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VIVA CONDITIONAL FEDERAL SPENDING!

SAMUEL R. BAGENSTOS*

From the rise of the New Deal through the constitutional litigation over the Affordable Care Act (ACA), conditional federal spending has been a major target for those who have sought to limit the scope of federal power. There are a couple of reasons for this.

First, as the Supreme Court narrowed Congress's power to regulate private primary conduct and state conduct in the last twenty years,¹ conditional spending looked like the way Congress might be able to circumvent the limitations imposed by the Court's decisions. Thus, members of Congress quickly sought to blunt the impact of the Court's decision to invalidate the Gun Free School Zones Act, as well as its sovereign immunity decisions. In the first case, they were successful;² in the second, less so.³ But there is a longer, preexisting trend of federal spending conditioned on requirements that states must fulfill. This trend has grown over many decades, beginning with the New Deal, with some decline in the 1980s but a rebound after that.⁴ And, perhaps surprisingly, even a number of conserva-

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1. See, e.g., *Bd. of Trs. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that Congress lacked power under Section 5 of the Fourteenth Amendment to override state sovereign immunity in Title I of the Americans with Disabilities Act); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's power under the Commerce Clause).

2. See 18 U.S.C. § 922(q) (2012) (making it illegal to possess, in a school zone, a firearm that has moved in or affects interstate commerce).

3. See Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 503 n.223 (2003) (discussing how a bill providing that every state program that receives federal aid must waive its immunity under the Age Discrimination in Employment Act died in committee).

4. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552–54 (1985) (discussing the increase in federal grants to the States and the proportion of state expenditures for which these grants account); 2 BUREAU OF THE CENSUS, U.S.

tive Republican governors have found themselves supporting conditional grants—notwithstanding the strings attached.⁵ This dynamic is not surprising—actors at each level of government have an incentive to increase conditional federal spending.⁶

For these two reasons—the availability of conditional spending to circumvent the Supreme Court’s recent limitations on federal power, and the longstanding role of conditional federal spending in the growth of federal programs—many scholars have attempted to develop a constitutional basis for the courts to limit the spending power. The Rehnquist and Roberts Courts offered a number of hints that their jurisprudence might move in the direction favored by these scholars. These hints were particularly evident in the Court’s aggressive expansion of the notice requirement.⁷ The notice requirement itself operated only incrementally to trim particular exercises of the spending power. But individual Justices and lower court judges suggested that a more fundamental set of limitations on the spending power was on its way.⁸

In this context, the Spending Clause holding of the *National Federation of Independent Business v. Sebelius*⁹ (*NFIB*), looks like it ought to be a big deal. It looks, at least at first glance, like the taming of the federal leviathan that many conservatives have been waiting for. It represents the first time that the Supreme Court has ever held a spending condition unconstitutional because that condition coerces the States.¹⁰ Although cases before

DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, 311 tbl.471 (2012) (federal grants to state and local governments, 1990–2011 statistics); BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 1125 tbl.Y638–651 (1975) (federal grants to state and local governments, 1930–1970 statistics).

5. See Karen Bouffard, *Michigan House sends Medicaid expansion bill to governor for signing*, DETROIT NEWS, Sept. 3, 2013, <http://www.detroitnews.com/article/20130903/POLITICS02/309030085>.

6. See MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* 278 (2012).

7. See Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 393–409 (2008) (describing the Court’s expansion of the notice doctrine in Spending Clause cases).

8. See *id.* at 408–09.

9. 132 S. Ct. 2566 (2012).

10. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601–08 (2012) (holding the Medicaid expansion unconstitutional as coercive); *id.* at 2630 (Ginsburg, J., concurring in part) (“The Chief Justice therefore—for the first time ever—finds an exercise of Congress’ spending power unconstitutionally coercive.”).

