States Checking Up on Health Reform: States Opting out

Moderator: Senator Jeremy Nordquist, Nebraska
Presenting: Dick Cauchi, Program Director, NCSL
Thomas Miller, Resident Fellow, AEI
Timothy Stoltzfus Jost, Robert Willett Family Professor, Washington and Lee Univ. School of Law

This webinar is sponsored by the Legislative Health Staff Network, through a grant from the Robert Wood Johnson Foundation. Please go to www.ncsl.org/lhsn for more information.
Health Reform: States Opting Out

Presentation for NCSL Webinar - December 3, 2009

Dick Cauchi, Program Director, Health
NCSL – Denver

rev. 12/2/09-s
Overview

• States already regulate much of health insurance
• What is being opposed
• State opponents to health reform
  • Bills already filed, 2008 to 2010
  • State constitutional amendments – where, how, when
• State roles delineated in federal reform bills
  • Insurance Exchanges: federal or state?
  • Public Insurance Program option: opt out?
  • Other features
States: quite active in health reform

- **2009**: 33 states had bills to address access to health care.
- **2006 to 2008**: 26 states approved Medicaid income eligibility expansions;
  - 6 expanded coverage to parents.
  - 7 reduced asset tests or financial barriers.
- **By 2009**, 30+ states had expanded family health insurance coverage to include young adult dependents.

• NCSL Reports online: www.ncsl.org/?tabid=14516
State Constitutional Proposals seek to ban:

- **Individuals Must Buy Insurance**
  - “Individual mandate”
  - Fines for non-coverage

- **Employers must pay toward Insurance**
  - Employer 50% contribution
  - Employer penalties

- **Regulated payment / Single Payer**
  - May affect rate-setting?
  - CON, medical loss ratios?
Arizona: Proposed Constitutional Amendment

"To preserve the freedom of (residents of the state) to provide for their own health care …"
"A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system …"

- Passed House + Senate June 2009
- Will appear on ballot in November 2010
- Similar version defeated by 0.4% in 2008
States with 2009-2010 Legislation Opposing Certain Health Reforms

- Legislation passed; requires statewide vote in future year
- Legislation filed for 2009 or 2010
- Legislation did not pass in 2009
Variations State to State

○ 2009 sessions: 50 states in session
  • 7 constitutional amendments = 1 passed, 4 failed, 2 pending, (1 carryover)
  • 2 statutes = 1 failed (WV), 1 pending (PA)
  • 1 non-binding resolution = failed (IN)

○ 2010 sessions: 43 states in session
  • 7 constitutional amendments (AL, FL, GA, MI, MN, OH, SC as of 12/2/09)
  • 1 statute (PA)
  • Reported discussions in 11+ (?) others

○ ALEC & Republican member roles
How Far Can States Go?

Preemption and legal issues

- State constitutions clearly *can* restrict state law -
  - Prevent a future state single-payer bill or law
  - Prevent a state individual or employer mandate (like MA)
  - Could interfere with current state policies like requiring Cafeteria Plans for categories of employers (CT, MA, MO, MN, RI require for over 25 or 50 employees)
  - "CON" – roll back Certificate of Need laws?

- How far can states go in altering, declining or defying a future federal law?
- Federal law clearly can preempt some state actions.

→ next speakers
States Opting Out or In?

- Health Insurance Exchanges: proposed substantial state role in creating and running these programs? [House + Senate versions]

- Public Option (non-profit insurance alternative) – states may opt-out? [Senate]

- Creating a non-profit Health Cooperative? [Senate]

- Varied Medicaid choices for states [all versions]
How will Idaho pay for health care reform?
The state still doesn’t know exactly what the health care bill will mean for an already tight budget.

WASHINGTON — As Congress continues its work to overhaul the nation’s health care system, states such as Idaho know one thing: Key decisions on who will be covered and how it will be paid for still will have to be made in Boise and other state capitals.

… if health care reform goes through at the federal level, Idaho officials expect to see a bigger pool of people eligible for state-subsidized health care. That likely means expanding Medicaid, a program paid for mostly by the federal government, but administered by states and paid for in part with state tax revenue, too.

Idaho is unlikely to seek to opt-out of the national overhaul if that’s an option available when the final legislation passes, But (Governor) Otter believes the proposals in play right now “negatively impact the economy of this country,”
The role of campaigns and voters

Will constitutional amendment ballot questions:
  - Be substantial popular referenda – “phase 2 of health reform”?
  - OR
  - Be a “footnote” – limited by legislative procedure, votes and opposition?

