by Brion McClanahan

When Idaho Governor C.L. "Butch" Otter signed HO391 into law on 17 March 2010, the "national" news media circled the wagons and began another assault on State sovereignty. The bill required the Idaho attorney general to sue the federal government over insurance mandates in the event national healthcare legislation passed. The lead AP reporter on the story, John Miller, quoted constitutional "scholar" David Freeman Engstrom of Stanford Law School as stating that the Idaho law would be irrelevant because of the "supremacy clause" of the United States Constitution.

In his words, "That language is clear that federal law is supreme over state law, so it really doesn't matter what a state legislature says on this." Now that Barack Obama has signed healthcare legislation into law, almost a dozen States have filed suit against the federal government, with Idaho in the lead. Battle lines have been drawn. Unfortunately, the question of State sovereignty and the true meaning of the "supremacy clause" may be swallowed up in the ensuing debate.

Engstrom's opinion is held by a majority of constitutional law "scholars," but he is far from correct, and Idaho and the thirty seven other States considering similar legislation have a strong case based on the original intent of the powers of the federal government vis-à-vis the States.

The so-called "supremacy clause" of the Constitution, found in Article 6, states, "This Constitution, and the Laws of the United States *which shall be made in Pursuance thereof;* and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding [emphasis added]."

The key, of course, is the italicized phrase. All laws made in pursuance of the Constitution, or those clearly enumerated in the document, were supreme, State laws notwithstanding. In other words, the federal government was supreme in all items clearly listed in the document.

A quick reading of the Constitution illustrates that national healthcare is not one of the enumerated powers of the federal government, so obviously Engstrom's blanket and simplistic statement is blatantly incorrect, but his distortion of the supremacy clause goes further.

The inclusion of such a clause in the Constitution was first debated at the Constitutional Convention on 31 May 1787. In Edmund Randolph's initial proposal, called the Virginia Plan, the "national" legislature had the ability to "legislate in all cases to which the separate states are incompetent…" and "to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union…." John Rutledge, Pierce Butler, and Charles Pinckney of South Carolina challenged the word "incompetent" and demanded that Randolph define the term. Butler thought that the delegates "were running into an extreme, in taking away the powers of the states…" through such language.

Randolph replied that he "disclaimed any intention *to give indefinite powers to the national legislature*, declaring that he was entirely opposed to such an inroad on the state jurisdictions, and that he did not think any considerations whatever could ever change his determination [emphasis added]." James Madison, the author of the Virginia Plan, was not as forthcoming as to his sentiment. Ultimately, Madison preferred a negative over State law and wished the national legislature to be supreme in call cases. But he was not in the majority.

The Convention again broached a federal negative on State law on 8 June 1787. Charles Pinckney, who presented a draft of a constitution shortly after Randolph offered the Virginia Plan, believed a national negative necessary to the security of the Union, and Madison, using imagery from the solar system and equating the sun to the national government, argued that without a national negative, the States "will continually fly out of their proper orbits, and destroy the order and harmony of the political system." Such symbolism made for a beautiful picture, but it belied reality.

To most of the assembled delegates, the national government was not the center of the political universe and the States retained their sovereignty. Hugh Williamson of North Carolina emphatically stated he "was against giving a power that might restrain the states from regulating their internal police."

Elbridge Gerry of Massachusetts was against an unlimited negative, and Gunning Bedford of Delaware believed a national negative was simply intended "to strip the small states of their equal right of suffrage." He asked, "Will not these large states crush the small ones, whenever they stand in the way of their ambitious or interested views?"

When the negative power was put to a vote, seven States voted against it and three for it, with Delaware divided (and Virginia only in the affirmative by one vote). Roger Sherman of Connecticut summarized the sentiment of the majority when he stated he "thought the cases in which the negative ought to be exercised might be defined." Since the negative did not pass, such a definition was unnecessary.

Thus, the federal government was supreme only in its enumerated powers and it did not have a negative over State law. Supremacy had limits.

