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Center for Competitive Federalism



Shining a Light on Coercion in Federal “Assistance” to States
A Model Policy for Resisting Federal Coercion

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Every year, the federal government provides hundreds of billions of dollars in assistance to state governments. Over many decades, the amount of federal assistance to states has hovered around 3.0 percent of GDP, nearly equal to the federal deficit.¹ That level of funding gives the federal funding a powerful lever over the budgets and policies of states governments, a lever that is rapidly turning into an instrument of control. In violation of the federal structure of our Constitution, which was designed to reflect the “vertical” separation of powers, the fiscal operations of federal and state governments are increasingly integrated – and the feds are increasingly in control.

State officials are all too familiar with this creeping federal takeover. Every day, these “assistance” programs confront them with a painful dilemma – either remain faithful to the preferences of the voters who elected them and risk the money that the federal government has already taxed away from them, or secure the money and trade away the voters’ preferences. Law professors call it “cooperative federalism,” but from the point of view of state officials, a more apt term might be “coercive federalism.”

The superficial appeal of federal conditional grant programs is understandable. Supporters point to inequality among states. They hope that with federal support, poor states will provide adequate government services to the underserved. And if the federal government is dispensing funds, doesn’t it make sense to attach conditions to make sure the funds are equitably spent in accordance with the program’s purposes?

Unfortunately, the benefits of federal funding are not as clear as proponents seem to believe, and the downsides are considerable. Such programs generally encourage states to inflate their budgets well beyond the point many states would be willing to tax their citizens to support. Divorcing spending from taxing decisions is one way to accomplish this. Enticing the states into policy choices that are funded with federal dollars that their taxpayers have already parted with (often as a “bait” that will be later be “switched” to state taxpayers) makes it less likely that the costs of new spending will ever be carefully weighed against the benefits. It is no accident that virtually all of the growth in the American public sector since the 1950s has come at the state and local level.

Perhaps the worst of the downsides is the constitutional effect. Federal funds for states – and especially the conditions attached to them – give the federal government an enormously powerful lever over state policies. Now a pervasive practice, federal grants to the states are rapidly dissolving the separation between federal and state governments, resulting in a general federal takeover of state budgets and state policies. Increasingly, state officials are mere servants of the federal government, with little latitude to reflect the will of their voters.

States have their own taxing authority. They don’t need federal funds to tax and spend at whatever level their citizens desire. The history of major federal conditional funding programs suggests the real reason the federal government sends funds to the states. If Medicaid had been “scored” as a fully federal program in the 1960s, it would never have

been enacted, because critics would have been able to argue that it would bankrupt the federal government in a matter of decades. But by “offering” money to the states to implement the program themselves, the federal government was able to enlist their administrative support and share the funding burden with them – and states are required to implement a myriad of conditions to keep receiving funding.

Contrary to popular perception, Medicaid is not a program of federal matching grants for state health care programs. It is a program of forced *state* matching grants – and forced state implementation – of a *federal* health care program. When the federal government undertakes a major national program in an area traditionally reserved to the states, it will find that doing the work of 50 governments is expensive and time-consuming, and it doesn’t want to do that work alone. And because of the permissiveness of the Supreme Court, it doesn’t have to. It can use a powerful lever, namely the money it has already taxed away from the residents of every state. It uses that lever to “encourage” states to obey federal mandates, under the threat of losing the funds that state residents have already contributed to the program.

The Supreme Court Throws States a Lifeline

The Supreme Court has insisted that federal and state governments must remain free and independent within their respective spheres of authority. It has also, however, generally insisted that the federal government can attach virtually any condition it wants to the money it sends to the states. In the context of federal funding for states, the two principles are in conflict, since the monopoly position of the federal government with respect to redistribution from state to state puts it in a position to trample on the freedom and independence of state governments. In other words, this is not a situation where states must accept the “bitter” with the “sweet.” They get the “bitter” – paying taxes to fund Washington’s largesse to the states – whether or not they want its associated benefits.

The Court recognized this early on, in the case of *United States v. Butler* (1936),² when it warned that through the tactic of conditional federal grants, “constitutional guarantees, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion.”

The classic precedent on conditional federal funds is *South Dakota vs. Dole* (1987),³ in which the Supreme Court upheld a provision of the highway bill that allowed the Department of Transportation to reduce federal highway funding for any state that refused to raise its drinking age to 21.

In *Dole* the Court recognized the potential problem in such conditional grant programs, but essentially waved the problem away by creating a distinction without a difference. The Court recognized that the penalties attaching to such conditional federal programs could not be so onerous as to pass “the point at which pressure turns into compulsion.” The Court insisted that state prerogative must be preserved, both in theory and in fact. But the Court argued the states’ freedom of choice is preserved in the states’ ability to refuse the funding itself.

