Health Care Reform, the Spending Clause, and Dole's Restrictions

by David G. Oedel

I am here to discuss a constitutional problem with the Health Care Reform Act[85] that so far has gotten little attention and that has not yet been discussed by our other panelists. The question is whether the federal government's expansion of Medicaid is a coercive exercise of federal power in violation of the Spending Clause of the United States Constitution.[86] This is one of the two main arguments being pressed by the twenty states[87] in the Florida litigation challenging the constitutionality of health care reform.[88] It is an argument that I think you're likely to hear more of in the future. Although I am a deputy special attorney general for Georgia in that case, I speak here in my personal capacity as a constitutional law professor at Mercer University, and my views do not necessarily reflect those of any party.

Let me begin by outlining how Medicaid is being transformed by health care reform. Basically, eligibility for Medicaid under the Act is being expanded by millions of people and now will reach people who are substantially above the federally-specified poverty line.[89] Medi*care* is exclusively a federal program; Medi*caid*, on the other hand, is a joint program with the states. It is the occasion for the single largest slug of federal funding going to the states.[90] It is a sum that is larger than federal funding to the states for transportation and education combined. Under the Health Care Reform Act, the federal funding for Medicaid appears likely to soon be more than half of all federal funding to the states (it had been about 40% before health care reform). In 2010

---

85. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

86. U.S. CONST. art. I, § 8, cl. 1.

87. These states include Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Indiana, Idaho, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Pennsylvania, South Carolina, South Dakota, Texas, Utah, and Washington. *20 States Prepare for Day in Court Against Health Care Law*, FOXNEWS.COM (Sept. 13, 2010), http://www.foxnews.com/politics/2010/09/13/states-prepare-day-court-health-care-law/.

88. Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011).

89. Persons with incomes up to 133% of the "poverty" designation will be covered under the changes to Medicaid beginning January 1, 2014. Patient Protection and Affordable Care Act § 2001(a)(1), 124 Stat. at 271.

90. "Medicaid is the single largest Federal grant-in-aid program to the States, accounting for over 40[%] of all Federal grants to States." H.R. 985, 109th Cong. § 2(13) (2005), http://www.gpo.gov/fdsys/pkg/BILLS-109hr985ih.pdf.

Medicaid cost the federal government about $289 billion according to the federal government's own estimates–more than an 11% increase from 2009, and these costs were incurred even before some of the costliest changes to Medicaid go into effect in 2014. So far health care reform seems to have had no dampening effect on Medicaid costs. Meanwhile, Medicaid is also a large and growing part of the typical state's own budget. On average in 2006, even before recent increases in the costs of Medicaid, states were spending about 17% of their own state revenues each year to fund their share of Medicaid.[91] Under health care reform, Medicaid's expansion will initially be funded by the federal government, but even if Medicaid were otherwise staying level (not growing by more than 10% a year because of lack of cost controls in the classic system), states will soon be spending more of their own revenues to fund 10% of the expansion or possibly more in six years, whatever that expansion turns out to be.

The twenty (now twenty-six) states in the Florida case are not arguing that some reform of Medicaid is unwarranted. Rather, the argument is about the unconstitutionally heavy-handed way the federal government chose to force these particular changes on the states. Those states are supposed to be partners in Medicaid, but they were basically shut out of the reform even though their own fiscs were already being depleted by Medicaid's runaway costs. Those fiscs are expected to be further raided by the federal government to help fund the new expansion of Medicaid.

Let me give you some of the deep constitutional background to the states' constitutional challenge to Medicaid. According to Article I, section 8 of the United States Constitution, "The Congress shall have Power [t]o . . . provide for the common Defence and general Welfare of the United States . . . ."[92] Throughout our nation's history, this clause has been understood to permit Congress the power only to spend for the "general welfare" of the nation as a whole and not for the benefit of some local state administrations to the exclusion of others. Justice Story, for

