

ACA LAWLESSNESS PLAGUES THE STATES

Red states are at the forefront of these extralegal health care expansions.

✦ BY CHRISTINA SANDEFUR

Abusing the legislative process has become a routine part of the rollout of the Affordable Care Act (ACA). Since it was signed into law in 2010, the Obama administration has delayed, waived, or otherwise ignored key provisions of the act over two dozen times. Flouting Congress's distinct directives and precise deadlines, President Obama has decreed these changes by press conference, unilaterally altering the law to suit the expediency of the moment. This has generated considerable criticism on the national level.

Little has been said, however, about an equally alarming trend: ACA-related violations of law at the state level. This is especially evident in states that have expanded—or are considering expanding—their Medicaid programs pursuant to the act. Governors across the country are employing drastic measures to adopt the ACA within their borders, often ignoring the will of their legislatures and ditching constitutional constraints on their power. Perhaps surprisingly, governors of “red” states have been among the worst abusers of the rule of law in their efforts to collaborate with the Obama administration.

THE SUPREME COURT'S SILVER LINING

The U.S. Supreme Court's 2012 ruling in *National Federation of Independent Business v. Sebelius* effectively made states the ultimate guardians of health care freedom, holding that the federal government cannot force states to expand their Medicaid rolls to unprecedented levels. The Court ruled 7–2 that the ACA's provisions forcing states to transform their Medicaid programs from “a program for the neediest among us”—namely, the disabled, blind, elderly, and needy families with dependent children—to “an element of a comprehensive national plan to provide univer-

sal health insurance coverage” exceeded Congress's power under the Spending Clause. Instead, states must remain free to choose whether or not to adopt Medicaid expansion.

But even when regarded as voluntary, the ACA's Medicaid provisions are extreme. The law asks states to embrace Medicaid's broadest expansion ever. Through 2016, the federal government vows to cover the medical costs for newly eligible enrollees. Of course, that simply means that the costs will be borne by federal taxpayers. And even with the pledged federal funds, the Kaiser Family Foundation estimates that states could be on the hook for billions of dollars during the nascent stages of expansion, making this some of the most expensive “free” money they have ever received. As federal funding declines under the law over subsequent years, the costs to the states will only increase.

The Court's rejection of the Medicaid expansion mandate was a crucial step toward restoring the states' historical role as protectors of health care freedom. By rejecting Medicaid expansion, states could control their own budgets, reduce federal spending by hundreds of billions of dollars, and halt a critical component of the federal takeover of the health care industry. Yet while 26 states battled in court to secure this option, many governors are not only shifting their positions on Medicaid expansion, but doing so in ways that seriously damage the rule of law within their states.

WILD WEST: ARIZONA'S TAXATION WITHOUT AUTHORIZATION

Perhaps the most perplexing example comes from Arizona, a state with a rich history of resisting federal encroachment on health care. Although Medicaid was established in 1965, Arizona waited until 1982 to join the program, becoming the last state to do so. Despite having 17 years of data and lessons from other states, Arizona has nevertheless incurred tremendous unexpected costs from adopting the program. In 2005, for example, the cost of expanding the program exceeded the state's expectations by almost \$1 billion.

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Wary of government involvement in health care, in 2010 state voters enacted the Health Care Freedom Act, which protects people's right to make their own health care decisions and prevents the state government from forcing people to participate in a health care system. Arizona also rejected a state-funded ACA health insurance exchange, which would have cost Arizona taxpayers millions of dollars annually, as well as providing kickbacks to private health insurance companies and making the state an accomplice in enforcing the ACA.

In the tradition of resisting federal overreach, Arizona's Republican Gov. Jan Brewer fought hard to advance the state's legal challenge to the ACA's Medicaid expansion mandate. Her unsuccessful request to compromise on Medicaid expansion revealed the federal government's strict, all-or-nothing approach. It was the Obama administration's letter to Brewer, making clear that failure to expand Medicaid to the full extent required under the ACA would result in a loss of *all* state Medicaid funds, that persuaded the Supreme Court to declare mandatory expansion unconstitutionally coercive.

But the next year, Governor Brewer inexplicably changed course and demanded that Arizona implement the new Medicaid program she had so successfully resisted. To fund the state's obligations, her plan called for a mandatory "provider tax" on hospitals. Many legislators objected to such an expensive and risky program, especially because it lacked protections for Arizona taxpayers such as a guarantee that reductions in federal support would not stick Arizonans with an even greater tab. The bill also did not require an annual study of the program's quality of care or an independent

audit to ensure that hospitals complied with rules forbidding them from passing the cost of expansion on to patients.