The problem with this logic is that any amount of money taxed away from the states and returned to them only on condition of compliance with federal preferences weakens the state’s ability to choose. If the penalty involved is miniscule, there is still pressure, and freedom of choice is lessened. Conversely, if the penalty is enormous, there is still freedom of choice, notwithstanding the pressure. Either there is coercion in both cases or there is coercion in neither. In both cases, states are being forced to agree to something they wouldn’t bargain for of their own free will, in order to get their citizens’ money back. The only difference is how much harm the federal government is willing to inflict to ensure compliance.

The Court’s insistence that there is some point at which mere encouragement turns into compulsion is a logical fallacy. The whole point of Vito Corleone’s “offer you can’t refuse” in *The Godfather* is that it is not an offer at all. States can

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always so “no” but doing so will always require their citizens to pay a price. The Court’s framework has proven unworkable in practice: no lower federal court has interpreted *Dole* to require striking down a federal funding program as overly coercive.

The only case that has struck down part of a federal grant program as coercive was *NFIB v. Sebelius* (2012),⁴ and that was only because the Affordable Care Act’s Medicaid-expansion provisions threatened to withhold all *pre-existing* Medicaid funds if a state did not adopt what the Court considered an *entirely new program* – the Medicaid expansion provisions.

NFIB is potentially transformative because it recognizes that the threat to withdraw federal funds can be a “gun to the head” and gives lower courts some basis for finding coercion in other programs. For this reason, it is crucial to focus first, on what the Court had to say about coercion in *NFIB*, and second, Justice Sandra Day O’Connor’s dissent in *Dole*, which the *NFIB* Court implicitly elevated to the status of doctrinal precedent.

The Court in *NFIB* noted that conditional spending legislation is “in the nature of a contract”:

“[T]he Constitution simply does not give Congress the authority to require the States to regulate.” When Congress threatens to terminate other grants as a means of pressuring the States to accept a Spending Clause program, the legislation runs counter to this Nation’s system of federalism.⁵

Without providing any more guidance than *Dole* on where the line is to be drawn between mere encouragement and coercion that passes the point at which pressure turns into compulsion, the Court simply noted, “wherever that line may be, this statute is surely beyond it. Congress may not simply conscript state [agencies] into the national bureaucratic army, and that is what it is attempting to do with the Medicaid expansion.”⁶

The Court distinguished the holding in *Dole* because of the modest size of the penalty in that case compared to the prospect of losing all existing Medicaid funds. “[T]he federal funds at stake [in *Dole*] constituted less than half of one percent of South Dakota’s budget at the time.”⁷ By contrast, under the provisions of the Medicaid expansion, states stand to lose “not merely a relatively small percentage of its existing Medicaid funding, but all of it,” on average more than 20 percent of each state’s total budget. This, wrote Roberts, is “much more than relatively mild encouragement—it is a gun to the head.”⁸

The most potentially transformative part of the Court’s opinion, however, came with its elevation of the distinction made by Justice O’Connor in her dissenting opinion in *Dole*:

We have upheld Congress’s authority to condition the receipt of funds on the States’ complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the “general Welfare.” **Conditions that do not here govern the use of the funds, however, cannot be justified on that basis.** When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.⁹

As Justice Sandra Day O’Connor argued in her *Dole* dissent, conditions on federal funds must be integral to the federal interest in the program’s goals.¹⁰ Conditions that relate only to how states can spend federal money advances the program’s goals without impacting state policies or state spending. But federal conditions that impact how the state spends its own money or collateral state policies are a means of regulating the states as states, something the Court has clearly prohibited in such cases as *New York v. U.S.* (1992); *Printz v. U.S.* (1997). The relevant portion of Justice O’Connor’s dissent is in [Appendix A](#).

These Supreme Court pronouncements suggest that there is great promise in a state policy that distinguishes, for purposes of state law, between (a) federal conditions that attach only to how federal money is to be spent, and (b) federal conditions that seek to regulate state spending or collateral state policies. It should be the policy of every state to declare the latter “coercive” and unconstitutional and to resist the imposition of such coercive conditions. [Appendix B](#) suggests a model state policy.

Excerpt from *South Dakota v Dole* (1987)
(portion of Justice Sandra Day O’Connor’s dissenting opinion)

[...]

