Georgetown University
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CENTER FOR CHILDREN
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Medicaid and the Role of the Courts

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Major Types of Cases

- Federal courts reviewing federal statutes
- Federal courts reviewing federal agency actions
- Federal courts reviewing state actions
- Federal courts reviewing state attacks on fundamental rights
- Final Thoughts

Fed Courts Reviewing Federal Statutes

- Congress must have a Constitutional basis for legislating
- Federal health care laws can be struck down because Congress lacks authority for the specific legislation
  - For example, in the big ACA case (*NFIB*), the Sup Ct found for the first time ever that voluntary funding under Congress's Spending Clause authority was "coercive" upon states
  - Thus, states that do not expand Medicaid cannot be punished

Fed Courts Reviewing Federal Statutes

- Federal health care laws can also be struck down if they otherwise violate the Constitution or federal law
  - Medicaid Expansion "coverage gap" solutions would likely face lawsuits if they target non-expander states
  - *Braidwood v. Becerra*: District Court struck down part of ACA preventive services mandate

Takeaway: Courts Weakening Legislature

- After *NFIB*, Congress may have less power to improve or modernize Medicaid laws
- Congress may have less authority to create large and dynamic national programs, or update them
- Also, Congress may also have less authority to regulate health care (including Marketplaces) and other commerce
- Medicaid coverage gap legislation will be attacked using *NFIB* or other legal theories
- Congress may struggle to empower agencies to keep Medicaid up to date (*Braidwood* case)

Fed Courts Reviewing Federal Agencies

- Federal agencies issue regulations, guidance, approve waivers, and take other actions
- These actions may be challenged because the substantive content violates laws or because the agency has not followed the proper *process* to take the action
- The Administrative Procedure Act (APA) says courts should set aside agency actions that are:
  - "Arbitrary" and "capricious" – Ex. contrary to the evidence record
  - Contrary to law or Constitutional rights
  - Exceed statutory authority of agency

Fed Courts Reviewing Federal Agencies

- Dynamic public programs need empowered agencies, so lawsuits *against* agency action are often brought by small government advocates aiming to limit agencies
  - *West Virginia v. EPA*: Sup Ct ruled in June that EPA regulations to cut power plant emissions exceeded agency authority
  - *Colville v. Becerra*: New case challenging CMS Medicare payment policies promoting health equity
  - Family glitch case coming?
- However, Medicaid advocates might be the ones challenging agencies during an anti-Medicaid administration
  - Work requirements, premiums, etc. being challenged since 2018

Takeaway: Courts Weakening Agencies

- There is a concerted effort underway to weaken federal agencies
- Conservative judges will read statutes very narrowly to limit the things agencies can do and make it hard to keep regulations up to date
- Congress would have to constantly go back and update statutes

Special Issue: Section 1115 Waivers

- Successful litigation against work requirements, premiums, etc., focused the courts on *coverage*
  - CMS waiver approvals found arbitrary and capricious
  - Public comments were critical
- Key issue being litigated: Can HHS rescind a waiver after it has been approved?
  - Section 1115 demonstrations are run at the discretion of HHS Secretary, so the answer *would appear to be* yes
  - But, on Aug. 19, a District Court judge found it was arbitrary and capricious for CMS to rescind Georgia's work requirement and premiums

More Section 1115 Waiver Issues

- Can a prior administration (Trump), sign agreements with states to bind review by a future admin (Biden)?
- Are 10-year approvals legal?
- Can states skip the required public comment period?
- Can 1115 be used to weaken the Medicaid entitlement?

Fed Courts Reviewing State Actions

- States sometimes pass statutes, issue regulations, or take other actions (such as Medicaid policy decisions) that violate federal laws and/or the Constitution
- For individuals or orgs in states to bring lawsuits against a STATE for violation of a FEDERAL law (including Medicaid standards), they need a legal trigger -- a "right of action"
- The most important trigger for enforcing rights against states is "**Section 1983"** (came from Civil Rights Act of 1871) which creates a private right of action that *sometimes* applies

Section 1983

- Section 1983 allows an individual to file a lawsuit against a state that is violating a Medicaid standard if the specific standard is written in a way that "creates a right"
- Example: courts have generally found that EPSDT *does* have a private right of action under 1983, thus enabling lawsuits against states that violate EPSDT
- However, conservative justices are tightening the 1983 criteria, making it harder and harder to get to court
- *Talevski* is a major case at the Supreme Court now that could damage or *end* the 1983 private right of action

Takeaway: People Can't Enforce Rights

- Individuals and organizations could entirely lose or see greatly reduced their right to file a lawsuit challenging Medicaid violations by states
- Even if HHS wanted to dramatically step up its oversight and enforcement, it wouldn't have the resources, enforcement mechanisms, and bandwidth
- Does Medicaid coverage become something you have in theory, but really you get whatever the state is willing to provide?

Fed Court Reviewing State Attacks on Fundamental Rights

- When reviewing laws that limit rights, the Sup Ct applies different "levels of scrutiny" depending on the issue
- Certain rights get the highest level of scrutiny ("strict scrutiny") and infringements are usually struck down
- Strict scrutiny is applied to issues such as discrimination (ex. racial), most of the Bill of Rights, and other *fundamental rights*
- *Fundamental Rights* include right to vote, interstate travel, and a *right to privacy*: marriage (interracial & same-sex), use contraception, to have and raise kids, ~~abortion~~

Takeaway: Court Not Interested in Rights*

- Abortion is no longer a fundamental right
- A wave of new lawsuits testing the limits of Dobbs are likely (ex. emergency contraception)
- Four of the five Justices that wrote the opinion *say* that other fundamental rights are not implicated by their Dobbs decision, but the logic of Dobbs seems to implicate other fundamental rights and Thomas actually said the other fundamental rights *should* be revisited
- Expect new attempts to attack Eisenstadt (contraception), Obergefell (same-sex marriage)

Final Thoughts

- The composition of the federal judiciary is a major factor in the decisions coming down
- Small government conservatism is reducing the power of the legislature to pass laws and the agencies to act – weakening the federal government
- Part of the strategy is to reduce rights and reduce the enforcement of rights – no access to courts
- The opponents of Medicaid will use litigation as a strategy to limit the evolution of the program; Medicaid allies may need to engage more