

Power Struggle

The Supreme Court's recent term focused on whether the Constitution limits federal authority and power.

BY DAVID G. SAVAGE

The Supreme Court's decision upholding the constitutionality of President Barack Obama's health care law made headlines this summer. But for states, its ruling allowing them to opt out of the Medicaid expansion is likely to have the biggest impact over the months and years ahead.

For the first time ever, the high court struck down a federal spending law on the grounds that the federal money was being used as a club to force states to comply with Washington, D.C.'s, wishes.

"In this case, the financial inducement Congress has chosen [for expanding Medicaid coverage] is much more than relatively mild encouragement. It is a gun to the head," said Chief Justice John G. Roberts Jr.

The major theme of the court's term concerned the power of the federal government and whether the Constitution limits federal authority. On that score, the result was mixed.

The justices, by a 5-4 vote, said Congress cannot use its power to "regulate commerce" as the basis for requiring all Americans to have health insurance. At the same time, however, a separate 5-4 majority agreed Congress does have the power to impose a tax penalty on those who can afford insurance, but choose not to buy it.

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On the immigration front, the court said federal authorities had "broad discretion" to enforce, or not, laws against illegal immigrants. The decision in *Arizona v. United States* blocked three key parts of the state's law from taking effect.

Medicaid Expansion

The high court's Medicaid decision was most important because of the huge sums of money at stake and its potential effect on other federal spending programs. Since the 1930s, the federal government has steadily increased grant money and extended its grip over state and local governments. "As of 2010, federal outlays to state and local governments came to over \$608 billion, or 37.5 percent of state and local expenditures," the dissenters in the health care case noted.

The money, of course, has come with strings attached in the form of rules and regulations. Grumbling aside, practically no one before this year had considered these regulations unconstitutional. The golden rule of government has long been, "He who has the gold makes the rules."

When a group of state attorneys general, led by Florida's Bill McCollum, sued to challenge the Affordable Care Act, they targeted the Medicaid expansion. Before 2010, Medicaid had long been "the largest federal program of grants to the states," the justices noted, with states in turn devoting "a larger percentage of their budgets to Medicaid than to any other item."

The federal law seeks near-universal health care coverage and expands government-paid insurance for the poor to achieve it. The law required states to expand Medicaid by 2014 to cover



everyone under age 65 with incomes below 133 percent of the federal poverty line, which would have added an estimated 17 million people.

“There is no doubt,” said Chief Justice Roberts, that the law “dramatically increases state obligations under Medicaid. ... It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide for universal health insurance coverage.”

The administration’s lawyers argued that the federal government would be paying 100 percent of the cost of the expansion in the first years, later dropping that to 90 percent. Justice Elena Kagan said during the arguments that rather than a bad deal or coercive measure this sounds like “a big gift from the federal government.”

Former U.S. Solicitor General Paul Clement, who represented the 26 states who challenged the law, said the threat of losing all federal Medicaid money if a state refused to go along with the expansion crossed the line from a legal inducement to an unconstitutional coercion.

That claim failed in all the lower courts, but found support at the Supreme Court.

“Given the nature of the threat and the programs at issue here, we must agree” the required expansion is unconstitutional, Roberts said for the 7-2 majority. “The threatened loss of over 10 percent of a state’s overall budget is economic dragooning that leaves the states with no real option but to acquiesce in the Medicaid expansion. ... Congress has no authority to order the states to regulate according to its instructions. Congress may offer the

states grants and require the states to comply with the accompanying conditions, but the states must have a genuine choice whether to accept the offer.”

Justices Stephen Breyer and Elena Kagan agreed with this part of Roberts’ opinion, and Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas and Samuel A. Alito Jr. agreed in separate opinions.

Roberts said the Medicaid expansion itself may continue, as long as the secretary of Health and Human Services understands that she may not threaten any state that refuses to go along. “As a practical matter, that means states may now choose to reject the expansion; that is the whole point. But that does not mean all, or even any, will,” Roberts wrote. The four conservative dissenters said they would have voided the Medicaid expansion entirely, along with the rest of the law.

