The Supreme Court's Medicaid Ruling: 'A Shift In Kind, Not Merely Degree'

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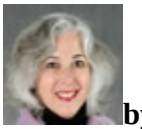

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This is a day to think about the Constitutional, rather than the practical, implications of the Patient Protection and Affordable Care Act. Nonetheless, the hallmark of the remarkable decision handed down today is the degree to which it navigates multiple political and ideological currents in order to create and hold a majority for the constitutionality of Act's centerpiece, the individual mandate.

One of the toughest currents – and ironically the most far-reaching insofar as coverage is concerned – is represented by the Medicaid expansion. Of the 32 million additional children and adults who will have insurance coverage when the Act is fully implemented, a full 16 million stand to be covered through a Medicaid expansion. The effect of this expansion is to reshape Medicaid from a program covering certain categories of the poor into one that offers universal public insurance for all non-elderly low income citizens and long-term legal residents living in poverty.

Bitter Opposition From Many States To The Medicaid Expansion

Medicaid was the sleeper issue all along. The expansion was bitterly opposed by a large number of states, despite the fact that it came with 100 percent federal funding in its initial phase beginning January 1, 2014, with funding remaining at 90 percent in the outyears. A quick glance leaves one scratching one's head over the basis of this objection, in light of the fact that as Justice Kagan noted at the oral argument, states were given a "boatload" of money toward its support. Deeper reflection suggests an opposition rooted in ideological rejection of mandates generally; fears that expansion would have a "woodwork" effect, encouraging enrollment by people who fall into traditional Medicaid eligibility categories and for

whom there is no enhanced federal funding; and fears over the impact on the health system of millions of newly insured poor people in search of health care.

Whatever the reasons – some practical, some philosophical – the states mounted a ferocious legal campaign against the expansion. Their argument was that the expansion amounted to unconstitutional coercion, in light of the fact that, under federal law, their refusal to comply could cost them all of their federal Medicaid funding. In the states' view, the Medicaid reforms were not part of a voluntary agreement between the parties, but instead an unanticipated demand for modification of their Medicaid programs, with a threat of total funding cutoff should they refuse to comply.

For its part, the federal government argued (and in its decision, the Eleventh Circuit agreed) that nothing about the Medicaid expansion altered the fundamental fact that Medicaid remains a voluntary program, that states are free to participate or not participate, and that the Secretary has plenty of discretion when it comes to noncompliance and has seldom (in fact never) completely cut off a state's funding. Indeed, during oral arguments, Justice Breyer wrung a concession from Paul Clement, who argued for the states, that the Secretary potentially would lack a rational basis were she attempt to sanction state noncompliance with the coverage expansion by withholding all federal funding.

Were the Medicaid expansion to be declared unconstitutionally coercive, half a trillion dollars in federal funding would have been lost, along with all hope of coverage for the poorest Americans, since the ACA bars the availability of federal premium assistance credits in the case of people with incomes below 133 percent of the federal poverty level, with the exception of recently arrived legal immigrants not yet eligible for Medicaid.

In her eloquent concurrence, Justice Ginsburg, writing for herself and Justice Sotomayor, noted that the Medicaid amendments in the ACA represent a sensible expansion of an existing program and therefore are subject to the same ground rules — comply or risk a full disallowance of federal funding — that otherwise govern the Medicaid program:

Through Medicaid, Congress has offered the States an opportunity to furnish health care to the poor with the aid of federal financing. . . . The spending power conferred by the Constitution, the Court has never doubted, permits Congress to define the contours of programs financed with federal funds. . . . And to expand coverage, Congress could have recalled the existing legislation, and replaced it with a new law making Medicaid as embracive of the poor as Congress chose.

The question posed by the 2010 Medicaid expansion, then, is essentially this: To cover a notably larger population, must Congress take the repeal/reenact route, or may it achieve the same result by amending existing law? The answer should be that Congress may expand by amendment the classes of needy persons entitled to Medicaid benefits. A ritualistic requirement that Congress repeal and reenact spending legislation in order to enlarge the population served by a federally funded program would advance no constitutional principle and would scarcely serve the interests of federalism. To the contrary, such a requirement would rigidify Congress' efforts to empower States by partnering with them in the implementation of federal programs.

