Supreme Court's Obamacare Decision Renders Federal "Tort-Reform" Bill Unconstitutional

by

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Congressional schemes to federalize state health care lawsuits always have been constitutionally suspect. But Chief Justice John Roberts' opinion in last year's "Obamacare" case really knocks the props out from under them.

Under the proposed Title V of the American Health Reform Act, Congress would assume vast control over state judicial systems. Some of the bill's provisions would be reasonable if adopted at the state level. But for Congress to start micro-managing state courts and state juries should frighten anyone who cares about our American constitutional system.

This essay addresses four subjects. First, it outlines some of Title V's objectionable features. Second, it explains how advocates of the measure try to justify it constitutionally. Third, it shows why the proposal far exceeds congressional powers under our Constitution when that document is read as the Founders intended. Finally, it explains why the bill is likely unconstitutional under modern Supreme Court law as well—and specifically under Chief Justice Roberts' Obamacare decision.

What Title V Would Do.

The bill would rewrite personal injury law extensively—and not just in federal courts administering federal law. It would intrude on state courts applying state law. For example, the bill requires state judges and juries to adopt federal standards of proof, federal standards of guilt, federal damage rules, and federal

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deadlines. It imposes rules for attorneys' fees that override both state law and private contracts. It even mandates that some useful information be withheld from juries.

Many members of Congress were elected after affirming their commitment to federalism—that is, to "states' rights." So Section 508 of the bill is entitled "State Flexibility and Protection of States' Rights." But the title is misleading.

The very first sentence of Section 508 is about federal supremacy, not state flexibility. It reads, "The provisions governing health care lawsuits set forth in this subtitle preempt, subject to subsections (b) and (c), State law to the extent that State law prevents the application of any provisions of law established by or under this subtitle."

And what of subsections (b) and (c)? They provide that states may establish rigid damage caps, but may not leave damages to the jury—and that states may make it harder for plaintiffs to prevail, but not easier! In other words, a state may be "flexible" if it does what Congress likes, but not what Congress doesn't like.

How Supporters of Title V Try to Justify It.

How can advocates justify constitutionally this massive intrusion into state and local governance? They really can't. So they finesse the issue in precisely the same way the sponsors of Obamacare did: They invoke Constitution's much-abused Commerce Power.

Their argument has two components. First, they claim that the Founders crafted the Commerce Power broadly enough to allow Congress to intervene. Secondly, they claim that even if the Constitution, properly understood, does not authorize Title V, the Supreme Court still will uphold it under its modern Commerce Power jurisprudence.

The first claim is misrepresentation so gross as to be ludicrous. The second claim would be more plausible—except that the discussion of the Commerce Power in Chief Justice Roberts' Obamacare decision kicked away much of its support.

Why Title V Violates the Founders' Design.

If there is one thing that can be asserted with absolute confidence about the American Founding, it is this: Federal control over state judges, state juries, and

state tort law is emphatically NOT what the Founders intended. The Constitution created a federal government limited to enumerated (listed) powers, and the Founders did not design those powers to include federal control of state civil justice. *The evidence on this point is overwhelming.*

In 2011, I investigated the issue thoroughly, and reported my findings in a detailed paper entitled *The Roots of American Judicial Federalism*, available at http://constitution.i2i.org/files/2011/11/Roots_Am_Federalism.pdf. That paper showed that (1) a core reason the Founders fought the American Revolution was to assure local control of courts, (2) the Constitution was structured to achieve the same goal, and (3) leading Founders specifically represented—not merely once or twice, but again and again—that state civil justice systems and tort law would remain free of federal control. Despite a few half-hearted assertions to the contrary, the paper's conclusions have never been seriously challenged.

The Importance of the Obamacare Case: Why Title V Likely Violates Modern Commerce Power Doctrine.

Technically, the Commerce Power stems from two separate constitutional provisions. One is the Commerce Clause (Article I, Section 8, Clause 3). It grants Congress authority "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." By "Commerce," the Founders did not mean everything economic. They meant trade among merchants, transportation, commercial paper, and a few associated activities. Contrary to widespread belief, the Supreme Court has never really changed this definition, except when it ruled in a 1944 case that "Commerce" also included insurance.

