FROM: PRAWFSBLAWG

HEALTHCARE AND FEDERALISM

SHOULD COURTS STRICTLY SCRUTINIZE FEDERAL REGULATION OF MEDICAL SERVICES?

Rick Hills[†]

I am sick to death of arguing about functionally empty federalism theories. Therefore, if you want a detailed analysis of why the 11th Circuit's recent opinion in *Florida v. United States*[1] errs in accepting Randy's argument against the constitutionality of PACA's individual mandate, take a look at Mark Hall's excellent post at Balkinization[2] or David Orentlicher's post over at Health Law Profs blog.[3] (In the unlikely event that you are interested in my views, they're all over prawfsblawg – here,[4] here,[5] here,[6] and here,[7] for

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[†] William T. Comfort, III Professor of Law, NYU School of Law. Original at prawfsblawg.blogs.com/prawfsblawg/2011/08/healthcare-and-federalism-should-courts-strictly-scrutinize-federal-regulation-of-medical-services-.html (Aug. 14, 2011; vis. Oct. 1, 2011).

[1] aca-litigation.wikispaces.com/file/view/CA11+opinion.pdf.

[2] *Why the 11th Circuit's Opinion Self-Destructs*, balkin.blogspot.com/2011/08/why-11th-circuits-opinion-self.html.

[3] *Judge Sutton More Persuasive Than Judge Hull*, lawprofessors.typepad.com/healthlawprof_blog/2011/08/judge-sutton-more-persuasive-than-judge-hull.html.

[4] *Federalism & healthcare: The dangers & benefits of confusing individual rights with federalism*, prawfsblawg.blogs.com/prawfsblawg/2010/12/federalism-healthcare-the-dangers-benefits-of-confusing-individual-rights-with-federalism.html.

[5] *An economist's view of what is (charitably) called "legal reasoning,"* prawfsblawg.blogs.com/prawfsblawg/2011/02/an-economists-view-of-what-is-charitably-called-legal-reasoning.html

[6] *Judge Vinson's incoherent extension of Printz's anti-commandeering principle from states to private*

instance).

My objection to Randy's argument is that the action/inaction distinction is just more empty federalism etiquette born entirely of the need to distinguish precedents rather than the desire to construct a sensible division of powers in a federal system. The action/inaction distinction will not really limit federal power: As Randy concedes, Congress could impose precisely the same mandate through the taxing power or even conditional "prohibitions" on "actions" like buying insurance or being employed. Moreover, the distinction is not even very crisp, as Judge Sutton's concurring opinion in *Thomas More Law Center v. Obama*[8] explains with exemplary clarity and dispassionate good sense. So I'll be delighted when the SCOTUS finally upholds PACA's mandate and we can get on with the real business of figuring out how to limit the federal leviathan in ways that actually make a practical difference.

Which leads me to a question asked by Abby Moncrieff via e-mail: She asks me why a sensible theory of functional federalism would not suggest "devolution in the ACA case." As Abby puts the matter, "[h]ere is a case of deep and salient disagreement among local populations as to the propriety of insurance mandates," disagreement that would suggest that a one-size-fits-all national law would be a bad idea. Why not, instead, let the states go their different ways on the issues addressed by PACA?

Good question, Abby – and one blessedly free from the normatively vacuous precedent slalom that is the PACA litigation.[9] My answer, following the jump, is that sensible functional federalism (a) *would* devolve the regulation of medical practice to the states but (b) would give the national government substantial power to finance health care. Resolving the tension between (a) and (b), however,

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persons, prawfsblawg.blogs.com/prawfsblawg/2011/01/the-folly-of-extending-printzs-anti-commandeering-principle-from-states-to-private-persons.html.

[7] *Should libertarians applaud the Individual Mandate as a matter of policy?*, prawfsblawg.blogs.com/prawfsblawg/2011/02/should-libertarians-applaud-the-individual-mandate-as-a-matter-of-policy.html.

[8] aca-litigation.wikispaces.com/file/view/CA6+decision+%2806.29.11%29.pdf.