The 2013 or 2014 delayed effective date gives state legislatures time to craft decisions - either
  1. going beyond minimum federal standards OR
  2. trying to limit state participation.
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<tr>
<td>Dick Cauchi, Program Director, Health</td>
</tr>
<tr>
<td>Denver, CO</td>
</tr>
<tr>
<td>(303) 856-1367</td>
</tr>
<tr>
<td>Dick.Cauchi @ ncsl.org</td>
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State Constitutional Protections & National Health Reform: When One Size Doesn’t Fit All

National Conference of State Legislatures webinar
December 3, 2009

Tom Miller
Resident Fellow
American Enterprise Institute
Origins

- Arizona: Proposition 101
- Arizona Health Care Freedom Act
- ALEC model law
- Other states considering
What It Is:
Two Provisions

• No extra penalties to leave the box (opt out)
• Right to direct pay (patients, providers)
• Preserving ultimate control
What It Is: Language

• A law or rule shall not compel, directly or indirectly, any person, employer, or health care provider to participate in any health care system.
• A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services.
• A health care provider may accept direct payment for lawful health care services and shall not be required to pay penalties or fines for accepting direct payment from a person or employer for lawful health care services.
What It Is Not: Radical, Sweeping

Lessons learned:
• Go through state legislature
• Not challenge existing rights & benefits
• Bypass Medicare, divisive social health issues
• Can still tax to fund health goals
Legal & Constitutional Strategy

• Federalism, 10th Amendment
• State constitution vs. federal law conflict
• Recent pro-federalism cases, language (Lopez, Printz, Morrison, Oregon, Horne, NW Austin, McConnell)
• Not clear cut (Raich, San Antonio, Cooper)
• Will S.Ct. try to avoid direct conflict?
• Shakier federal power vs. narrow state constitutional protection
Political Strategy

- Force exposure of coercion on less defensible terrain
- Strength of individual/employer mandates weakening
- Unravel rest of interconnected provisions
- Not challenge everything head on
- Engage, rally local citizens vs. made in Washington
- A long slog till 2014
Why?

- At some grassroots – loss of control
- Bullet proof against worst fears
- Looking for escape routes, life rafts
- Mismatch: local opinion vs. national political commitments
Prospects, Scenarios

- Will pass in Arizona
- Wait & see other states
- Critical mass for real court challenge
- May reinforce state opt outs from public plan
- Soften mandates even more
- Grassroots opposition momentum, spreads to other items
Caveats, Weaknesses

- Standing, ripeness, political question
- How explicit is congressional statement of purpose
- Long time till fully kicks in
- But – 1988 Catastrophic repeal took off quickly
- Post-Rehnquist Court not as gung-ho re federalism
- Even judicial pols follow the polls
- Implementation, enforcement might need to play out
- States haven’t fully determined – winners or losers?
Health Reform and the States

Timothy Stoltzfus Jost
Washington and Lee University
Health Care Reform: Congress and the States

• When states reform health care, they must deal with federal laws
• When Congress reforms health care, it can change the federal laws
• But Congress must comply with constitutional constraints
Constitutional limitations on Congress

• Congress is limited to enumerated powers
• The most important of these for health care reform are
  – The power to tax and spend for the general welfare
  – The power to regulate interstate commerce
  – But these are interpreted very broadly
Constitutional limitations on Congress

• Congress has the authority to regulate insurance
• Congress cannot criminalize non-economic activity
• The one real issue is the constitutionality of the individual mandate, though the mandate does regulate economic activity and seems within the scope of recent cases
Constitutional limitations on Congress

• Congress cannot commandeer the states to carry out regulatory programs
• But Congress can incentivize the states to do its will
  – Congress can use the spending power and impose conditions, like Medicaid
  – Congress can ask the states to enforce legislation, but retain fallback power and act directly if the states refuse or fail to do so
  – Finally, Congress can always regulate directly
Constitutional limitations on the states

• The states cannot simply nullify federal law
• The Supremacy Clause provides that the federal laws supersede state laws to the contrary
• The states cannot resist federal law, and state officers who resist it violate their oath of office
• Threatening to nullify federal law may be good politics, but is not constitutional
How does the House bill deal with federalism?

- The House bill creates a new federal agency, the Health Choices Administration, that will enforce the reform law in cooperation with the states.
- State laws are preempted only to the extent that they conflict with the law.
- States can operate their own exchanges with federal permission.
How does the Senate bill deal with federalism?

• The Senate bill adopts reforms, and asks the states to implement them

• The states are also required to implement exchanges

• If the states refuse or fail to do so, HHS can implement directly

• The federal government governs the states, the states govern insurers
How does the Senate bill deal with federalism?

• The federal government implements the premium and cost-sharing subsidies, the individual mandate, the employer mandate, and the small employer credit, the states implement the rest

• States are allowed to waive these provisions if they can come up with a program that provides affordable coverage that is at least as comprehensive for a comparable number of residents without increasing the federal deficit
Conclusion

• The federal legislation should create a floor beyond which states could go further. Reform should be a cooperative effort, with the federal government enforcing federal law, the states state law
Additional Resources

State Legislation Opposing Certain Health Reforms, 2009-2010
By Richard Cauchi

An Individual Mandate for Health Insurance?
We Could Do That, But It Would Be Wrong
By Thomas P. Miller
http://www.aei.org/speech/100105

The Senate Bill: Medicare And Much Else
By Timothy Jost

Health Care Reform Requires Law Reform
By Timothy Jost
http://content.healthaffairs.org/cgi/content/abstract/28/5/w761