By the time the Constitution was debated in the several State ratifying conventions in 1787 and 1788, the "supremacy clause" galvanized opponents of the document. The Constitution, they said, would destroy the States and render them impotent in their internal affairs. The response from *proponents* of ratification illuminates the true intent of the clause. William Davie, a delegate to the Constitutional Convention from North Carolina and proponent of the Constitution, responded to attacks levied on the "supremacy clause" by stating that:

> This Constitution, *as to the powers therein granted*, is constantly to be the supreme law of the land. Every power ceded by it must be executed without being counteracted by the laws or constitutions of the individual states. *Gentlemen should distinguish that it is not the supreme law in the exercise of power not granted. It can be supreme only in cases consistent with the powers specially granted, and not in usurpations* [emphasis added].

Davie wasn't alone in this opinion. Future Supreme Court justice James Iredell of North Carolina argued that, "This clause [the supremacy clause] is supposed to give too much power, when, in fact, it only provides for the execution of those powers which *are already given in the foregoing articles*....If Congress, under pretence of executing one power, should, in fact, usurp another, they will violate the Constitution [emphasis added]."

Furthermore, in a foreshadowing of nullification, Iredell argued that, "It appears to me merely a general clause, the amount of which is that, when they [Congress] pass an act, if it be in the execution of a power given by the Constitution, it shall be binding on the people, *otherwise not* [emphasis added]. Other ratifying conventions had similar debates, and proponents of the Constitution continually reassured wavering supporters that the Constitution would only be supreme within its delegated authority.

Most bought their assurances, though to staunch opponents, the Constitution still vested too much power in the central authority. The States would lose their sovereignty, they argued, and as a result, these men demanded an amendment to the Constitution that expressly maintained the sovereignty of the States and placed limits on federal power. Even several moderate supporters of the Constitution embraced this idea.

Ultimately, the three most powerful States in the Union, New York, Massachusetts, and Virginia, demanded that a bill of rights be immediately added to the Constitution; near the top of those recommended amendments on every list, a State sovereignty resolution. These ultimately became the Tenth Amendment to the Constitution, which 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."

Clearly the intent of this amendment was to mitigate any design the federal government had on enlarging its powers through the "supremacy clause." If the power was not enumerated in the Constitution and the States were not prohibited by the Constitution from exercising said power, then that power was reserved to the States.

Several other constitutional "scholars" have weighed in on the debate in the last week, and each has invoked the "supremacy clause" to defend their opposition to State action against healthcare. Duke Law Professor Neil Siegel went so far as to suggest that the States are not reading the Tenth Amendment correctly. In perhaps the most outlandish statement of the debate, he also said, "Any talk of nullification bothers me because it's talk of lawlessness."

I guess Mr. Siegel has failed to consider that Idaho bill HO391 was passed by a legitimate legislative body elected by the people of the State. That would make it lawful.

Of course, this debate ultimately boils down to loose interpretation verses strict construction. Thomas Jefferson had the best line on this issue. When asked to read between the lines to "find" implied powers, Jefferson responded that he had done that, and he "found only blank space."

The original intent of both the "supremacy clause" and the Tenth Amendment indicate that Idaho and the other States challenging Obamacare are justified and correct and that the legal profession is either in the tank for the federal government or has not read either the debates of the Constitutional Convention and/or the State ratifying debates. This should make people like Engstrom and Siegel, rather than legitimate State law directed at unconstitutional authority, irrelevant.

Brion McClanahan holds a Ph.D in American history from the University of South Carolina and is the author of ***The Politically Incorrect Guide to the Founding Fathers*** *(Regnery, 2009).*

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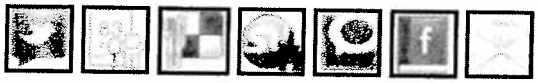

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States Launch Legal Challenge to Health Care Law

At Least 14 States File Suit Challenging Constitutionality of Health Care Law


President Obama signs the Affordable Health Care for America Act during a ceremony with fellow... ▼
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State Legislatures to Challenge Health Care Law

In addition to constitutional challenges to the law, legislators in at least 36 states are attempting to limit, alter or oppose some of its provisions through state constitutional amendments or laws, according to the National Conference of State Legislatures.