[9] Rick Hills, *What does it mean to have a theory of federalism?*, prawfsblawg.blogs.com/prawfsblawg/2010/12/what-does-it-mean-to-have-a-theory-of-federalism.html.

requires a little more elaboration as well as an explanation of where I stand regarding Abby's excellent theory of "federalization snowballs."[10]

First, why give subnational jurisdictions a lead role in the regulation of medical practice? Professional standards for the practice of medicine raise religiously and culturally sensitive issues of life and death, physical privacy, and acceptable risk-taking. National legislation on such matters invites unnecessarily divisive struggles for the commanding heights of federal power. Devolution of such issues reduces the acrimony of pitting Red State folks (who dislike med mal liability but hate *avaunt-garde* ethical innovations like physician-assisted suicide) against Blue State folks (who have opposite instincts). Given that the choice-of-law rules for medical malpractice and professional discipline predictably assign legislative jurisdiction to the state where medical services are performed, states can easily internalize the costs of their regulatory regimes in terms of inflated or reduced insurance premiums. (This latter point distinguishes standards of professional care from standards for the design of highly mobile pharmaceuticals – hence, the need for the Food, Drug, & Cosmetic Act).

Second, why give the feds the lead role in healthcare finance? The reason is the familiar point, set forth by Paul Peterson long ago,[11] that the subnational governments cannot redistribute wealth effectively in a federal system characterized by mobility of labor and capital. Any health insurance scheme will involve massive redistribution of wealth from the young to the old, from the rich to the poor, and from the sick to the healthy. The notion that subnational jurisdictions can take the lead in performing these financing functions strikes me as untenable.

But here's the rub: Limits on insurance coverage provided by the feds under Medicare (or PACA) will obviously affect the standards

[10] *Federalization Snowballs: The Need for National Action in Medical Malpractice Reform*, at www.columbialawreview.org/assets/pdfs/109/4/Moncrieff.pdf, and 109 Colum. L. Rev. 844 (2009).

[11] Paul E. Peterson, *The Price of Federalism* (1995), books.google.com/books/about/The_price_of_federalism.html?id=_A-Dg_NnvakC.

of medical care provided by state-regulated doctors and hospitals. Costs imposed by those standards of care imposed by state law will obviously affect the costs of health care financed by the feds. Abby Moncrieff emphasizes this latter point in her article on "Federalization Snowballs": Because the feds foot the bill for medical services, the federal taxpayer ends up subsidizing states' medical malpractice regimes. Abby argues that the feds, therefore, might need to preempt state med mal regimes. But I'd argue that the feds need only do what private insurers do: Price the liability through higher premiums. Specifically, the federal spending power could legitimately impose special Medicare payroll taxes in states where the med mal liability really seems to impose an extra burden on the federal fisc. Differential payroll taxation has always been used to equalize spending between states with state-financed unemployment insurance systems and states without: Why could not such a tax system solve the problem of "federalization snowballs"?

So that's my 500-word theory of federalism and medicine. I do not pretend that it is comprehensive answer to the problems of dividing power over medicine in a federal regime. But these are the sorts of functional considerations that I would like to see being debated in the U.S. reports rather than the nonsense of whether "inaction" is "commerce."

COMMENTS

Hi Rick,

Thanks for the answer to the email question – and for the kind words on Snowballs. I have several reactions, not surprisingly, but I'll selfishly focus on the two that are most important to what I'm working on right now.

1. It's not clear, in your analysis of healthcare federalism, where the individual mandate ought to fall. The mandate is a financing measure that's intended to be redistributive, but it's a kind of financing regulation that isn't obviously outside of the states' competency to enact and enforce. Even when it works perfectly, a mandate redistributes only within the discrete private insurance pools that mandated individuals join, and the vast majority of those pools

remain state-specific after PACA (much to my chagrin). Furthermore, many of them do not do much by way of redistributing from young to old, rich to poor, or sick to healthy due to too much homogeny in the pools. This particular tool of redistribution, thus, might be less subject to the traditional failures of subnational government.