Shortly after the ruling, Republican governors in Florida, Louisiana, Mississippi, South Carolina and Texas said they would not expand their Medicaid programs, with others saying they were likely to do the same. Yet other state leaders said they would welcome the extra federal funds. Health care experts caution it may be some time before it is clear when and where Medicaid will be expanded.

The court’s opinion is likely to trigger future legal attacks on federal spending programs. If Congress requires states or localities to undertake a new duty or face a loss of funding, the law will almost surely face a constitutional lawsuit.

Immigration

States did not fare as well on the immigration front. In the Arizona case, the court left little room for states to enforce immigration laws, stressing that the federal government was the “single sovereign responsible for ... keeping track of aliens within the nation’s borders.”

Frustrated with the failure of federal officials to arrest and deport the hundreds of thousands of illegal immigrants living in Arizona, legislators adopted S.B. 1070. It made it a crime for illegal aliens to seek work or to fail to carry registration documents. It also authorized the police to check the immigration status of anyone lawfully stopped and make arrests for potentially deportable offenses.

The court blocked the first three provisions—seeking work, not carrying papers or committing deportable crimes—on the grounds they were preempted by federal law. In the 5-3 opinion, Justice Kennedy said this state enforcement conflicts with federal law and policy.

“Arizona may have understandable frustration with the problems caused by illegal immigration,” he wrote, “but the state may not pursue policies that undermine federal law.” The Obama administration said its policy was to arrest and deport aliens who were criminals, gang members or repeat border crossers, but not illegal immigrants who are otherwise abiding by the law.

The court cleared the way for the state to begin enforcing Section 2, which authorizes immigration status checks, but only with

the understanding it would not “result in prolonged detention.” Roberts, Breyer, Ruth Bader Ginsburg and Sonia Sotomayor joined to form the majority. Kagan sat out the case.

Scalia dissented, arguing that a “sovereign state” such as Arizona should not be left “at the mercy of federal executive’s refusal to enforce the nation’s immigration laws.” Thomas and Alito dissented as well.

Sovereign Immunity

Despite this setback, the doctrine of “state sovereign immunity” made a comeback in other cases. The court ruled states and state agencies may not be sued for damages by employees denied unpaid sick leave for a “serious health condition.” The 5-4 decision in *Coleman v. Maryland* threw out a damages claim from a state court employee who sued under the Family and Medical Leave Act. The ruling was in line with a series of decisions from the 1990s that limited lawsuits by state employees.

The most far-reaching criminal law ruling put new limits on prison terms for young criminals. It was the third such ruling in seven years. In 2005, the court abolished the death penalty for juvenile murderers. And two years ago the court struck down state laws that imposed a life term with no possibility for parole for young offenders whose crimes did not involve homicides.

This year, the court went a step further and struck down “mandatory sentencing schemes” that set life terms with no possibility for parole for murderers under age 18. “A judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles,” said Justice Kagan. The 5-4 decision in *Miller v. Alabama* held it was cruel and unusual punishment to mandate a life term for these young offenders.

Since the 1980s, many states have adopted laws allowing juveniles to be tried as adults and several have passed laws requiring life terms with no parole for certain homicides. In March, the court heard the cases of two 14-year-olds, from Alabama and Arkansas, who were given life terms for participating in, but not personally committing, a murder.

The court’s opinion did not forbid these life terms, but said the defendant must be given a hearing to consider whether this is the proper punishment for an underage criminal. More than 2,000 prisoners nationwide were sentenced as juveniles to life terms with no parole under these conditions.

In late June, the justices ended any expectation they might revisit the *Citizens United v. Federal Election Commission* decision when they struck down a 100-year-old Montana law. It prohibited corporations from making expenditures “in connec-



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tion with a candidate or political committee.” The justices said the First Amendment frees all independent political campaign spending, including spending by corporations, just as they did in the *Citizens United* case in December 2011. “There can be no serious doubt” Montana’s law is unconstitutional, the justices said in an unsigned 5-4 opinion. The Montana Supreme Court had upheld the 1912 law based on the state’s history of “copper barons” dominating government.