Many of the proposals seek to keep health insurance coverage optional for individuals and exempt employers from penalties if they don't offer coverage for workers.

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Earlier this month, Virginia and Idaho became the first states to enact laws specifically stating that health insurance coverage is not required.

Still, many legal experts say these legislative efforts will ultimately be trumped by the so-called supremacy clause in the U.S. Constitution, which says federal laws "shall be the supreme law of the land."

"State law cannot nullify federal law," Timothy Stoltzfus Jost, a health law expert at Washington and Lee University School of Law, writes in the New England Journal of Medicine. "This principle is simply beyond debate, and state legislators, many of them lawyers, know that. The purpose of these laws, therefore, is not legal but rather political

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Indiana joins 13 states to challenge health reform

13 other states raise constitutional questions about the new legislation

By Bill Ruthhart

Posted: March 30, 2010

Indiana became the 14th state Monday to challenge the constitutionality of the federal health-care legislation, but legal e xperts warned the lawsuit faces an uphill climb against previous court rulings.

After reviewing the sweeping health-care reforms, Indiana Attorney General Greg Zoeller announced he would join a lawsuit already filed jointly by 13 other attorneys general in a Florida federal court.

At the core of Zoeller's decision to join the suit is the charge that Congress does not have the power to force Americans to buy health insurance coverage or require them to pay a fine if they fail to do so.

"It's really critical that we have these questions asked and answered," he said, "so that the Supreme Court's final word as to whether the new reach of the federal government in this statute meets constitutional muster."

Zoeller also argued that the new reforms impinge on states' sovereignty by requiring states to set up health insurance exchanges for their residents to purchase coverage.

Democrats immediately accused Zoeller of playing politics. Of the 13 other attorneys general who have joined the lawsuit, 12 are Republicans.

"This is purely politics, nothing but," said Indiana Democratic Party Chairman Dan Parker. "The legal argument is weak, the political argument is weak. It's all based on false information, and the opponents of this couldn't stop it, so they're grasping at straws and this is the final straw to grasp."

Zoeller's announcement came after Gov. Mitch Daniels said Friday he had encouraged Zoeller to join the suit, even though Daniels said he was skeptical of

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its chances for success. The attorney general said Monday he made the decision based on the case's merits and independent from any political input.

"It's unfortunate that the entire subject matter has been politicized," Zoeller said, "but that was done in Washington before we ever joined (the lawsuit)."

Parker declared the suit a waste of taxpayer dollars.

Zoeller said he could not give an estimate of how much the lawsuit would cost but said he has no plans to hire outside counsel. He said the state's initial cost would be its undetermined share of a contract capped at $50,000 with a Washington, D.C., law firm hired to handle the case.

Indiana Republican Party Chairman Murray Clark said the lawsuit has merit.

"I think it's the right decision," he said. "Clearly, there's some constitutional questions that need to be asked and answered in light of one of the largest federal government overreaches we've seen in a long time."

The key question the lawsuit raises is whether the new law's requirement that all Americans carry health insurance coverage or be forced to pay a penalty should serve as a new test to the Constitution's commerce clause, which gives Congress the power to regulate business.

Over the past several decades -- starting in the 1930s -- constitutional law experts say, the courts and lawmakers have broadly interpreted that clause, giving Congress wide-ranging regulatory power.

Most legal scholars think those precedents would make it difficult for the Supreme Court, or any other, to rule that Congress does not have the power to add the new insurance regulations, said Carl Tobias, a constitutional law expert at the University of Richmond in Virginia.

Furthermore, he said, backers of the bill will defend the prospective fine for those who don't buy insurance under the taxing power that the Constitution gives Congress.

"The precedents all favor constitutionality," Tobias said. "There's nothing exactly the same as this challenge, but the relevant precedents, if

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you analogize from them, lead you to the conclusion that this challenge won't succeed."

But that's not to say the lawsuit isn't a worthy one, he said.