2. The problem with a national mandate is not just that it's contentious. It's that it has become contentious along a particular dimension that is highly "culturally sensitive" – in the invocation of constitutional liberty interests. I agree, of course, that the action/inaction distinction is deeply silly and problematic for federalism doctrine. But the action/inaction distinction, as I think all reasonable scholars have recognized, is merely a thin veneer for what the courts (and Barnett) really care about: substantive liberty interests in economic freedom – and also, I would argue, in healthcare autonomy. The question, then, is whether the scope and content of the constitutional freedom of contract and the constitutional freedom of health – both of which are substantive freedoms that have arguably been left to political protection (rather than simply abolished from the constitutional landscape) – should be decided at the state or national level. If that is the question, then the answer is obviously, I think, that the states could do a much better job, thanks to their advantages in voice, diversity, experimentation, and exit – i.e. for the same reasons that you think they'd do better at defining rules for medical practice. The courts therefore could hold, consistently with functional federalism of the kind you like, that Congress exceeded its authority by implementing a new and significant encroachment of constitutional liberty interests – interests that should be left to state elaboration. Like the action/inaction distinction, that holding would be a new kind of Commerce Clause holding for the courts, but it would not be a totally new kind of holding. It would be essentially identical to what the Court said in Glucksberg when it refused to set a uniform national right to physician assisted suicide, choosing instead to leave elaboration of that right to state political processes.

In my view, such a holding would essentially say that the best federalism for healthcare regulation should take a back seat to the best federalism for substantive libertarianism. I'm not sure whether that's how I would choose to organize the world if I were dictator of the Court, but it's not a crazy or vacuous idea.

Posted by: Abby Moncrieff | Aug 14, 2011 1:54:02 PM

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Abby writes:

The question, then, is whether the scope and content of the constitutional freedom of contract and the constitutional freedom of health – both of which are substantive freedoms that have arguably been left to political protection (rather than simply abolished from the constitutional landscape) – should be decided at the state or national level. If that is the question, then the answer is obviously, I think, that the states could do a much better job, thanks to their advantages in voice, diversity, experimentation, and exit….

Well, if I thought that that PACA's individual mandate really raised genuinely important issues of individual liberty, then I might be inclined to agree with you. I agree that, when a law burdens important liberty interests, then it makes sense for the SCOTUS to discourage Congress from enacting such a law through "plain statement rules" or even constitutional invalidation. For instance, I believe that the SCOTUS was right to construe the Controlled Substances Act narrowly in *Gonzales v. Oregon* to exclude the use of controlled substances to induce death rather than for recreational purposes. Just because the Court did not protect this right judicially through substantive due process doctrine in *Glucksberg* does not mean that the Court should not try to protect the right politically through federalism, by allowing different states to take different positions on the divisive and difficult question of private liberty's proper definition.

It just seems odd to me to consider the PACA's financial penalty for failure to buy insurance as similar to the criminalization of physician-assisted suicide. Yes, freedom of contract as a general matter enjoys some protection under the 5th and 14th Amendment. And, yes, I'd agree that judicial refusal to protect such freedoms directly

through judicial injunction on state and federal laws does not mean that the Court should not encourage a decentralized resolution of conflict over the definition of such freedoms.

But surely it is not the case that every single federal invasion of freedom of contract automatically constitutes an invasion of a sensitive liberty interest! How exactly is PACA's mandate different, from a libertarian point of view, from any number of financial penalties imposed by the tax code that encourage us not to "free ride" off of other people's expenditures? The Cato Institute wants to use tax credits to promote the purchase of insurance: How is the extra tax liability that the uninsured will bear under the Cato Institute's proposal any different in principle, from a libertarian point of view, from PACA's mandate?

Not every limit on private freedom constitutes a burden on a sensitive liberty interest sufficient to trigger some limit on Congress' power. So until I have some account of why PACA's burden is different from run-of-the-mill social welfare legislation that Congress routinely enacts (sometimes with "conditional prohibitions" like the Fair Labor Standards Act, sometimes with the tax code), I am not inclined to invoke constitutional limits on Congress' power to preserve the liberty of waiting until one is sick before purchasing insurance.

