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# ObamaCare's Next Constitutional Challenge

The Medicaid provision of the health law spells the death knell for competition among the states.

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By RICHARD A. EPSTEIN And MARIO LOYOLA

The constitutional battle over ObamaCare has largely focused on the constitutionality of the individual mandate. Namely, does forcing individuals to buy health insurance violate the commerce clause? But as the Eleventh Circuit Court of Appeals prepares to hear *Florida v. United States*, a second issue is of equal importance: Was District Court Judge Roger Vinson correct to rule that the federal government can force states to expand their Medicaid programs as a precondition for continuing to receive matching federal funds for the program?

Under the Patient Protection and Affordable Care Act, states have a choice: Expand their Medicaid rolls or bear the full cost of caring for their state's current Medicaid population, while continuing to subsidize the Medicaid programs of other states. The constitutional danger of such a scheme has long been recognized. In 1936, the Supreme Court warned in *U.S. v. Butler* that if conditional federal grants were not restrained, the taxing and spending power "could become the instrument for the total subversion of the governmental powers reserved to the individual states."

And yet the government is comparing this Medicaid requirement to a "voluntary" contract. Does anyone believe that a person is entitled "voluntarily" to continue his journey so long as he pays for all poor people who use the roads? The government's action is plainly coercive because it necessarily conditions the exercise of one right upon the conscious surrender of a second.

Unfortunately, the Supreme Court's decision in *South Dakota v. Dole* (1987) confused matters. *Dole* let Congress condition 5% of federal highway funds on the states raising their drinking age to 21. The Court argued that this modest penalty was mere persuasion—not coercion—but cautioned 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.'"

The question, then, is where that point is. Judge Vinson denied that any such point exists because the federal courts have routinely ignored the Court's warning in *Dole* by approving virtually every conditional federal

grant program—no matter how intrusive.

The reason why the analysis in *Dole* has failed to offer any protection for state autonomy is that it is fundamentally wrong to think of coercion as a matter of degree. The government always engages in coercion when it taxes away money from the citizens of several states, only to return it to those states that abide by certain conditions.

The Medicaid provision of ObamaCare spells the death knell to competition among the states. States cannot function as "laboratories of democracy"—as the 10th Amendment intended—if the federal government can use its power to tax and spend to bludgeon all states into conformity.

In *New York v. United States* (1992), the Supreme Court ruled that the federal government cannot require state governments to take ownership of nuclear waste that citizens could not otherwise dispose of safely. And in *Printz v. United States* (1997), the Court held that the U.S.



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could not compel local law enforcement officers to conduct background checks on prospective handgun owners without their consent, because such commandeering of state public officials is contrary to the federal structure of our Constitution.

In neither *New York* nor *Printz* did the result turn on the "level" of coercion, nor should it do so in the current case. The constant backdrop of the federal taxing power makes a mockery of the claim that state participation under ObamaCare is voluntary. The only way to prevent this grave intrusion on state autonomy is to strike down the Medicaid provisions of the health-reform law.

*Mr. Epstein is a professor of law at New York University and a senior fellow at the Hoover Institution. Mr. Loyola is director of the Center for Tenth Amendment Studies at the Texas Public Policy Foundation, which filed an amicus brief in Florida v. United States.*

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