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Health overhaul bill facing court challenges

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It now appears that some form of a health care bill will be passed unilaterally by congressional Democrats. But the fat lady has yet to warm up. Key provisions in the bill could be unconstitutional and need to be challenged. It could be a close constitutional call, as there are arguments on both sides.

Those who framed and ratified the Constitution intended to create a system of enumerated powers where all powers not specifically delegated to the federal government remained with state and local governments, and the people. Defenders of the individual mandate, requiring all Americans to have health insurance, cite the taxing power of the 16th Amendment and the commerce clause as the enumerated powers for this mandate.

In 1994, the Congressional Budget Office (CBO) opined: "The mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States." But the CBO is a budget office, not a legal office issuing a historical statement about policy.

Individuals not carrying health insurance will be fined and possibly subjected to other penalties by the Internal Revenue Service. However, Congress has been careful not to call this a

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"fine," but rather a "tax," permissible under the 16th Amendment that authorized the federal income tax ("the Congress shall have power to lay and collect taxes on incomes, from whatever source derived").

Such a tax would be discriminatory against individuals without health insurance, but defenders would counter that a graduated, discriminatory income tax schedule has been in effect since 1913, with those in higher-income tax brackets paying more taxes at a higher percentage rate. Hence, the 14th Amendment's equal protection clause may or may not be applicable to the individual mandate.

The 5th Amendment's takings clause may also be operative in that the government is, in a very real sense through the individual mandate, taking the individual's private property, in the form of his or her income, to buy insurance.

The commerce clause was initially intended by the framers to free up interstate commerce, specifically trade among the 13 Colonies, which had erected trade barriers. Following the New Deal and the Supreme Court-packing scandal, federal courts frequently defined the commerce clause as permitting regulations governing all commercial activity, far beyond the scope of interstate trade.

However, several recent decisions have revived some limits on the clause, such as United States v. Lopez. In this 1995 case, the Supreme Court

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held the commerce clause does not authorize a federal law banning guns in local school zones.

Critics of the Senate health care bill have also argued that the bill violates the equal protection clause by legislating unequal treatment among the states. Several "sweetheart" deals were arranged to secure passage of the bill — for example, the so-called "Cornhusker Kickback" in which the state of Nebraska was given a permanent waiver for any expanded state Medicaid costs mandated by the bill. Poor states will subsidize this discriminatory bailout.

But defenders of the bailouts will counter that state earmarks have been business as usual for decades by both Democrats and Republicans.

Even if Congress passes a health care bill on the grounds that it passes constitutional muster under the equal protection clause, the takings clause and the commerce clause, Congress does not have the final say: The courts do. We learned this from *Marbury v. Madison*, where the Supreme Court ruled an act of Congress unconstitutional. The courts today could indeed rule portions of the health care bill in violation of the 14th and 5th Amendments and/or the commerce clause.

The bill must be challenged in court. Forcing Americans to buy a certain private-sector product is an overdose of big government that may be toxic to the plain meaning and intent of the Constitution.

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