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States' cost, constitutionality fuel health debate

Commentary by Getahn Ward
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For constitutional law scholars such as Vanderbilt University's Professor James F. Blumstein, the health-care reform debate in Congress is filled with complex case studies.

Take, for instance, the expectation that states would absorb some expenses from the expansion of Medicaid — something that's projected to cost Tennessee an additional \$735 million from 2014 to 2019 under the Senate's version, or nearly double that amount under the House health bill.

Under both measures, the federal government would pay 100 percent of the costs for Medicaid expansion for three years, then 90 percent thereafter.

Under the Senate's bill only Nebraska was exempted from paying any additional Medicaid funds, but that could change since Sen. Ben Nelson, D-Neb., now is seeking to replace that exemption with a provision that gives all state governments the same treatment.

Blumstein sees harsh repercussions if states end up being asked to pay a larger share of the cost of Medicaid. Some states could withdraw from the state and federal health-care program for the poor if the financial burdens increase, he said. The federal government can offer incentives to induce states to participate in federal programs, but it cannot require participation, he points out.

"I see that conversation occurring if health reform is passed," Blumstein said, adding that states could let Medicaid patients go through health exchanges that are to be set up under the reform package and use federal subsidies to obtain coverage, relieving the states of that financial responsibility.

Can insurance be required?

Another issue on which Blumstein has yet to reach a conclusion is the argument about whether it's unconstitutional for the government to require everyone to have health insurance.

Randy E. Barnett, a senior fellow at the libertarian Cato Institute and a constitutional law professor at Georgetown University Law Center, is among scholars raising the idea that health reform might be unconstitutional in its current structure.

Barnett questions the constitutionality of requiring nearly everyone to have insurance.

Democrats believe the insurance mandate falls within the broad definition of interstate commerce, and they could use specific language in any final version of the health bill to protect their assertion, saying it's akin to congressional authority under the Constitution to levy taxes.

But Barnett argues that Congress doesn't have the right to force people to buy insurance from a private company. He considers the penalty that people who don't get insurance would have to pay to be more of a fine than a true tax.

"Regulating commerce is one thing," Barnett said. "Forcing you to engage in economic activity is not the same thing as regulating it if you do."

Blumstein says Barnett has been around in constitutional law circles long enough and has the credibility to be taken seriously, but Blumstein remains skeptical about Barnett's position. "I'm still evaluating that argument and not willing to endorse it yet," he said.