NFIB had twice mentioned coercion as a possible limitation on the spending power, the Court had never invalidated a statute for unconstitutionally coercing the States. In *Steward Machine Company v. Davis*,¹¹ Justice Cardozo's majority opinion suggested there might be a point where "pressure turns into compulsion."¹² But though he thought there might be such a point, the Social Security Act provision that the Court considered did not cross it, and the Court emphasized that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties."¹³ In *South Dakota v. Dole*,¹⁴ Chief Justice Rehnquist's majority opinion quoted *Steward Machine* for the proposition that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"¹⁵ But, as did the Court in *Steward Machine*, the *Dole* Court concluded that the condition before it was nowhere close to the compulsion line.¹⁶

So how much does *NFIB*'s Spending Clause holding tame the federal leviathan? Not very much. The Chief Justice's pivotal opinion renders a spending condition coercive only in very narrow circumstances: Where Congress takes a (1) very large (2) preexisting conditional spending program, and (3) tells the state that if it wants to continue participating in the program, it must also agree to participate in an entirely separate and distinct program.¹⁷ In those circumstances, there is coercion.

In the specific context of Medicaid, which is the largest conditional federal spending program by far, Chief Justice Roberts's argument is powerful, though there is room to quibble even there.¹⁸ But any reading of *NFIB* as imposing more significant limitations on Congress's conditional spending power is inconsistent both with how Chief Justice Roberts described the holding in his pivotal opinion and with the constitutional principles that he said drove that holding: (a) governmental ac-

11. 301 U.S. 548 (1937).

12. *Id.* at 590.

13. *See id.* at 589–90.

14. 483 U.S. 203 (1987).

15. *Id.* at 211 (quoting *Steward Machine Co.*, 483 U.S. at 590).

16. *See id.* at 211–12.

17. *See* Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After NFIB*, 101 *Geo. L.J.* 861, 864–65 (2013).

18. *See id.* at 902–06 (exploring objections to the anti-leveraging principle).

countability, and (b) ensuring that the current Congress can continue to tailor spending programs in accordance with its current view of what serves the general welfare.

Not very much taming is going on, and that is a good thing. First, coercion, in the sense that the *NFIB* joint dissent uses it,¹⁹ is not really the right concept. The idea that states have a will that is overborne by large offers of federal money raises serious conceptual problems. What is the difference between an offer that is too good to refuse and an offer you cannot refuse? Since Cardozo, who discussed how this kind of inquiry plunges us into “endless difficulties,” we have understood the conceptual problems with saying that, by offering a state too much money, the federal government coerces the state.²⁰

Even if one could get past the conceptual problems, the facts make it hard to say that states are coerced by federal spending conditions. Although some scholars argue that federal taxes crowd out state sources of revenue, thus giving states no real option to refuse conditional offers of federal funds, empirical evidence suggests that no such crowd-out effect exists.²¹ States and state officials are very much at the table in developing conditional federal spending packages.²² This is in part why the federal matches—the inducements to states—tend to be so generous. And, of course, a state can always say no, so the federal government has to pay enough to overcome each state’s holdout price.²³

19. *Nat’l Fed’n of Ind. Bus. v. Sebelius*, 132 S. Ct. 2566, 2664 (2012) (Scalia, J., dissenting) (concluding that the ACA violates the anticoercion rule in part because the massive amount of funding states were set to lose if they chose to opt out was on a scale “quite unlike anything . . . [the Court had ever] . . . seen in a prior spending-power case”); cf. *Dole*, 483 U.S. at 211–12 (holding that retaining only 5% of the funds the federal government would otherwise grant to South Dakota if it chose not to raise the minimum drinking age constituted mild encouragement, not coercion, and left the States with a bona fide choice, not merely a choice as a matter of law).

20. See Bagenstos, *supra* note 17, at 919 (“[I]t is conceptually difficult to identify a point at which the amount of federal funds at stake is so great that a state has no realistic option to refuse.”). See generally Nicole Huberfeld et al., *Plunging Into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. 1 (2013).

21. See Brian D. Galle, *Does Federal Spending “Coerce” States? Evidence From State Budgets*, NW. U. L. REV. (forthcoming 2013).

22. See generally Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011).

23. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 871–91 (1998).