Unwilling to incorporate those safeguards, expansion proponents embraced underhanded and even unconstitutional tactics to ensure passage of the bill. Brewer threatened to veto all legislation, on whatever subject, until her expansion plan passed both houses, and she made good on that threat by vetoing five unrelated bills. In moves reminiscent of the ACA's midnight passage through Congress, she called lawmakers to the capitol for an overnight special session, demanding that Medicaid expansion be fast-tracked to approval. Supporters suspended procedural rules to bypass traditional review before consideration by the full legislature. Yet even in the early hours of the next morning, the bill's backers were unable to garner the support necessary to pass the program's new tax as required by the state's Constitution.

Over two decades ago, Arizona voters enacted a constitutional provision that requires a two-thirds supermajority of both houses of the legislature to approve any "act that provides for a net increase in state revenues," including new taxes and fees. But Brewer and her supporters devised a way to evade that requirement. Their bill ceded to the state's Medicaid director the power to levy the Medicaid tax, giving the director full discretion to set the amount of the tax and to choose who must pay and who will be exempt. Supporters hoped that by renaming the tax an "administrative assessment" and assigning control to an appointed official, they could escape the supermajority requirement. Although the bill received only the votes of an ordinary majority, supporters in the legislature deemed it "passed" and Governor Brewer signed it into law.

HEALTH & MEDICINE

Thirty-six state legislators who voted “no” later sued, arguing that their votes—which should have defeated the bill—were effectively nullified by the refusal to obey the supermajority rule. After a year and a half of appeals and delays, the state Supreme Court ruled this past New Year’s Eve that the lawsuit can proceed.

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constitutional checks and balances are designed to prevent: the consolidation of power in a single unaccountable bureaucrat who is free to play favorites by exempting politically powerful hospitals from paying the tax. Indeed, the Medicaid director has already exempted eight hospitals from the obligation, even though they are realizing immediate financial benefits from the program. Attempting to evade the Constitution in this way ensures that the true beneficiaries of Medicaid expansion are not the people, but the politically connected hospitals that lobbied to line their pockets with the Medicaid expansion program’s sizable federal subsidies.

Medicaid expansion proponents lament that subjecting the provider tax to the supermajority requirements makes expansion unfeasible. But it is precisely when contemplating politically and emotionally charged issues—such as medical care for the needy—that constitutional protections are needed most. The ballot pamphlet that accompanied Arizona’s supermajority requirement in 1992 made clear that it would “make it more difficult to raise taxes” and “restrain growth in state government,” even for programs “for the poor” and even in “emergency situations.” State constitutional protections—particularly protections for taxpayers—must be applied even in hard cases, or they will mean nothing.

VIRGINIA: EXPANSION BY EXECUTIVE ORDER?

While the lawsuit against Brewer was pending, Virginia Gov. Terry McAuliffe (D) announced his intention to proceed with plans to expand Medicaid without legislative approval. Like their Arizona counterparts, Virginia lawmakers found Medicaid expansion to be a raw deal for the state. The state’s General Assembly went so far as to explicitly reject expansion, prohibiting any expenditure of funds on the program unless the legislature gives the green light.

But McAuliffe, imitating President Obama’s “pen and phone” strategy of enacting legislation without congressional approval, proclaimed that he would be “moving forward” with expansion plans anyway so as not to “waste any more time on a process.”

That “process” is a fundamental feature of the rule of law, not a bug. The Virginia Constitution requires all spending to be appropriated by the General Assembly, the branch of government

closest to the people. Strong-arming the legislature into submission—or ignoring it entirely—is an abuse of power that sets a chilling precedent for the state’s future. Constitutions protect the people from arbitrary rule by establishing a deliberate legislative procedure subject to checks and balances. Subverting those constitutional protections breeds inconsistency, unfairness, and unpredictability.

While threats of litigation temporarily quelled his plans, Governor McAuliffe has since indicated that he may renew his expansion efforts. Accomplishing this by executive bullying will do far more damage than saddling the state with dependency and debt. It will inflict a lasting act of lawlessness, encouraging future governors to enact legislation by executive decree, without the protection of legislative checks and balances.

