Week 10 Bonus Material

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Doug Karo · 18 hours ago

In my opinion, the discussion of health care act (ACA) issues was very interesting and very well presented. I gather that courts show considerable deference to the established rules and practices of the legislative branch.

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Joel Kovarsky · 18 hours ago

I also thought this was quite interesting, and it got me looking around for other information about "shell bills."

Kysar, Rebecca M., The 'Shell Bill' Game: Avoidance and The Origination Clause (August 27, 2013). 91 Washington University Law Review, 2014, Forthcoming; Brooklyn Law School, Legal Studies Paper No. 341. Available at SSRN: http://ssrn.com/abstract=2271261

"Abstract:
With increasing frequency, many important revenue laws, such as the Affordable Care Act and the American Taxpayer Relief Act of 2012, begin as “shell bills." The Origination Clause of the Constitution aims to place decisions over tax policy closer to the people by requiring that bills raising revenue begin in the House of Representatives, but the Clause also allows the Senate to amend such bills. The Senate has interpreted its amendment power broadly, striking the language of a bill passed by the House (the shell bill) and replacing it entirely with its own unrelated revenue proposal. According to a new challenge against the Affordable Care Act, this shell bill game is an unconstitutional sleight of hand because it obfuscates the bill’s true origins in the Senate.

The constitutional fate of the Affordable Care Act and myriad other revenue laws, as well as the intra-congressional balance of power over revenue policy, turns on the interpretation of the Senate’s power to amend revenue legislation, an analysis heretofore unexplored in the academic literature. This article draws upon constitutional text, history, and congressional and judicial precedent to conclude that such amendment power is broad and, accordingly, that the Affordable Care Act does not violate the Origination Clause. This article also proposes a conceptual framework for analyzing existing jurisprudence interpreting the Origination Clause — a “legislative process avoidance” doctrine, whereby

the Court deflects searching review of lawmaking procedures. Grounded in constitutional text and history, theories of judicial review, and longstanding principles guarding congressional purview over internal rules, this legislative process avoidance doctrine further supports deference to the Senate's expansive interpretation of its amendment power without rendering the Clause a nullity. Separation of powers concerns also show the doctrine's promise in other constitutional contexts, such as the interpretation of gaps in the lawmaking process left open by Article I, Section 7."

I have to read more of the paper, at least in terms of what I can understand. Looking around at other comments I've located, the responses most frequently appear to fall on predictably partisan grounds, hence if anyone knows legal scholars of various stripes going against their usual slant with respect to this issue, I would like to know about it.

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 Susan Ye Laird Signature Track · 10 hours ago

There is a need to review Healthcare Laws passed by Congress for the past half centuries. With ever accelerating pharmaceutical discovery and emerging medical/diagnostic technologies, policy making in this field is most challenging. I would firmly argue that 'Affordable Care Act' is another Constitutionally stupid Act . (or 'executive speedy non-resolution ' for those that might take 'stupid' as offensive term in academic debate)

2003 Medicare Modernization Act (MMA) is a cost control measure that backfired, according to this paper.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1002673
"In 2003, with no debate, Congress amended the Medicare Secondary Payer Act (the MSP) to make it all but impossible for Medicare beneficiaries to participate in the settlement of individual or mass tort claims. Under this new Rule, the Secretary of Health and Human Services has the right to collect any money that Medicare expended on a beneficiary's healthcare needs from a settling tort defendant, even if the defendant denies liability; from a settling Medicare beneficiary, even if the settlement does not reflect medical payments; or from the settlement proceeds, even if those proceeds are distributed to a contingency fee attorney.

This article provides the first scholarly treatment of this startling barrier to civil settlements. Tracing the historical roots of Medicare and the Secondary Payer Act, I explore why Congress passed the 2003 amendment and, using an economic model of litigation, demonstrate the potentially disastrous impact the new Rule may have on the tort system. As I show, Medicare beneficiaries now have less incentive to bring and settle individual tort suits and contingency fee attorneys are unlikely to include Medicare beneficiaries as clients in individual or mass tort suits. Where Medicare beneficiaries make up a

significant percentage of claimants in mass tort litigation, plaintiffs' attorneys may shy away from bringing mass tort claims altogether.

The new Medicare regime thus undermines the deterrence and corrective functions of the tort law, with little gained in return. Although Congress passed the amendment as a cost-recovery mechanism for Medicare, it may have the perverse effect of making it more difficult for the Secretary to recover Medicare's conditional outlays. If Medicare beneficiaries do not bring and settle tort claims, defendants will have no obligation to repay Medicare under the amendment and the Secretary will have no settlements to plunder. Further, without tort lawsuits, the Secretary may be deprived of valuable information about alleged tortfeasors, thus making it more difficult to bring subrogation claims."

Another related thread in regards of Healthcare:
https://class.coursera.org/conlaw-001/forum/thread?thread_id=3036#post-8673

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 Susan Ye Laird Signature Track · just now

When it rains, it pours. When society believed it spotted a villain, sometimes a community would jump in and cry out loud for more compensation than it rightfully deserved. This is the ultimate HIGH cost of social security and healthcare, how to manage and minimize 'moral hazard' that is always a part of social fabric with human society.

I have read carefully on Office of Administrative Law's case against Dr. Kaul. I would question, especially, the provision of its sanction against Dr. Kaul for additional $300,000 civil penalties and $175,422 in legal cost reimbursements to the State. As it turns out, NJ Appellate Court 2013 jurors had already awarded 1.2 million to J.J., a patient of Dr. Kaul.
http://www.njattyblog.com/surgical-negligence/jarrell-v-kaul/

Isn't there a double jeopardy in civil lawsuits for pretty much the same violation of public trust to a professional service, even if we believe accusation of gross negligence and incompetence against Kaul to any certain extent?! If there ought to be any remedy in the name of the public, I would certainly think that OAL is to examine more closely the Medical Board's procedural and guidance to its members, instead of piling up blames on one individual physician.

https://www.kuro5hin.org/comments/2014/4/14/133435/065?pid=3#4

I would very much appreciate any input from this quasi-legal forum. Thank you. -susan

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