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THE 10th AMENDMENT, THE COMMERCE CLAUSE, THE SUPREMACY CLAUSE: AN OLD FASHION CONSTITUTIONAL DEBATE

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Whether you are in the classroom or the coffee shop there is nothing quite as invigorating as a good old-fashioned Constitutional debate. Now that the bill to overhaul the nation's health care delivery system has been passed by Congress and signed into law by the President, experts in Constitutional law are sprouting up everywhere like the daffodils in early spring. Fourteen states and counting have signed up to sue the Federal government in its effort to implement the new legislation. What awaits all of us as this process unfolds is a fascinating visit to history, a new chapter in the ongoing debate over the Constitutional intent regarding the power of the states versus that of the federal government, and an interesting sidebar pertaining to the politics of the Supreme Court.

First, to provide some intriguing context comes the brush with history. More than a few pundits (Byron Williams of the *Huffington Post* and Bill Hare of *Political Cortex* among them) have noted that the rhetoric of those within the states that are lining up to sue to block the Federal government from enforcing the provisions in the new health care law that require citizens to purchase health insurance is eerily reminiscent of two other periods in our history – the Civil War and the Civil Rights movement. The terms for these earlier efforts were first “nullification” and later “interposition.” Prior to the Civil War the Southern states unsuccessfully attempted to push the legal concept of “nullification” as a preventative to federally-enforced impediments to slavery. Articulated by the fiery South Carolinian John C. Calhoun the concept of nullification held that a state could declare an act by Congress “null and void” within its borders. Over time the term “interposition” replaced “nullification.” The term “interposition,” so held the legal argument, was intended to mean that state governments could “interpose” themselves between the citizens of the states and the federal government to prevent enforcement of laws with which the respective states did not agree. The concept of “interposition” enjoyed new life following the 1954 Supreme Court holding in *Brown v. The Board of Education*, which abolished the concept of “separate but equal”

as far as race was concerned and thus mandated the integration of public education in the United States. As in the earlier case, the concept of “interposition” failed to gain a foothold of legal acceptability.

Now here we are again on the precipice of a brand new debate on federal versus state power. No doubt the goal is to have the deciding round of the debate before the United States Supreme Court. So, what are the Constitutional elements that are likely to come into play in this debate? Here are a few of the major ones.

Article I discusses the power of the Congress. Contained in this article are the “commerce clause” and the “necessary and proper clause”. The commerce clause gives the Congress the “power to regulate commerce among the states” and the “necessary and proper clause” conveys to Congress the power to “make all laws which will be necessary and proper to execute the foregoing powers” of which the regulation of commerce is one. As if to underscore the firmness of this directive, the framers of the Constitution threw in the “Supremacy Clause” in Article IV for good measure. This states in part that “This Constitution and the Laws of the United States Shall be the supreme Law of the land and Judges in every state shall be bound thereby....” While this would seem like an air tight case for national supremacy, the legal minds in the states bringing suit feel like they have a substantial leg to stand upon – The Tenth Amendment – the last amendment in the Bill of Rights. The Tenth Amendment 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.” Thus, the states will use this language to make a case that the Congress has overstepped its authority while the federal government will counter with the powers implied by the Commerce clause, the “necessary and proper clause” and the supremacy clause and the Supreme Court will decide.

Thus we arrive at Supreme Court politics. Many experts on the Supreme Court and the Constitution have already discounted out of hand the chances that the states filing suit will be successful. They should be a little more cautious in their predictions. Just as the Court surprised many such pundits by agreeing to hear Bush versus Gore in the 2000 Presidential election they may certainly reverse a trend that weakens the power of the State governments in relation to the Federal government if given the chance. The current nine-member Supreme Court contains four solid conservatives, four leftward leaning justices and one “swing” vote who is likely to be the key to any decision rendered. Furthermore, 90 year old liberal Justice John Paul Stevens has announced his intent to retire. Democrats would be terrified to face a Supreme Court confirmation process under current hyper-partisan conditions.

In summary, there are no guarantees that the Supreme Court would offer up a holding affirming the power of Congress to require that citizens must purchase health insurance.



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