The other component of the Commerce Power is the Constitution's Necessary and Proper Clause (Article I, Section 8, Clause 18). This refers to Congress's authority to make laws "necessary and proper" for carrying out its other powers. The Founders did not intend the Necessary and Proper Clause to actually give Congress additional authority. Its purpose—as we know from 18th century legal sources and from statements from Founders such as Hamilton, Madison, and James Wilson—was merely to inform the reader that the itemized powers should be read to include certain subsidiary or "incidental" authority.

The leading Supreme Court case on the Necessary and Proper Clause is McCulloch v. Maryland. In that case, Chief Justice John Marshall also explained that the Clause did not grant to Congress any "great substantive and independent powers." Moreover, in Gibbons v. Ogden (the first great Commerce Power case) Marshall added that "health laws of every description" were outside the federal

sphere and exclusively reserved to the states. In other words, under the view of the greatest chief justice in American history, both Title V and Obamacare are utterly unconstitutional.

Supporters of Title V nevertheless point out that the modern Supreme Court has allowed Congress to go beyond those limits. That is true: In 20th century cases such as Wickard v. Filburn (1942), the Court re-wrote the Necessary and Proper Clause to allow Congress more "great substantive and independent powers." The problem for Title V's sponsors, however, is that Chief Justice Roberts has informed us that those days may be over.

The most famous part of his Obamacare opinion upheld the individual insurance mandate as a tax. But Roberts issued three other rulings as well:

(1) The mandate was outside Congress's power under the Commerce Clause;

(2) The mandate was outside Congress's power under the Necessary and Proper Clause; and

(3) Obamacare's effort to force its Medicaid expansion on the states also violated the Necessary and Proper Clause.

Observers who understand that the Supreme Court has not greatly expanded the Founders' definition of "commerce" were not surprised by the first ruling. A mandate that someone buy insurance is not "commerce" as the Constitution uses the term. Neither, for that matter, is a health care lawsuit.

But many found Roberts' second holding more surprising: Roberts announced a reversion to the original understanding of the Necessary and Proper Clause. Here is a passage from his opinion (with some punctuation removed):

> Although the Clause gives Congress authority to legislate on that vast mass of incidental powers which must be involved in the constitution, it does not license the exercise of any "great substantive and independent power[s]" beyond those specifically enumerated. . . . Instead, the Clause is merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant. . . . [T]he individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. . . . This is in no way

> an authority that is "narrow in scope" or "incidental" to the exercise of the commerce power. . . .

In a Yale Law Journal article, Professor William Baude shows why this language is important: Roberts is saying that if the Constitution doesn't specifically give Congress a "great substantive and independent power," then the Necessary and Proper Clause doesn't give it to Congress either.

Is control of the state court systems a "great substantive and independent power?" You bet it is. The Founders clearly considered the judiciary a very important aspect of government, and the Constitution addressed it in detail. But while prescribing the rules for the federal courts, the framers deliberately omitted any federal role in the state judiciary. Here are some examples:

* The Constitution provides for appointment of federal judges—but not state judges.

* It gives Congress authority to "constitute" (create and regulate) lower federal courts—but not state courts.

* It defines the jurisdiction of the federal courts—but not of the state courts.

* It requires, in many cases, trial by jury in federal court—but not in state court.

The Founders obviously deemed judicial organization and procedure to be a "great and independent" subject, worthy of much constitutional attention. Yet in all procedural and organizational particulars, they left state courts alone. They certainly granted Congress no power to micro-manage them. They left the "great substantive and independent power" of operating the state courts to the states themselves. Under Justice Roberts' opinion, that's where it stays.

The part of the opinion dealing with Medicaid buttresses this conclusion. For a 7-2 majority, the chief justice struck down Congress's efforts to dragoon the states into the Medicaid expansion. His was the latest in a long series of rulings in which the Supreme Court has protected state governments (legislatures, executives, and courts) from what the Court calls "commandeering."

As in previous cases, the Court held that "commandeering" infringes core state sovereignty. Infringing core state sovereignty violates the Necessary and Proper Clause because a federal law attacking core state sovereignty is not "proper." A federal statute dictating to state legislatures, judges, and juries how they manage

lawsuits arising under their own state law is of that kind.

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One reason for Congress's abysmal public approval rating is the perception that most members of Congress are hypocritical power-seekers. Most of the sponsors of Title V assert that Obamacare is an unconstitutional intrusion on the rights of the states and the people. Yet by supporting Title V they are promoting a bill that may be even more constitutionally suspect than Obamacare.

For their own political survival—as well as for the Constitution and for constitutional principle—those sponsors need to back off.

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