In the context of Medicaid, every state gets at least half of its expenses reimbursed,²⁴ and many states get much more. This was the case even before the Medicaid expansion that was before the Court in *NFIB*. The expansion itself is even more generous to states. The federal government will entirely pay for the individuals added to Medicaid as a result of the ACA for the first couple of years, dropping to 90 percent by the end of the decade.²⁵

States and state officials might not like particular conditions, but those conditions are part of a package that results from a negotiation between state officials and federal officials—a negotiation in which state officials have substantial leverage and involvement. So the idea that this is coercion in the sense that the federal government has overborne the States' will, which is essentially how the *NFIB* joint dissent expresses the concept, doesn't really work. That is why the most sophisticated critiques of conditional spending, like those of Professors Baker and Greve, focus on its homogenizing effects and its effects in limiting interstate competition, rather than on overborne wills.²⁶

But even the more sophisticated critiques presume that if conditional spending is limited, matters that are now addressed at the federal level will devolve to the States. Often, however, the alternative to conditional federal spending is not devolution but complete nationalization. In the context of health care, the subject of *NFIB*, it would be remarkably easy for Congress, when setting up Medicaid, to say, "Let's do this entirely as a national program."²⁷ Medicaid is an insurance program that the Department of Health and Human Services could easily administer by itself—just as it administers Medicare. We have seen this precise dynamic play out in the context of the ACA's exchanges. When the States have refused to participate in or set up the exchanges, the federal government has

24. 42 U.S.C.A. § 1396d(b) (West 2013) ("[T]he Federal medical assistance percentage shall in no case be less than 50 per centum or more than 83 per centum . . ."); see also Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2011 through September 30, 2012, 75 Fed. Reg. 69,082–83 (Nov. 10, 2010) (listing percentages).

25. See 42 U.S.C.A. § 1396d(y)(1) (West 2013).

26. See GREVE, *supra* note 6, at 327–29; Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1947–57 (1995).

27. See Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 432, 473–84 (2011).

stepped in to set up those exchanges itself.²⁸ Notwithstanding the problems with the website the Department initially set up for those exchanges, there is nothing in administering them that cannot be done at the federal level.

If the alternatives are cooperative federalism or complete nationalization—as they are for many federal spending programs—we are not choosing between conditional federal spending and no federal program. We are choosing between a federal program in which States participate and one in which they do not. And there are good reasons why a federal program with state participation is preferable. In particular, cooperative federalism allows individual states to mold the implementation of a federal program to local conditions. This can occur through day-to-day state administration, as well as the negotiation of waivers. Waivers, in particular, have grown dramatically since the Clinton administration.²⁹ These mechanisms provide an opportunity for substantial tailoring of federal-state cooperative programs to local conditions, whether they are factual conditions or different local values. This recognition of local variation is important, and it would not happen as readily if there were complete nationalization.

Of course, there are times when the alternative to cooperative federalism is not nationalization. In those cases, if there is no conditional federal spending there will be no federal program. Because of collective action dynamics among the States, many very worthy government objectives cannot be achieved without a strong federal policy and financial role.³⁰ These objectives simply cannot be achieved at the state level, even if people in most or even all states want to achieve them. That is the point Justice Cardozo recognized in upholding the national unemployment insurance system. Similar points apply to Medi-

28. See Samuel Bagenstos, *The Legally Flawed Rearguard Challenge to Obamacare*, BALKINIZATION (Nov. 27, 2012), <http://balkin.blogspot.com/2012/11/the-legally-flawed-rearguard-challenge.html>.

29. See Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 227, 228–31 (Nathaniel Persily et al. eds., 2013); David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 267–69 (2013).

30. See Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 135–44 (2010).

caid, the Elementary and Secondary Education Act,³¹ and the Federal Aid Highway Act.³² These statutes are not perfect, but they are all quite successful in significant ways, and we would not have been able to achieve their objectives without a strong federal financial role.

Of course, my assessment of this point depends on my normative priors, and those may differ from the priors of my conservative colleagues. But that only highlights the problems with imposing a *judicial* check on conditional federal spending. Rather, disagreements about matters like these are and ought to be the ordinary stuff of democratic politics. One person's race to the bottom is another person's interjurisdictional competition. One person's effort to avoid collective action problems, or to adopt universal entitlements of national citizenship, is another person's cartel. There is no way to resolve these questions without making very contestable normative judgments about what the proper objectives of government are, what our nation is supposed to be about, and what citizenship as an American is supposed to be about. Often, too, these questions cannot be resolved without making highly contestable empirical judgments.

I would submit that the political process of debate, of argument, of deliberation, of pulling, hauling, and trading, is superior to a process of judicial fiat for resolving these questions. And so I would submit that what the Court did in the *NFIB* case, by not imposing aggressive limits on conditional federal spending, was a good thing.

31. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965).

32. Federal Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374 (1956).