---

91. Georgetown University Health Policy Institute Center for Children and Families, *Medicaid and State Budgets: Looking at the Facts,* GEORGETOWN UNIVERSITY, http://ccf.georgetown.edu/index/cms-filesystem-action?file=ccf%20publications/about%20medicaid/nasbo%20final%205-1-08.pdf (last visited Mar. 10, 2011). The Georgetown study indicates that 16.8% of the states' general fund budgets were devoted to Medicaid in 2006 and that Plaintiff States overall have similar characteristics, some devoting more and others less than average. Most recent data for 2010 suggests that the present level of state spending is 21% of state budgets overall. Peter Suderman, *ObamaCare and the Medicaid Mess,* WALL ST. J., Feb. 15, 2011, *available at* http://online.wsj.com/article/SB10001424052748703843004576138682854557922.html.

92. U.S. CONST. art. 1, § 8, cl. 1.

example, was insistent on this view of the Spending Clause in his Commentaries.[93]

Of course, the Spending Clause in Justice Story's day was not the major tool of congressional expansion it has become since the advent of the income tax by ratification of the Sixteenth Amendment[94] in 1913 and the expansion of federal spending during the New Deal. But the basic constitutional architecture with respect to congressional limits on spending has been left untouched. There was little occasion for testing the outer bounds of the Spending Clause until the New Deal, when key new areas of federal spending were upheld–social security in *Helvering v. Davis*[95] and unemployment insurance in *Steward Machine Co. v. Davis*.[96]

In upholding the federal spending on unemployment insurance in *Steward Machine*, Justice Benjamin Cardozo, writing for the Court, predicted that the spending power would reach its limit one day when the federal government's coercive use of the purse would allow the federal government to overrun the states.[97] In his eloquent words, Justice Cardozo called that the point at which "pressure turns into compulsion."[98] The twenty states in the Florida litigation believe that a prime case of compulsion is now squarely confronting the nation, and the face of this compulsion is health care reform in the coercive design of the expansion of Medicaid.

Of course, the federal government has a different view, and I would like to summarize briefly here three of its key points while acknowledging that there is much more briefing on the subject. First, the federal government now in court says that the states are free to opt out of the Medicaid changes if they want, even if the statute itself makes no mention whatever about that theoretical possibility. Second, the federal government points out that no case of spending coercion has yet been

---

93. Although Story sided with Hamilton over Madison on whether Congress could spend for some unenumerated purposes, Story simultaneously insisted that any such purposes still must be for "general," not parochial "state administration," purposes: "Have congress a right to raise and appropriate the public money to any, and to every purpose, according to their will and pleasure? They certainly have not. The government of the United States is a limited government, instituted for great national purposes, and for those only." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 692-93 (Charles C. Little & James Brown eds., 2d ed. 1851). According to Justice Story, on whom the defendants rely, Congress would be beyond its power "to apply money in aid of the state administrations, for purposes strictly local . . . ." *Id.* at 693.

94. U.S. CONST. amend. XVI.

95. 301 U.S. 619, 644-45 (1937).

96. 301 U.S. 548, 598 (1937).

97. *Id.* at 589-90.

98. *Id.* at 590.

decided either in general or in the specific context of prior expansions of Medicaid. Third, the federal government questions whether a coercion case can even be justiciable because it may implicate political questions.

Most of the argument in the twenty-state litigation about Medicaid is being framed by a case about Spending Clause limits that did reach the Supreme Court of the United States twenty-five years ago and is arguably the last word on the subject from the Court. That 1987 case was *South Dakota v. Dole*.[99] In *Dole* South Dakota challenged whether the federal government could threaten to withhold 5% of highway funding from South Dakota if it did not change its nineteen-year-old drinking age to a twenty-one-year-old drinking age.[100] The Court held that merely withholding 5% of an already modest allocation of highway funding was only a form of "relatively mild encouragement" and not coercive.[101]