FLOUTING THE RULE OF LAW?

Arizona and Virginia are not the only states whose governors have pursued Medicaid expansion through unilateral executive action. When Ohio’s Republican Gov. John Kasich’s 2013 push to expand Medicaid was met with strong opposition from lawmakers in his own party, he used administrative action to impose expansion anyway. Since he could not secure funding from the legislature, he turned to the state’s Controlling Board, a hybrid legislative/executive agency that doles out funds for *approved* programs to cover their costs. Both actions sidestepped the General Assembly, which had explicitly rejected the expansion plan. The Ohio Supreme Court tossed out a legal challenge to Kasich’s maneuvers, ruling that the board was not obligated to follow the legislature’s will.

Likewise, when the Kentucky legislature refused to adopt major components of the ACA, Gov. Steve Beshear (D) decided to go it alone, issuing executive orders both to expand the state’s Medicaid program and to establish a state-funded health insurance exchange. A legal challenge to that expansion is working its way through the state appellate courts.

Until those legal questions are resolved, other governors will be tempted to imitate their peers’ missteps. Alaska Gov. Bill Walker, a Republican turned Independent, is considering bypassing the state’s Republican-dominated legislature to expand the program via executive order. In Tennessee, legislators have called into question the legality of Republican Gov. Bill Haslam’s proposed

funding mechanism for Medicaid expansion and his authority to engage in negotiations with the federal government despite legislative opposition. Other governors may follow suit.

To protect the people from an unaccountable bureaucracy, federal and state constitutions reserve the lawmaking power to elected officials, whose decisions are subject to checks and balances by the other branches. Ignoring restrictions on the taxing power, yielding control to independent officials, or bypassing the legislature altogether eviscerates those protections, inviting arbitrariness and paving the way for special interest groups to hijack the lawmaking process.

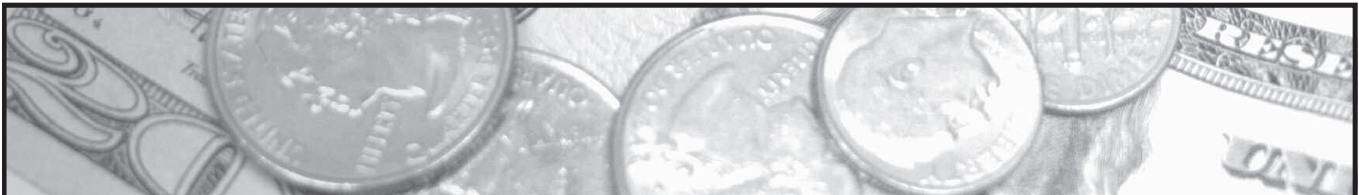
A steadfast adherence to the rule of law is critical precisely because policy preferences differ and political leaders change. Enabling lawmakers to skirt the rules whenever doing so appears politically popular empowers them to do the same when a law is detrimental. As Chief Justice John Marshall asked more than 200 years ago, “To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”

Lawmakers are often urged by hospitals—the supposed experts—to pursue expansion at all costs. But hospitals stand to benefit handsomely from federal subsidies and they have less interest in preserving the integrity of the legislative process or

defending the voters’ legacy of curbing taxes and government growth. Like all other special interests, hospitals are interested in protecting their bottom lines. That is why state constitutions entrust important fiscal decisions to the people’s representatives, not politically connected pressure groups who lobby to line their pockets. Whether states should expand their Medicaid programs is a policy question properly left to the political process. But that process must operate within the confines of a state’s constitution.

Unfortunately, when it comes to Medicaid expansion, some state legislators are willing to kowtow to the demands of the executive branch. The damage sets precedent that resonates far deeper than Medicaid expansion, delivering a lasting blow to the rule of law.

In 2010, Democrats enacted the ACA without a single Republican vote, ensuring that the party would bear sole responsibility for the act’s embarrassing failures. Yet even after staggering defeats in two midterm elections and his own admission that he “got beat,” President Obama has clung to his go-it-alone strategy, refusing to consider proposals to change the law, but liberally distributing arbitrary exemptions to the law from the Oval Office. It is disturbing to see governors, especially Republicans who ardently oppose the ACA, following suit. In the end, the ACA’s most destructive legacy may not be its damage to the health care industry, but the culture of lawlessness it encourages and perpetuates. R



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