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Perspective

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Although the media and the U.S. public focused primarily on the minimum-coverage requirement, or individual mandate, during the recent oral arguments in the challenges to the Affordable Care Act (ACA) before the Supreme Court, the most important issue before the Court may well be the constitutionality of the ACA's Medicaid expansion. There are potential alternatives to the minimum-coverage requirement, but a finding that the Medicaid expansion is unconstitutional could threaten all federal spending programs that set minimum participation standards. Indeed, as Justice Stephen Breyer observed during the oral argument, if the plaintiff's argument is accepted, then "Medicaid has been unconstitutional since 1964."[1]

The ACA expands Medicaid to cover all adults under 65 years of age who have an income below 138% of the federal poverty level. The federal government will pay 100% of the cost of this expansion for 2014 through 2016, phasing down to 90% by 2020. But states must cover the newly eligible population in order to receive any federal Medicaid funding.

The 26 Republican governors and attorneys general bringing the ACA lawsuit claim that the expansion is unconstitutional because they are being "coerced" into expanding their Medicaid programs under threat of losing all federal Medicaid funding. Their argument is grounded in statements made in two earlier Supreme Court cases speculating that financial inducements that the federal government offers states to participate in federal–state programs "might be so coercive as to pass the point at which 'pressure turns into compulsion.'" No federal court has ever declared a law unconstitutional under this coercion theory, and it was rejected by the lower courts in this case.

Paul Clement, arguing for the plaintiffs, contended that the Medicaid expansion is coercive because the states must choose between accepting expanded coverage and losing all federal Medicaid funds, that the lost funding would be enormous, and that if states don't participate in Medicaid, their poorest population will be unable to comply with the ACA's minimum coverage requirement. He also asserted that federal taxes for funding the expansion would leave states incapable of funding an alternative program if they chose not to participate. Solicitor General Donald Verrilli responded

that the federal government has always retained the right to change Medicaid and that earlier expansions have also required states to accept new responsibilities or lose funding. States remain free not to participate, he argued, but have no vested right to keep the program unchanged. Virtually all Medicaid-eligible persons would be exempt from the minimum-coverage penalty. Finally, most state Medicaid spending today covers optional benefits and populations, and the expansion's terms allow continued flexibility.

The Court's four liberal justices seemed unconvinced by Clement's arguments, pointing out that the federal government is not extracting money from states to pay for the expansion, since state residents are also independently subject to federal taxes, and that previous mandatory Medicaid expansions would also be unconstitutional under the states' theory. The more conservative justices seemed sympathetic to the states and to Clement's claim that, realistically, no state could withdraw from Medicaid, although Chief Justice John Roberts also recognized that the states bear responsibility for the current situation because they have willingly participated in federal spending programs since the New Deal. Justice Anthony Kennedy seemed to think that the key lay in the question of whether a state can be accountable to its citizens for a program it has no control over, but he recognized that this line of inquiry might not lead to a workable standard for deciding when coercion is present. Justice Breyer contended that any decision to withdraw Medicaid funding from a state that rejected the expansion would be judicially reviewable.

There was no clear sign that the Court is prepared to strike down the Medicaid expansion, but what would it mean if the Court held it unconstitutional?

The biggest losers would be the 16 million to 17 million Americans who are expected to gain Medicaid coverage under the 2014 expansion and the millions more who will be eligible should they have medical emergencies. Medicaid is not perfect — low provider payments limit access to care. But Medicaid beneficiaries are more likely than the uninsured to receive care, and after adjustments for health status, they have better outcomes.[2] Medicaid will continue to be a lifeline.

Striking the Medicaid expansion would also mean a huge loss for U.S. health insurers. Most of the newly eligible population is likely to be enrolled in private managed-care plans that contract with Medicaid agencies. One amicus brief in the Supreme Court case concluded that insurers will receive $356 billion in revenue from the Medicaid expansion over the next 10 years — almost as much as they expect to gain from both the ACA's minimum-coverage requirement and tax credits.[3]

Hospitals would also lose. Six hospital associations, representing virtually all U.S. hospitals, filed an amicus brief in support of the expansion.[4] If the Medicaid expansion is rejected, hospitals will continue to provide uncompensated care for uninsured Americans who would otherwise receive Medicaid. ACA cuts in Medicare payments to hospitals, coupled with enhanced obligations for tax-exempt hospitals, make the Medicaid expansion even more vital. ACA provisions allowing hospitals to make presumptive determinations of Medicaid eligibility will further reduce their uncompensated-care burden — if those provisions remain in place.

Although many physicians forgo Medicaid participation, many — particularly hospital-based and clinic-based physicians — depend on Medicaid.[5] In 2013 and 2014, Medicaid will pay 100% of the Medicare payment level for primary care services, dramatically increasing revenue for primary care physicians who accept Medicaid patients.

Paradoxically, another loser if the expansion is stricken would be the states, 13 of which filed an amicus brief in support of the expansion. A number of states have already expanded their Medicaid programs and expect fiscal relief if the expansions are upheld. Additional states would be relieved of billions of dollars in uncompensated care burdens.

As the oral argument ended, Justice Ruth Bader Ginsburg asked Clement if the states would accept a remedy blocking the expansion only in the objecting states, were the Court to find the expansion unconstitutional. Clement agreed. This solution would mitigate the damage caused by a ruling for the states but would not address the greatest threat posed by such a ruling.

Most cooperative federal programs — addressing not only health care but also transportation, education, welfare, community development, and environmental problems — involve conditional federal grants to the states. All these programs are subject to litigation if the states win this case. The Court's establishing the coercion theory as an active legal doctrine would threaten the ability of the federal govern-

ment to work with the states to address national problems. Holding the expansion unconstitutional could eliminate federal–state cooperative programs. The ramifications of such a ruling could far exceed those that might follow from the invalidation of the minimum-coverage requirement.

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