. . . In shaping Medicaid, Congress did not endeavor to fix permanently the terms participating states must meet; instead, Congress reserved the 'right to alter, amend, or repeal' any provision of the Medicaid Act. (Slip Op. J. Ginsburg Concurrence, p. 38)

This result thus would have subjected opposing states to the potential for a total disallowance of federal funding for their failure to accede to the expansion.

Justice Roberts' Solution: Breaking Medicaid Into Two Spending Programs

In the face of this possibility –- and the insistence by the dissent that by its very terms such an expansion was coercive — the Chief Justice fashioned what only can be thought of as a remarkable "Two State Solution," and persuaded Justices Breyer and Kagan (who otherwise were members of Justice Ginsburg's concurrence) to go along. His achievement essentially saved the Medicaid expansion from extinction, while at the same time reaching a result that could satisfy any states' rights aficionado.

In effect, the Chief Justice broke Medicaid into "two spending programs," as Justice Ginsburg noted: states' existing programs; and — in what from a legal perspective is framed as a separate program — the ACA Medicaid expansion population. Indeed, this portion of the Medicaid ACA amendments (of which there are many) was the only portion to be parked in this new program created by the Chief Justice:

The Medicaid provisions of the Affordable Care Act . . . require States to expand their Medicaid programs by 2014 to cover *all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line. . . . [T]he Government claims that the Medicaid expansion is properly viewed merely as a modification of the existing program because the States agreed that Congress could change the terms of Medicaid when they signed on in the first place.. … The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. . . . The original program was designed to cover medical services for four

particular categories of the needy. . . Previous amendments merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the federal poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage. (Slip Op. C.J. Roberts, pp. 43-54)

By recasting a relatively straightforward Medicaid expansion (the addition of a new mandatory categorically needy coverage group, as so many have been added in the past) as effectively a program within a program (or a second state), the Chief Justice then set the stage for the obvious conclusion: whatever the coercion doctrine may or may not mean, it is clear that a state cannot be forced to participate in a new federal program and most certainly cannot be threatened with the loss of funding under one federal program because of its refusal to participate in a separate federal program. Without missing a beat, Chief Justice Roberts essentially rewrote the statute, segregating a new eligibility category into its own independent statutory construct. The result of such a move is clear:

Nothing in our opinion precludes Congress from offering funds under the Affordable care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What congress is not free to do is to penalize States that choose not to participate in *that new program* by taking away their existing Medicaid funding." [emphasis added] (Slip Op. C.J. Roberts, p. 55)

Some would argue that this sleight of hand effectively turns a mandate into a state Medicaid option. To be sure, this is the practical effect of the decision. But actually, the approach – which saves the expansion while doing what the states wanted and shielding them from the legal consequences of Medicaid non-compliance – is more nuanced. It essentially demarcates Medicaid eligibility categories in terms of the enforcement options that are available to the federal government, without in any manner undermining the legitimacy of the expenditure itself as the dissent would have done.

The Chief Justice concluded his discussion by noting that the existing Medicaid program – and the applicability of 42 U.S.C. §1396c, allowing full sanctions in the face of non-compliance – remain untouched. Indeed, the states argued as much. Instead:

The Court today limits the financial pressure the Secretary may apply to induce States to accept the terms of the Medicaid expansion. As a practical matter, that means States may now choose to reject the

expansion; that is the whole point. But that does not mean that all or even any will. (Slip Op. C.J. Roberts, p. 57)

Satisfying State Concerns While Saving Crucial Medicaid Funding

It is hard to recall a time when the Court used its power to decide in quite the same way – to restructure a law in order to satisfy the practical concerns of the litigants, while simultaneously allowing the law — and the irreplaceable funding it represents — to survive ideological opposition to the notion of investing federal funds in people in need.

Are there issues? Sure. Implementation will be slower and bumpier. But it always has been thus with Medicaid, a bumpy ride if there ever were one, but perhaps the health care system's most irreplaceable component. Some states may come on line slower than before. They may be emboldened to negotiate the terms of their surrender in ways that might not have arisen had the expansion been deemed a simple expansion of the existing program. But states eventually will take advantage of the extraordinary opportunity created by the commitment of funds.

The way forward may contain even more twists and turns than we thought, but I am convinced that millions of poor people ultimately will have the Chief Justice and Justices Kagan and Breyer to thank for figuring out a way not to let the money go.

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