Posted by: Rick Hills | Aug 14, 2011 3:40:21 PM

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Okay, fair enough. I think there's a tiny little something to the argument that conditions of citizenship (really of residency, in this case) should look openly compulsory, like taxes, rather than being framed and sold as conditional penalties. That argument would lend a bit of credence to the Cato Institute's view. And I think there's a tiny little something in the notion that the penalty must raise constitutional concerns because it has raised concerns of a constitutional magnitude. I'm not quite willing to write off a massive populist groundswell as political opportunism, even though that might well be what it is (and even though this argument obviously renders the existence of a constitutional liberty interest conclusory in some

sense). But I've also said from the beginning of the ACA litigation that the insurance "mandate" is economically indistinguishable from the first time home buyers' tax credit and should therefore be unquestionably constitutional from a substantive libertarian point of view.

(The paper I'm working on argues that it would be better to protect liberty through structural holdings than through substantive holdings; it doesn't actually argue that the liberty interests exist or that the mandate violates them.)

Posted by: Abby Moncrieff | Aug 14, 2011 4:30:50 PM

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Rick, interesting post. I'm interested in health care and functional federalism myself,[12] and (2) unsurprisingly, have chatted with Abby about it. (Hi, Abby). Quick thoughts:

Speaking purely from a functional (rather than constitutional) perspective: prior to ACA, the health insurance market simply wasn't open to millions of people. For reasons of price or health condition, many could not buy insurance even if they wanted to. ACA addresses both market barriers, but I just want to say a quick word about the latter – preexisting condition exclusions –- because of the influence it's had on some of my thinking about federal and state power.

If I'm the federal government, and I federally bar preexisting condition exclusions, then I open the market, yes, but if I don't deal with the resulting adverse selection problem, then I might destroy the market I just opened. If I leave solving the adverse selection problem to the individual states, i.e., total devolution, some states might fail to solve – or take a very long time to solve – the problem. In the interim, significant damage could result both to insurance companies and their consumers.

So if, in addition to barring preexisting condition exclusions, I enact a federal individual mandate, then I've increased access to and preserved the health insurance market in one fell swoop. Once the

[12] papers.ssrn.com/sol3/papers.cfm?abstract_id=1798004.

market has been so opened, it seems to me the states may well be better at choosing the legal rules that govern the tort and insurance rules applicable in their specific markets. (I also think it would be great if states could experiment with private insurance arrangements explicitly incorporating cost-effectiveness thresholds into the insurance promise itself, but I digress). Opening state insurance markets also gives employees, at least theoretically, more choice between state law and federal ERISA law (although that choice is considerably complicated by other factors) in those areas about which ACA does not directly speak, which to me seems appealing, because ERISA does not represent modern thinking regarding what optimal legal rules are.

To me, then, a federal surcharge for states with certain legal rules could make sense to offset the externalities arising from federal subsidization Abby memorably discussed. But there's a measurement problem that's significant, I think, and it may make more sense administratively and politically to simply accept that federal subsidies frequently result, at some level, in state level inefficiencies. Perhaps, perhaps not.

I also don't know the degree to which ACA using federal power to "open and preserve markets" is meaningful from a big picture line-drawing perspective; I make no such claim. But I do think that's a difference between ACA's regulation of the insurance market and the frequently discussed hypothetical Congressional regulation of the "broccoli market."

Posted by: Brendan Maher | Aug 14, 2011 4:51:06 PM

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BDG writes:

"Will most customers recognize that state law is driving their insurance costs? If they don't, will state officials fully internalize the costs of their regulatory choices, given that all such costs will be off-budget?"

I haven't addressed the snowballing parts of Rick's original post yet, but I think these are excellent points. There are two other problems with using Medicare, too: (1) the mobility of the citizenry

and (2) the difficulty of calculating per-state costs. On (1), let's say that I spend my working life in Wyoming, a state that I'll postulate has low med-mal expenses, and therefore pay a low or zero med-mal penalty through my Medicare FICA contributions. Then I retire to Florida, a state that I'll postulate has high med-mal costs. I'm no longer paying into the system at that point but am now consuming healthcare in the higher-cost environment and thereby draining the federal fisc. So it seems to me that Medicare payroll is quite an imprecise way to go about the problem, even if placing the penalty on consumers rather than states would work. Maybe we could get around this mobility issue by adding a penalty to Medicare's cost-sharing provisions as well as the FICA contributions, so that the penalty kicks in at point of service as well, but then we're still not solving the off-budget problem that BDG (Brian?) points out.

