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# ObamaCare and the General Welfare Clause

*The individual mandate is not the only problem with the health law. Its draconian Medicaid mandates on states exceed Congress's spending power.*

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Remember the Cornhusker Kickback? In a frantic effort to move ObamaCare through the Senate last December, the following provision was added to the bill: Nebraska was given a \$100 million exemption to cover the costs of the bill's dramatic expansion of Medicaid. The special exemption was ultimately dropped during reconciliation, but not only because of the public outrage it generated. Many realized it was unconstitutional for a reason that now applies equally to the health-reform law: Both violate the general-welfare clause.

While Congress has no constitutional authority to directly commandeer state legislatures into doing its bidding, it can place conditions on the money it offers them. So in the 1980s, for example, states had to raise their drinking age to 21 or the federal government would hold back 5% of a particular state's highway funds. But Congress's authority to impose conditions is not limitless.



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Article I, Section 8 of the Constitution gives Congress the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." The problem with the Cornhusker Kickback was that the citizens of 49 states would have had to pay for Nebraska's Medicaid exemption—without getting anything in return. The special exemption exceeded Congress's constitutional authority because it did not serve the "general welfare"—meaning, the welfare of the people of each and every state.

This defect is true of the new health law, the Patient Protection and Affordable Care Act. Although the constitutional objections to its individual insurance mandate—the requirement that any person who isn't provided insurance by his employer buy it on his own—have gotten all the public attention, the law also has a "general welfare" problem. It will pile unspecified new costs on states by requiring them to extend their Medicaid coverage to more people. In Florida, 20 states have challenged these state mandates as exceeding Congress's spending power. Their challenge is based on *South Dakota v. Dole* (1987).

In *Dole*, the Supreme Court upheld the congressional mandate that every state raise its drinking age to 21, or lose 5% of its highway funding. But the Court also acknowledged that "in some circumstances, the financial

inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion'" (quoting a 1937 opinion by Justice Benjamin Cardozo). The Court upheld the drinking age mandate because a state would only "lose a relatively small percentage of certain federal highway funds."

ObamaCare won't alter Medicaid in a relatively small way. It's an "all in or all out" proposition—not a threat of losing just 5% of some transportation funds, but a threat of losing 100% of the single largest federal outlay to the states.

The annual federal spending on Medicaid is now over \$250 billion, more than all federal spending on transportation and education combined, and it is climbing quickly. States on average devote about 18% of their tax revenues to Medicaid, typically funding between 40% and 50% of their state's total Medicaid costs. The health law's changes to Medicaid will force them to pay even more of their own funds.

The 20-state challenge to the new law was heard in federal district court in Pensacola, Fla., on Dec. 16. Much of the argument concerned whether the threatened loss of Medicaid funding passes the threshold laid out in *Dole*, where persuasion becomes compulsion. We think the case also presents a serious "general welfare" problem.

Normal federal spending occurs irregularly throughout the U.S. If Nebraska gets a military base, for example, making the case that it serves the "common defense and general welfare of the United States" is easy, since citizens of other states benefit from the base. The same general-welfare story can be told about virtually all federal spending programs, which is why Chief Justice William Rehnquist said in *Dole*, "[i]n considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress."

ObamaCare is different. Texas might be allowed to withdraw from Medicaid, but Congress will simply send the Medicaid portion of its citizens' federal tax payments to the 49 other states. Texas citizens would receive nothing in return.

Given the enormous sums involved, sending their tax payments to other states would make it nearly impossible for Texans to fund their own system of medical assistance to the poor: Texas's poor citizens would suffer while the state's tax payments would go to support the poor in other states. Taking from one state to benefit 49 others is as much a violation of the general-welfare clause as the Cornhusker Kickback, which proposed taking from 49 states to benefit one.

In short, the real key to the Medicaid challenge by the 20 states is not simply that withholding Medicaid funding is coercive. It is that the taxes paid by citizens of a state that opts out of Medicaid would no longer be spent in support of the general welfare of each and every one of the states—including itself.

The problem is not insurmountable: Congress could simply provide any state that chooses to withdraw from Medicaid a federal block grant equal to the amount that state's taxpayers would otherwise receive for Medicaid. That would make its choice to remain in or opt out of Medicaid truly voluntary and ensure that the Medicaid program serves the general welfare.

A cynic might respond, Congress would never offer such a block grant because then lots of states might withdraw. Exactly right. And this shows how the "coercion" principle of *Dole* is linked to the general-welfare clause. If the only way to withdraw from Medicaid is for a state to deprive its citizens of the benefit of their

tax payments, they are in this sense unconstitutionally coerced into remaining.

The conclusion is clear. So long as Congress insists on threatening the taxpayers of any state that withdraws from Medicaid by sending their tax money to the other states—and, in the process, depriving them of the funds needed to assist their poorest citizens—federal courts should follow *Dole* and rule that the new Medicaid requirements are unconstitutional.

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