Hirsh Professor of
Health Law and Policy
February 14, 2012

Key Decisions Below

Florida et al. v United States Department of Health and Human Services et. al. 648 F. 3d 1235 (11th Cir., 2011), holding that the minimum essential coverage requirement is unconstitutional, the Medicaid expansions are constitutional, and that the minimum essential coverage requirement is severable

Liberty University v Geithner, 2011 WL 3962915 (4th Cir., 2011), holding that the Anti-Injunction Act bars a challenge to the minimum essential coverage requirement

Thomas More Law Center v Obama, 651 F. 3d 529 (6th Cir., 2011), upholding the constitutionality of the minimum essential coverage requirement

Seven-Sky v Holder, 661 F. 3d 1(D.C. Cir., 2011), upholding the constitutionality of the minimum essential coverage requirement

Virginia ex rel Cuccinelli v Sebelius, 656 F. 3d 253 (4th Cir., 2011), holding that the state of Virginia lacks standing to challenge the constitutionality of the minimum essential coverage requirement

The Issue and the Questions

NFIB v Sebelius (No. 11-393); HHS v Florida (11-398); Florida v HHS (11-400) represent a defining struggle over the scope of Congressional powers to create a multi-strategy approach to a national problem that regulates markets as well as state coverage practices under a federal grant-in-aid program

1. Whether Congress has the power under Article I of the Constitution to enact the minimum essential coverage provision.
2. If unconstitutional, can the minimum coverage requirement be severed from the remainder of the Act?
3. Whether the Medicaid expansions, which are mandatory conditions of state participation, amount to unconstitutional coercion
4. Whether the Anti-Injunction Act, 26 U.S.C. 7421(a), bars a challenge to the minimum coverage provision until it is actually implemented.

Minimum Essential Coverage Requirement

- **Opponents of the Minimum Coverage Requirement**
 - Congress cannot rely on its commerce clause powers, because uninsured people are outside any market and cannot be compelled to participate in the insurance market without violating their liberty interests
 - Because the ACA involves a penalty rather than a taxing solution, Congress cannot rely on its taxing powers
- **Defenders of the Minimum Coverage Requirement**
 - Uninsured people in fact burden commerce because everyone uses health care, use cannot be predicted, and the national economic consequences of having the uninsured in the health care system are enormous
 - Requiring people to participate in a market has foundational precedent in *Wickard v Filburn*, 317 U.S. 111 (1942) in many ways the alpha case
 - The minimum essential coverage requirement is part of a broader system of insurance regulation and is thus necessary and proper to the stabilization of the market for health care
 - Like Social Security, the requirement is structured as an amendment to the Internal Revenue Code, and rests on Congress's taxing powers

Medicaid Expansion

- **Opponents of the Medicaid Expansion**

- This expansion is fundamentally different from all previous mandatory Medicaid expansions, which provided states with considerable flexibility
- This expansion is vastly bigger than earlier expansions and is inextricably linked to the universal coverage provisions of the ACA, which extend the minimum coverage requirement to virtually all Americans while barring the poorest Americans from any source of affordable coverage other than Medicaid. States are thus put into the position of having to participate in the expansion and face the loss of all Medicaid funds if they do not.
- In so doing, the Act changes Medicaid's fundamental terms, violates the coercion test in *South Dakota v Dole*, 483 U.S. 203 (1987) because it turns a spending program into federal regulation of the states, on penalty of losing all federal funds for non-compliance

Medicaid Expansion

- **Defenders of the Medicaid Expansion**

- This Medicaid expansion is like all prior mandatory expansions
- Congress historically has enacted Medicaid mandates as part of broader legislation aimed at achieving national health policy goals such as prescription drug coverage for the elderly, child health policy, and disability and health policy
- Medicaid remains voluntary, and Congress is paying nearly all of the expansion costs associated with establishing a coverage pathway for the poorest people
- The poorest Americans (incomes below not meet IRS filing threshold) are exempt from the minimum coverage requirement
- Congress expressly reserved the right to amend Medicaid, and the Secretary is empowered to create appropriate and lesser penalties

Severability

- **Proponents of Non-Severability**

- Severability turns on Congressional intent; Congress intended to link the insurance market reforms to a guaranteed pool of healthy risks in order to avert consumers from delaying enrollment until they are sick
- If the market reforms and coverage requirements fail on severability grounds, the Court should strike the entire law rather than just guaranteed issue and community rating

- **Proponents of Severability**

- Congress has a long history of regulation of health care through the Internal Revenue Code, ERISA, the Public Health Service Act, Medicare, and Medicaid. The ACA builds on these bodies of law and fills numerous gaps in the federal regulatory scheme
- Many ACA reforms already have taken effect, addressing issues other than the minimum coverage provision. These provisions address public health, Medicaid reforms, the scope and quality of individual and group coverage, and fraud and abuse.
- Non-severability proponents lack standing to challenge these ACA provisions
- In the event that it finds that the minimum coverage provision is unconstitutional, the Court should limit a finding of non-severability to the pre-existing condition exclusion and the community rating provisions. All other provisions can operate independently of the minimum coverage provision

Anti-Injunction Act

- **Proponents of the AIA as a Barrier**
 - The Court should reject any challenge to the minimum coverage requirement because, in accordance with the ruling in *Liberty University v Geithner* (2011 WL 3962915), the requirement is a tax and therefore the courts do not have the power to hear a challenge until an individual actually is penalized for failing to satisfy the requirement
- **Opponents of the AIA as a Barrier**
 - Although the minimum coverage requirement may rest on Congress's taxing powers, for purposes of the AIA, the minimum coverage provision amounts to a penalty and thus is not the type of tax that cannot be challenged until applied

The Decision's Ultimate Meaning

- **From a constitutional perspective**
 - One of the defining cases of our time that potentially could reshape Congress's powers to regulate commerce and to set minimum conditions on state participation in Spending Clause programs such as Medicaid and education and a range of federal programs under federal civil rights laws
 - Short of a Medicare-like approach linking taxes to public insurance, Congress may be able to incentivize but not command states or individuals
- **From a health policy perspective**
 - May mean little. A decision to uphold the law may not change opponents' efforts to repeal/replace. A decision striking down the minimum coverage requirement and/or the Medicaid expansion may trigger a scramble to restructure
 - Further policy interventions will be shaped by a Court decision to narrow Congressional powers to establish minimum standards for individuals and states

For highlights of the Supreme Court briefs
go to
<http://www.healthreformgps.org/?s=supreme+court+briefs>