State lawmakers may be interested in two more First Amendment opinions handed down in June. In *United States v. Alvarez*, the court struck down the federal Stolen Valor Act that made it a crime to falsely claim military honors. The government had argued that knowingly making false statements is not protected as free speech, but the 6-3 majority disagreed. The court’s opinion cast doubt on state laws that also make it a crime to make false statements or false claims during campaigns.

And in *Knox v. SEIU*, the court extended the First Amendment to cover public employees who object to unions and their political spending. In the past, the court said public sector unions may collect bargaining fees from all employees. At the same time, nonmembers of the union were given a right to opt out of any political spending by the unions, usually by seeking a partial refund of their dues.

Speaking for the court, Justice Alito suggested the rule should be reversed. “Requiring an objecting nonmember to opt out ... represents a remarkable boon for unions,” he said. In the future, “when a public sector union imposes a special assessment or dues increase, [it] may not exact any funds from nonmembers without their affirmative consent.” While the ruling concerned only a special, election-year fund, Alito’s opinion appears to encourage states to pass stronger laws to limit how public sector unions collect dues or fees from nonmembers.

More To Come

The court’s new term beginning in October promises major rulings on affirmative action, voting rights and gay marriage.

In *Fisher v. University of Texas*, the justices will decide whether state colleges and universities can continue to use race in admission decisions. In 2003, Justice Sandra Day O’Connor spoke for a 5-4 majority in upholding a limited use of affirmative action to help diversify colleges and law schools. Since then, however, Justice Alito has replaced O’Connor, and the balance appears to have tipped the other way.

The case has at least one complicating fact that could limit its national significance. Texas had a “top 10 percent” plan in the 1990s that required the university to admit the top graduates of all high schools, which significantly raised the percentage of minority students. After O’Connor’s opinion was issued in 2003, the university decided to give preferences to some other minority

applicants to increase diversity even further. That led to the lawsuit filed by Abigail Fisher, an unsuccessful white applicant. The court’s conservative justices could rule broadly against the use of race-based admissions, or rule narrowly that an affirmative action policy cannot be justified if a race-neutral policy like the “top 10 percent” plan already had opened doors for minority students.

The court is also expected to rule on the Defense of Marriage Act in a case that concerns the rights of legally married same-sex couples. By law and tradition, marriage has been a matter for the states, not the federal government. But in 1996, Congress adopted the marriage act to give states the power not to recognize same-sex marriages from other states. A second provision of this law said the federal government would not recognize a marriage other than that between a man and a woman.

Seven gay couples from Massachusetts sued, contending this second provision denies them the equal protection of the laws. They cannot, for example, file a joint tax return, or if a federal employee, cannot put their spouse on their health insurance plan. The Obama administration refused to defend this part of the law, and the House Republicans hired former U.S. Solicitor General Paul Clement to handle the legal defense. The U.S. Court of Appeals in Boston ruled the law un-

stitutional on May 31, setting the stage for a Supreme Court decision early next year.

Waiting in the wings is the much broader question of whether gays and lesbians have a constitutional right to marry. The justices may face that issue early next year in a case from California that struck down a voter initiative passed on Nov. 5, 2008, banning same-sex marriages. Thirty-eight states and Puerto Rico have passed Defense of Marriage laws.

Before the year is over, the court is likely to have before it a Southern challenge to Section 5 of the Voting Rights Act. Since 1965, much of the South and a few other areas have been required to seek permission known as “preclearance” from the Department of Justice or federal court before making any changes to their election procedures, voting rules or legislative districts.

No one disputes that this historic measure has been very successful in reducing discriminatory voting policies. So successful, in fact, many argue that special scrutiny is no longer justified. Texas and South Carolina have been locked in disputes with the Department of Justice over their voter identification laws, and Shelby County, Ala., has sued, seeking to have Section 5 struck down. One or the other is almost certain to get a hearing before the Supreme Court.



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