"I think it might have merit, but I just don't think it's going to win," Tobias said. "I think the best argument is about the individual mandates, but I think a fair number of constitutional scholars, and I agree, think that it's probably going to withstand the challenge."

Charles Rice, a constitutional law expert at the University of Notre Dame, said the case certainly is worth litigating.

"I think it's a legitimate thing to do. The outcome is not certain," Rice said. "It's really interesting, because it brings in precedents from a lot of the cases involving the Social Security Act and things like that, and it could provide the opportunity, if it gets to the Supreme Court, for the case to go either way."

Key to its outcome could be how the American public views the new law in the future, said Gerard Magliocca, a constitutional law professor at Indiana University School of Law-Indianapolis.

"This likely wouldn't be decided for two years, and a lot will depend on what people think of the health-care bill," Magliocca said. "If it's very unpopular, the courts are more likely to find a reason to declare it unconstitutional than if it turns out to be popular."

Parker, the state Democratic Party chairman, said Zoeller's decision would cost the attorney general in his next election in 2012, when he will have to explain why he fought against a bill that reformed the insurance industry to the benefit of so many Hoosiers. "Greg Zoeller is going to be on the wrong side of history on this one," Parker said.

Zoeller countered that almost everyone agrees the new law has raised fresh constitutional issues that the courts need to resolve.

"There aren't many people who say there isn't a new question here, because this is the first time the federal government has required people to purchase a commercial good, a commercial product," he said. "This is an insurance product that everyone, as a condition of being a citizen of the United States, will be required to purchase under the threat of penalty."

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In the end, Magliocca said, he gives the lawsuit a 25 percent chance of success.

"There is a plausible argument for saying this is unprecedented," he said. "It has a chance, but I think most everybody, most legal scholars, think it's unlikely this suit will succeed."

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March 24, 2010

HEALTH CARE REFORM: WHO WINS AND WHO LOSES

While the health care bill is not as sweeping as many had once hoped (or others had feared), make no mistake: The new legislation will dramatically change the nation's health care system.

So who wins and who loses? "The people who gain the most are low-income people who do not get health insurance from an employer," says John Goodman, president, CEO and the Kellye Wright Fellow of the National Center for Policy Analysis. "Just about everybody else loses."

Groups that will especially bear the burden include:

- Generation Y: Most of the 19 million uninsured Americans between the ages of 18 and 34 will be forced to buy coverage -- coverage likely more expensive than they might have otherwise chosen.
- Anyone who earns more than $200,000: Workers earning more than $200,000 a year or couples with a combined income over $250,000 will pay an additional 0.9 percent in federal income tax to help fund Medicaid expansion starting in 2013, and will likely pay a new 3.8 percent Medicare tax on all investment income.
- Individuals with so-called Cadillac health insurance: A 40 percent tax will be levied on plans with premiums of $10,200 or more per person.

Goodman also notes that "as many as 8.5 million seniors could lose their Medicare Advantage coverage altogether" under government plans to reduce benefits offered under the program.

Advocates of the legislation argue that winners include anyone with a preexisting condition, recent college graduates who can now get coverage through their parents, small businesses who will have access to insurance pools and doctors who will get paid for seeing uninsured patients they were treating for free.

In addition, individuals aged 60 to 64 - the oldest age demographic not eligible for Medicare - will pay no more than three times the cost of the premium paid by a healthy 20-something. But as Goodman notes, "People who are 60 to 64 are going to pay lower premiums than they otherwise would because people who are 20 to 24 are going to pay higher premiums."

Source: Catherine Holahan, "Health Care Reform: Who Wins and Who Loses," CBS MoneyWatch, March 22, 2010.

Link to text:

http://moneywatch.bnet.com/economic-news/article/health-care-reform-summary-who-wins-and-who-loses/406279/

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March 24, 2010

8 WAYS THAT HEALTH REFORM WILL AFFECT YOU

The health care legislation could "have an effect on almost every citizen," according to Kaiser Health News. So what should you expect?

