Insight

Could the PPACA's Medicaid Expansion be Unconstitutional?

ROBERT BOOK | JANUARY 27, 2012

While most of the public debate on the constitutionality of the health reform law has centered on the "individual mandate" – the requirement to obtain government-approved health insurance or pay a penalty – the Supreme Court has also agreed to consider another, far less discussed issue: whether the law's expansion of Medicaid eligibility might be an unconstitutional federal infringement on state legislative authority.

Medicaid is a joint federal/state program to provide health care for the poor that is established and operated through a complex mix of federal and state laws. Enacted in 1965, the idea was that the federal government would provide matching funds to state-run health programs for the poor. Federal law sets certain eligibility and coverage requirements, and if a state program meets those requirements, federal funds are provided for a percentage of the state's costs. (The percentage varies by state according to a formula, but the federal government always pays at least half the cost.) There is some state flexibility; for example, certain categories of individuals (for example, children from families with income below certain thresholds) must be covered, and additional categories of individuals may be covered at a state's discretion, but would still entitle the state to federal subsidies.

The health reform law passed in March 2010 provides for a substantial expansion of the "must cover" population – essentially anyone from a family with income below 138% of the federal poverty line (an amount that varies based on family size). This is a major component of the health reform law: according to the Congressional Budget Office, half the uninsured who they project to become covered as a result of new law will obtain coverage because of the Medicaid expansion.

From the states' point of view, the problem is, how will they come up with the money to cover their share of the cost of health care for these additional people? The health reform law provides a partial answer: the federal government will pay for the entire cost of coverage for those who are newly eligible – but only for the first three years, from 2014 to 2016. The federal government will reduce its contribution to 95% in 2017, then in stages, dropping to 90% in 2020 and thereafter.

For states to pay 10% of the cost may not seem like much, though it might turn out to be quite a substantial sum of money, given the large numbers of people involved. The fact is that most state budgets are already strained, and Medicaid spending is already one of the largest items in every state budget.

The constitutional issue, however, is what would happen if a state declined to pay for that portion of the Medicaid expansion not paid for by the federal government? Suppose, for example, a state decided to just forgo the expansion entirely, on the grounds that it could not afford to pay its share of the cost? In that case, the health reform law contains a built-in retaliation – the state would lose all federal Medicaid funding.

This is not the first time the federal government has used the threat of withholding federal funds as a means to induce states to enact laws that the federal government lacks the authority to enact directly. From 1974-1995, the National Maximum Speed Law required states to enact 55-mph speed limits (later raised to 65 mph on certain types of roads) or face the loss of federal highway funds. Since 1984, the National Minimum Drinking Age Act has required states to set a minimum age of 21 for purchasing alcohol or face a 10% (originally 5%) cut in their federal highway funds. In 1987, the Supreme Court upheld the latter Act, in *South Dakota v. Dole*.

However, when it comes to the Medicaid expansion, an *amicus* brief filed by former CBO director Doug Holtz-Eakin and others argues that something different is going on. The difference strikes at the heart of the meaning of federalism, and the separation of power between states and the federal government.

What gives Congress the authority to make federal grants dependent on state law? It should be clear that if the constitutional separation of powers is to mean anything, then when a particular power rests with the states, the federal government should not be able to compel the states to exercise that power in any particular way. The Supreme Court acknowledged this in South Dakota v. Dole, and noted that the law was upheld in part because the "relatively small financial inducement offered by Congress" meant the federal law merely applied "pressure" – but not "compulsion" – to the states.

What makes the health reform law's use of this strategy to expand Medicaid different is, to a large extent, the huge sums of money involved. Instead of a mere 5% or 10% of federal highway subsidies – which are a relatively small portion of state budgets to begin with – the law puts at stake 100% of federal Medicaid funds.

Medicaid is for most states one of the largest items in the budget, and with federal funds paying at least 50% and often more of the cost, the loss of these funds would have dramatic and harmful effects. The states would be forced to either enact huge tax increases to make up the difference, or drastically cut health coverage for the poor. Based on 2009 spending figures, the average state would have to raise tax collections by 34.4% to make up for the loss of federal funds. This sort of tax increase would be economically disastrous, not to mention politically infeasible.

The other alternative – cutting health care for the poor – would be no less disastrous (not to mention ironic, considering the original intent of the health care law). Indeed, cutting health care spending for the poor in response to health reform law would not only deprive the poor of significant health services; it could also lead to bankruptcy for some health care providers, thus impacting even non-poor residents. One reason for this is that in many circumstances, health care providers (such as emergency rooms) are required to provide care regardless of a patients (in)ability to pay, and often do so voluntarily even when not required. The instance of patients unable to pay would become much more common in the event of a huge cut in Medicaid.

These two alternatives are so unpalatable in practice that, the amicus brief argues, they are not real alternatives at all. The states' only choice is to expand Medicaid and pay the additional costs – even if it means cutting education, law enforcement, and other services, or raising state taxes. Therefore, the federal law is applying not merely "pressure," as permitted by the Supreme Court in South Dakota v. Dole, but "compulsion," which is an unconstitutional violation of the separation of powers.

The cynic might, at this point ask, if ending federal Medicaid subsidies is so drastic that it is unconstitutional to use as a stick to compel states, would it also be unconstitutional to end the Medicaid program entirely? And if so, how was it constitutional not to have Medicaid for the first 176 years of the federal government? Even though completely ending Medicaid without a replacement is such a remote possibility politically that we can safely disregard it (neither party has ever advocated it), it's worth looking at this question in theory.

The answer is no, for two reasons. First, what is unconstitutional is the discriminatory use of Medicaid funding only to states that do what Congress unconstitutionally demands. The second reason is that even though ending Medicaid subsidies to one state would be disastrous for that state, it does not necessarily follow that ending the entire program
would be equally disastrous for all states. The key insight here is that federal taxpayers and state taxpayers are mostly the same people. If Medicaid were ended in one state, that state's taxpayers would be paying federal taxes to support Medicaid in the other states, leaving their own state without the economic flexibility to increase taxes to make up for the loss of nominally federal funds. However, if the Medicaid program were ended entirely, federal taxes could be cut by an appropriate amount – leaving the states with the possibility of raising state taxes to collect the difference.

Of course, it is somewhat speculative to assume that ending a government program would result in the "correct" reduction in federal taxes. But it is even more speculative to assume, in the current political environment, that the federal government would end Medicaid – at least, without replacing it with another program aimed at providing health care for the poor.

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