In the Florida case, though, the states are facing a catastrophic 100% loss of all federal funding for Medicaid, by far the single largest federal transfer to the states. *Dole* is usually cited for a well-known dissent by Justice O'Connor about the degree of attenuation between the purpose of the funding and the condition that is being imposed,[102] but the twenty states are not primarily relying on that part of the opinion; rather, they are relying on the majority's general outline of the restrictions on the spending power. Justice Rehnquist, writing for the Court in *Dole*, quoted Justice Cardozo's prediction in *Steward Machine* about the possibility of persuasion turning into compulsion.[103] The Court in *Dole* made no mention of any justiciability problems with making such a declaration in an appropriate case someday. Moreover, the majority in *Dole* articulated four "general restrictions" on the spending power.[104]

The first of those general restrictions is that congressional spending must be for the general welfare.[105] Now, the Court in *Dole* recognized that Congress is usually in the position of defining what is in the general welfare. But that is not always the case. Sometimes Congress can go off on tangents that strain credulity on the subject and can

---

99. 483 U.S. 203 (1987).

100. *Id.* at 205, 211.

101. *Id.* at 211-12.

102. *Id.* at 215 (O'Connor, J., dissenting).

103. *Id.* at 211 (quoting *Steward Mach.*, 301 U.S. at 590) (majority opinion).

104. *Id.* at 207.

105. *Id.* Professor Barnett and I recently wrote an op-ed in the *Wall Street Journal* that further elaborates on this argument. Randy E. Barnett & David G. Oedel, Op-Ed., *ObamaCare and the General Welfare Clause*, WALL ST. J., Dec. 27, 2010, http://online.wsj.com/article/SB10001424052748703581204576033862848034544.html.

become "arbitrary" in the words of Justice Cardozo.[106] It is not enough to say that the 1936 case of *United States v. Butler*,[107] in which the Supreme Court held that the spending power reaches subjects not otherwise in the enumerated powers of Congress, justifies substantially problematic conceptions by Congress of the general welfare.[108] Here is how Justice Cardozo described the problem:

> [D]ifficulties are left when [a broader conception of the spending] power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large.[109]

Let me go forward from Justice Cardozo's time to last year and the Cornhusker Kickback.[110] It was the unique deal offered to Nebraska if one of its senators would sign on to health care reform.[111] Every other state would eventually have to pay some unspecified additional amount for Medicaid's changes, but Nebraska would get every dime of its increased costs paid.[112] There was outrage around the country about this provision, and it was eventually junked, but it is the kind of facially arbitrary provision that one could argue is unconstitutional because it is not within the "general" welfare. While all states were to get basically the same program, one state would have gotten a free ride when all others would have paid.[113] This is the kind of thing that Justice Story was talking about when he said that peculiar local benefits given to particular state administrations are not within the general welfare.[114] And Justice Story's views are especially important on this point because he was also the authority that the Supreme Court relied on in *Butler*: in that case, Justice Story helped resolve the separate controversy between

---

106. *Helvering*, 301 U.S. at 640.

107. 297 U.S. 1 (1936).

108. *Id.* at 85, 88.

109. *Helvering*, 301 U.S. at 640.

110. *See infra* note 113.

111. Robert Pear, *Deep in Health Bill, Very Specific Beneficiaries*, N.Y. TIMES, Dec. 21, 2009, http://www.nytimes.com/2009/12/21/health/policy/21health care.html.

112. *Id.*

113. In his final State-of-the-State address, California Governor Arnold Schwarzenegger got his biggest applause after mentioning Nebraska's sweetheart deal in the proposed expansion of Medicaid, then saying that Senator Nelson "'got the corn; we got the husk.'" Steve Yeater, *Schwarzenegger: California Needs a 'Sweetheart Deal,' Too*, PRESCRIPTIONS: THE BUSINESS OF HEALTH CARE, N.Y. TIMES BLOG (Jan. 6, 2010, 4:04 PM), http://prescriptions.blogs.nytimes.com/2010/01/06/schwarzenegger-california-needs-a-sweetheart-deal-too/.

114. *See supra* text accompanying note 93.