Within six months after the bill is signed into law:

- Health insurers will no longer be allowed to impose lifetime caps on coverage.
- Parents who have insurance through their employers will be allowed to continue coverage for their unmarried dependents up to age 26.
- Health insurers will be required to cover certain preventive services like osteoporosis screening for women over 65, smoking cessation counseling and interventions, and screenings for diabetes and sexually transmitted diseases.
- And later this year, people with serious health conditions that have prevented them from obtaining coverage will be eligible to purchase a policy from a high-risk pool in a government-subsidized exchange at a cost similar to healthy individuals' premiums.

Individuals will also be required to obtain health insurance or face a fine. Government subsidies will be available on a sliding scale for people making up to $43,000 per year (or nearly $90,000 per year for a family of four), but those who don't qualify for government subsidies should expect to pay about $5,000 a year for a policy on the exchange, while families should expect to pay about $15,000, says John Goodman, president, CEO and Kellye Wright Fellow of the National Center for Policy Analysis.

The penalty starts in 2014 at $95 or up to 1 percent of income for individuals, whichever is greater, and rises to $695 by 2016 or 2.5 percent of income, whichever is greater. Families pay heftier fines - $2,085 or 2.5 percent of income by 2016.

Other changes:

- Insurers won't be able to deny coverage based on preexisting conditions.
- Maternity support will be increased for women in the workplace.
- Additional, less expensive insurance options will be available when you lose or quit your job.

Increasing the number of insured individuals, however, will also mean longer waits to see a new doctor. In Massachusetts, for example, where health insurance is universal, Boston residents have to wait about twice as long to see a doctor as people in any other U.S. city, says Goodman.

Source: Deborah Kotz, "8 Ways Health Reform Will Affect You," U.S. News and World Report, March 22, 2010

For text:

http://www.usnews.com/health/managing-your-healthcare/insurance/articles/2010/03/22/8-ways-health-reform-will-affect-you.html

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20 WAYS OBAMACARE WILL TAKE AWAY OUR FREEDOMS

It is worthwhile to take a comprehensive look at the freedoms we will lose under ObamaCare, says blogger David Hogberg. Among them:

- You are young and don't want health insurance? You are starting up a small business and need to minimize expenses, and one way to do that is to forgo health insurance? Tough. You have to pay $750 annually for the "privilege." (Section 1501).
- You are young and healthy and want to pay for insurance that reflects that status? Tough. You'll have to pay for premiums that cover not only you, but also the guy who smokes three packs a day, drinks a gallon of whiskey and eats chicken fat off the floor. That's because insurance companies will no longer be able to underwrite on the basis of a person's health status. (Section 2701).
- You're a single guy without children? Tough, your policy must cover pediatric services. You're a woman who can't have children? Tough, your policy must cover maternity services. You're a teetotaler? Tough, your policy must cover substance abuse treatment. (Add your own violation of personal freedom here.) (Section 1302).
- You are an employer in the small-group insurance market and you'd like to offer policies with deductibles higher than $2,000 for individuals and $4,000 for families? Tough. (Section 1302 (c) (2) (A)).
- If you are a physician and you don't want the government looking over your shoulder? Tough. The Secretary of Health and Human Services is authorized to use your claims data to issue reports that measure the resources you use, provide information on the quality of care you provide, and compare the resources you use to those used by other physicians. Of course, this will all be just for informational purposes. It's not like the government will ever use it to intervene in your practice and patients' care. Of course not. (Section 3003 (i)).
- You will have to pay an additional 0.5 percent payroll tax on any dollar you make over $250,000 if you file a joint return and $200,000 if you file an individual return. What? You think you know how to spend the money you earned better than the government? Tough. (Section 9015). That amount will rise to a 3.8 percent tax in 2013 and will also apply to investment income, estates, and trusts. You think you know how to spend the money you earned better than the government? Like you need to ask. (Section 1402).

Source: David Hogberg, "20 Ways ObamaCare Will Take Away our Freedoms," Investors Business Daily, March 22, 2010.

For text:

http://blogs.investors.com/capitalhill/index.php/home/35-politicsinvesting/1563-20-ways-obamacare-will-take-away-our-freedoms

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