

## REVIEW &amp; OUTLOOK

## New Medicaid's Roach Motel

**T**he Republican Governors of Arizona, Florida and Ohio who helped lead the constitutional challenge to Obama-

Care but have since decided to expand Medicaid have a problem. They need to persuade their skeptical Republican legislatures to pass bills endorsing their flips, and now they're searching for any legal alibi in a storm.

One of their main claims, advanced by Ohio's John Kasich and others, is that states can change their minds later. Expand Medicaid today and pocket the 100% funding Washington is dangling in front of them for a time, but include so-called "sunset" clauses that would rescind the new coverage if Medicaid proves too costly or if the feds renege on their free-money promises.

A memorandum from the Columbus law firm Bricker & Eckler for the Ohio Hospital Association argues that "nothing" in the Affordable Care Act or its Supreme Court reinterpretation prevents the Buckeye State or any other from opting out without being punished, as long as they include the right caveats. Mr. Kasich is using this memo as his legal justification, but he needs better representation.

These supposed sunset clauses are really a roach motel. Once states check into new Medicaid, the almost certain legal reality is that they can never check out.

The Affordable Care Act mandated that states convert this joint state-federal program into a new, larger and far more expensive project in perpetuity. Democrats did not include any provision or opt-out clause that would let states leave new Medicaid in the future or revert to Medicaid in its old form. Democrats even wrote the bill so that if states failed to join new Medicaid, they would lose every federal Medicaid dollar, including the ones for the old program.

The Supreme Court said this coercion was unconstitutional. But unfortunately for Mr. Kasich and his fellow flippers, Chief Justice John Roberts and six of his colleagues did not stipulate a right to leave Medicaid at any time when they rewrote ObamaCare. They merely ruled that the threat to take away all federal funding if states did not join new

Medicaid violated the Constitution's separation of powers.

New Medicaid is "a shift in kind, not merely degree," Chief Justice Roberts wrote. The High Court's precedents say Congress can attach conditions to federal funds, akin to a contract, but Congress cannot use the spending power

**The GOP flippers can check in, but it's unlikely they can check out.**

to force states to sign it. So while Congress can't commandeer the states to do its bidding, it can offer them more or less any bargain it likes and states have the choice to voluntarily accept the terms or not. In the case of new Medicaid, the states can now freely take the contract as originally offered: accede to the new program, the free money and the lack of an opt-out clause.

The three-page Bricker memo nonetheless claims that states can enter and then leave Medicaid as long as they make such a stipulation when they first enter. Florida Governor Rick Scott is claiming his state will join only for three years and then revisit the decision if it's not working well.

But there's no evidence in the original law or the Supreme Court opinion that states can join or leave at their own whim. The logic of Justice Roberts's opinion suggests that once states adopt new Medicaid, the program immediately becomes the old program for the purposes of the law and then states can't leave.

The Becker memo also cites "guidance" from the federal Health and Human Services Department that states "may decide later to drop the coverage." But these informal documents on the HHS website lack the force of law or even of regulation; they aren't part of the Federal Register. In any case, HHS doesn't have such authority. Congress didn't grant the Administration any more statutory leeway than it did the states.

We wouldn't be surprised if HHS is promising flexibility now only to revoke it later as a deliberate bait and switch. That wouldn't be any more deceptive than Mr. Kasich's legal claims. Republicans tempted to sign up for ObamaCare's Medicaid expansion had better think twice because once they do, the likelihood is they're ceding control forever.