Hamilton and Madison about whether the spending power could be used to effect purposes outside the enumerated powers.[115]

Furthermore, health care reform is more plainly justiciable because what passed was a sophisticated system of coercion that threatened to allow a majority of states to exploit any stray minority state and its citizens. That is different from the Cornhusker situation, in which a minority extracted something from the majority. To understand the coercive elegance of the final scheme of recent health care reform, note to begin with that every single state is already completely committed to Medicaid. This situation is unlike that in *Dole*, in which there were many states with different drinking ages, including the complaining state of South Dakota. To the contrary, in 2010 we already had 100% uniformity with respect to Medicaid prior to the passage of health care reform. Now recall that the federal government's first-line defense against the alleged coerciveness of the changes to Medicaid is that the states are supposedly perfectly free to opt out. However, if a state were to opt out, all the federal funding–more than $5 billion for a median state–would completely disappear. Such a state would be unable to pay for its own poorer citizens' health care. Meanwhile, the funds of the U.S. taxpayers within the dissenting state would be used only to fund the poorer citizens of other states.

The coercive implications of this scheme are so obvious that even the *New York Times* admitted in an editorial that it would not be "practical" for any state to opt out of the changes to Medicaid.[116] Indeed, though we have twenty-plus states kicking and screaming about their objections to health care reform, not a single state has opted out. However, if any state did opt out, that action would reveal the unconstitutionality of the Act as being against the general welfare. In short, the all-in-or-all-out feature of Medicaid reform is really nothing more than a strong-arm tactic that effectively coerces every state to assent to the changes whether the state likes them or not.

Could the expansion of Medicaid have been structured constitutionally? Of course it could have: states wanting to opt out of the changes to Medicaid could have been given block grants for them to spend for the poor's health as they saw fit. We already have a system for rough justice in dividing Medicaid funding fairly among all fifty states, despite some differences in state incomes, under an elaborate calculus called the

---

115. 297 U.S. at 66.

116. "It is true, as the suit contends, that it may not be practical for states to drop out of a Medicaid program that serves many of their poorest residents." Editorial, *The Legal Assault on Health Reforms*, N.Y. TIMES, Mar. 29, 2010, http://www.nytimes.com/2010/03/29/opinion/29mon1.html?pagewanted=print.

Federal Medical Assistance Percentage formula. But Congress did not want to give the states the chance to get their same rough share of Medicaid funding, because Congress knew perfectly well that many states would exercise the opportunity to design their own approaches to health care reform–approaches that would not continue Medicaid's currently unbridled cost inflation and would not expand the classes of those entitled to use the most ill-conceived parts of the health care system.

As an aside, let me give you just one example of the federal government's folly when it comes to Medicaid design–just one reason why it makes sense for states to resist expansion of Medicaid as both inhumane and inefficient. The *Journal of the American Medical Association* provides that it makes sense for people with HIV to get on the AIDS cocktail when their t-counts dip below 350. However, Medicaid makes them wait until their t-counts drop to 200, when full-blown AIDS is already there or near, and catastrophic expenses that could have been avoided are then incurred.

Let us get back to *Dole* and why its second so-called "general restriction" on the spending power is being violated by health care reform. Coming out of the *Pennhurst State School & Hospital v. Halderman*[117] case, which was specifically cited in *Dole*,[118] the second general restriction is whether a state can clearly identify its options with respect to any condition the federal government wants to encourage through its spending–in other words, this restriction is about whether any conditions imposed on the states by the federal government are clearly and unambiguously articulated.[119] You might have thought that

---

117. 451 U.S. 1 (1981).

118. 483 U.S. at 207.

119. *Halderman*, 451 U.S. at 17-18.

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.
>
> Indeed, in those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly.

Id. (footnote omitted) (citations omitted); *see also* Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2495 (2009); Winkelman *ex rel.* Winkelman v. Parma City Sch. Dist., 550 U.S. 516,

in the thousands of pages of text of health care reform, there would be some mention of what would happen to a state if it were to opt out of the changes to Medicaid. But I can assure you, as I am apparently one of the few people who actually read the Act, that there is simply no mention whatsoever of any possibility of opting out of Medicaid or what opting out might mean. Only in court does the federal government now say that a state can opt out (even if it would lose the single largest form of federal funding to the state and its citizens). Of course, it is completely pretextual to say that a state can opt out. Each state's acceptance is practically mandatory. But if we do credit the federal government's argument that any state's choice to buy into the changes to Medicaid is really a choice, then that choice can only be made knowingly if states can understand the alternative by reading the Act. And that is not currently possible.