On (2), the problem is that we just don't know how much we spend on med-mal-induced utilization, even overall, much less per-state, and we therefore can't calibrate the penalty well at all. It's not for lack of trying – it's just really, really hard to figure out. Maybe the feds could just rely on differentials as an incentive – force Texas to pay more for Medicare than Lousiana on the ground that Texas seems to have more med-mal troubles than Louisiana, without worrying whether the penalty is fully recapturing the federal portion. But that seems so unsatisfying…

Posted by: Abby Moncrieff | Aug 14, 2011 5:18:37 PM

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All of the above comments illustrate the basic point of my post: To discuss federalism intelligently, one needs to take a functional perspective, explaining why subnational resolution is especially important (such that federal law would not be "proper") or why subnational resolution might be impossible (such the federal law is "necessary"). Yet our constitutional doctrine and litigation wastes its time parsing indeterminate precedents and has a peculiar abhorrence for functional considerations. It is this weird obsession with distinguishing past cases rather than trying to explain what the federal regime is supposed to accomplish that leads to what I take to be hair-splitting

litigation about the alleged distinction between forcing and conditionally prohibiting "action" and the like.

Now, as to the various specifics . . . .

(1) Abby notes that "[i]t's not clear, in your analysis of healthcare federalism, where the individual mandate ought to fall. The mandate is a financing measure that's intended to be redistributive, but it's a kind of financing regulation that isn't obviously outside of the states' competency to enact and enforce."

Constitutional categories, being difficult to change and fine tune, have to be reasonably crude: If the actual purpose of a federal law is to engage in redistribution that is plausibly impeded by interstate competition, then that purpose would be good enough for me as a justification for federal legislation, barring some special reason to strictly scrutinize whether the federal law was "necessary." The purpose being "proper," I'd defer to Congress even if it were not "obvious" that states were incompetent to act. Under ordinary circumstances – e.g., no "sensitive" issue demanding subnational resolution because of its cultural sensitivity – so long as it was not obvious that state *were* competent, I'd uphold the law.

(2) Brian asks: ""Will most customers recognize that state law is driving their insurance costs? If they don't, will state officials fully internalize the costs of their regulatory choices, given that all such costs will be off-budget?"

I'd think that an extra tenth of a percentage point of a payroll tax in high liability states would focus attention of voters wonderfully. (It could even be labeled "unreasonable medical malpractice surcharge" on the voters' paycheck).

(3) I agree with Brendan's basic point that banning discrimination based on preexisting conditions requires or, at least, is obviously facilitated by, the individual mandate. It is this basic functional point that, I think, will in the end trump all of the scholastic pettifogging about whether "inaction" is "commerce."

I have a bit of a quibble with the idea that ACA greatly broadens our healthcare options by limiting ERISA preemption, simply because I think ERISA preemption is itself absurdly broad – far broader than anything Congress could reasonably have foreseen or in-

tended. "Opting in" from such a wacky judge-made regime of extremely spare fiduciary duties is hardly a great boon for decentralization, given the lousiness of the ERISA baseline. Instead, Congress ought to have simply repealed ERISA preemption, replacing it with a much narrower rule. The rejection of the Kucinich amendment to PACA exempting states' single-payer systems from ERISA was a blow to "opt-in federalism," not an advancement of it.

Posted by: Rick Hills | Aug 14, 2011 5:57:24 PM

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"My objection to Randy's argument is that the action/inaction distinction is just more empty federalism etiquette born entirely of the need to distinguish precedents rather than the desire to construct a sensible division of powers in a federal system."

Well said. I remain surprised that this rather obvious point has not penetrated the discussion further. What is the link between the action/inaction distinction and the division between state and federal power? I haven't heard it.

Posted by: John Greenman | Aug 15, 2011 2:03:30 AM //