Another of the general restrictions of *Dole* is whether other constitutional violations are implicated by the scheme of spending.[120] In *Dole* there was no question of general welfare or the clarity of the choice between an inconsistent drinking age and 5% of highway funding, and the Court also concluded that a twenty-one-year-old drinking age presented no other constitutional affront to anyone.[121]

But health care reform is a very different situation. If a state were to opt out of Medicaid, as the federal government insists that the states have a right to do under the Act, the citizens of that state would thereby be deprived of federal funding for health care within their state simply because of the happenstance of their state citizenship. This kind of discrimination against individual U.S. citizens merely because of their state citizenship would violate both the Equal Protection Clause and the Privileges or Immunities Clause of the Fourteenth Amendment.[122] There are constitutional affronts, too, to the Ninth Amendment[123] and Tenth Amendment,[124] as well as to the Guaranty Clause[125]–an interesting suggestion made by the Supreme Court in the case of *New York v. United States*.[126]

---

534 (2007); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006); Nicole Huberfeld, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Health care Programs*, 86 N.C. L. REV. 441, 453-56 (2008).

120. 483 U.S. at 208, 210.

121. *Id.* at 211.

122. U.S. CONST. amend. XIV, § 1, cl. 2, 4.

123. *Id.* at amend. IX.

124. *Id.* at amend. X.

125. *Id.* at art. IV, § 4, cl. 1.

126. 505 U.S. 144, 185 (1992) (expressing sympathy with the view that "courts should address the merits of [Guaranty Clause] claims" in the context of Tenth Amendment

Let me close with these simple observations. Back in the 1930s, when the limits on the Spending Clause were first sketched out by Justice Cardozo and his colleagues, no states were challenging the spending, and the general welfare was not disputed. Today, however, many states object and yet must still capitulate because they are being coerced by the threat that if they do not capitulate, the general welfare and the rights of their own citizens will be damaged to the point that their poorest citizens will die from lack of health care. The states simply have no choice but to assent to a plan that continues to harm their states in very serious ways, forcing them to choose to continue funding a runaway Medicaid system at ever-increasing costs to the states while teachers and police are being laid off. The states' hard budgetary choices in this era are being made in substantial part by the federal government, not by the state legislatures. And the federal government is telling the states to keep spending more and more of their own money on a wildly inefficient system of Medicaid.

This is a prima facie case of coercion and a Tenth Amendment violation. I respectfully suggest that it would be appropriate for courts to adjudicate disputes regarding the constitutionality of health care reform under the authority of *McCulloch v. Maryland*,[127] thus vindicating the principle of representation reinforcement suggested in *McCulloch* and refined by Professors Bickel and Ely.[128] These states and their citizens have been pressed upon perniciously by the federal government in an elaborately unconstitutional scheme. I have nothing personal against heathcare reform in theory or President Obama as a politician. I even voted for President Obama. However, this is a situation that transcends partisanship and is a critical constitutional moment for our nation, and our courts must intervene for reasons that go far beyond health care.

---

concerns).

127. 17 U.S. 316 (1819). Even in that case, which is famed for stating a strong form of congressional power, Chief Justice Marshall was careful to note the difference between the exercise of congressional power for national rather than state-specific purposes, and he also warned that the judiciary must step in for representation reinforcement to rescue states from the threat of being treated differentially by the national government: "[T]he government of the Union . . . is the government of all; its powers are delegated by all; it represents all, and acts for all," wrote the Great Chief. "Though any one state may be willing to control [the national government's] operations, no state is willing to allow others to control them." *Id.* at 405.

128. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962) (judiciary as counter-majoritarian force); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87-88 (1980) (explaining the critical judicial role in representation reinforcement).

Thank you for this opportunity to sketch out why there may be more to the constitutional challenges to health care reform than may at first meet the eye.

(continued on next page)