There is a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants. It is the line identified in the Brief for the National Conference of State Legislatures et al. as *Amici Curiae*:

Congress has the power to spend for the general welfare, it has the power to legislate only for delegated purposes.... The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. ***The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress’ intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent.*** A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress’ delegated regulatory powers.

This approach harks back to *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477 (1936), the last case in which this Court struck down an Act of Congress as beyond the authority granted by the Spending Clause. There the Court wrote that “[t]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced.” *Id.*, at 73, 56 S.Ct., at 322. The *Butler* Court saw the Agricultural Adjustment Act for what it was—an exercise of regulatory, not spending, power. [...]

While *Butler*’s authority is questionable insofar as it assumes that Congress has no regulatory power over farm production, its discussion of the spending power and its description of both the power’s breadth and its limitations remain sound. The Court’s decision in *Butler* also properly recognizes the gravity of the task of appropriately limiting the spending power. If the spending power is to be limited only by Congress’ notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives “power to the Congress to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.” *United States v. Butler*, *supra*, 297 U.S., at 78, 56 S.Ct., at 324. This, of course, as *Butler* held, was not the Framers’ plan and it is not the meaning of the Spending Clause.

Our later cases are consistent with the notion that, under the spending power, the Congress may only condition grants in ways that can fairly be said to be related to the expenditure of federal funds. For example, in *Oklahoma v. CSC*, 330 U.S. 127, 67 S.Ct. 544, 91 L.Ed. 794 (1947), the Court upheld application of the Hatch Act to a member of the Oklahoma State Highway Commission who was employed in connection with an activity financed in part by loans and grants from a federal agency. This condition is appropriately viewed as a condition relating to how federal moneys were to be expended. Other conditions that have been upheld by the Court may be viewed as independently justified under some regulatory power of the Congress. Thus, in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Court upheld a condition on federal grants that 10% of the money be “set aside” for contracts with minority business enterprises. But the Court found that the condition could be justified as a valid regulation **2802 under the commerce power and § 5 of the Fourteenth Amendment. *Id.*, at 476, 478, 100 S.Ct., at 2775. See also *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 787, 39 L.Ed.2d 1 (1974) (upholding nondiscrimination provisions applied to local schools receiving federal funds).

This case, however, falls into neither class. **As discussed above, a condition that a State will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction.** The only possible connection, highway safety, has nothing to do with how the funds Congress has appropriated are expended. Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor. As such it is not justified by the spending power. [...]

The immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a Government of enumerated powers. *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819). Because 23 U.S.C. § 158 (1982 ed., Supp. III) cannot be justified as an exercise of any power delegated to the Congress, it is not authorized by the Constitution. The Court errs in holding it to be the law of the land, and I respectfully dissent.¹¹

Model Policy – Identifying Coercive Federal Funds in State Budget

Policy Summary: The legislation below would significantly increase transparency on the federal government’s coercion of the states through the manipulation of federal fiscal assistance to the states. It would require the state’s budget bureau or fiscal board to identify all the conditions attached to significant sources of federal funds in the state budget, and categorize them according to whether the conditions affect how the federal funds are spent, or instead affect what the state does with its own funds and regulatory authority. The legislation then by operation of law designates conditions attached to matters other than how the federal funds are to be spent as coercive conditions for purposes of state law, and declares it the policy of the state to resist all such conditions and to work together with other states to end such federal programs.

This legislation seeks to “operationalize” Justice O’Connor’s dissent in *South Dakota v. Dole* (1987) and the Medicaid portion of the Supreme Court’s ruling in *NFIB v. Sebelius* (2012).

[draft legislation on Coercive Federal Funds Report]

AN ACT to create [section _____] of the statutes; **relating to:** [state legislative budget bureau] reports on federal funds in the state budget, and the conditions attached by federal law and federal regulation thereto, including related guidance.

The people of the state of [state _____], represented in senate and assembly, do enact as follows:

SECTION [_____] of the statutes is created to read:

() COERCIVE FEDERAL FUNDS REPORT; AUTHORITY TO CHALLENGE.

(a) In this subsection, “federal funds” refers to any federal grants in aid or other federal funds that are include in each budget bill.

(b) The [state legislative budget bureau] shall prepare a “Coercive Federal Funds Report” on each budget bill. The report shall contain all of the following:

1. A detailed description of each source of federal funds in the budget bill [that exceeds \$5 million in the aggregate]; and

2. A detailed description of the conditions that must be met for continued eligibility for each such source, based on relevant federal law, regulations and guidance. The description of the conditions attached to each source shall be clearly separated into the following three categories:

- a. Conditions that describe the manner in which the federal funds must be spent.
- b. Conditions that describe the manner in which any related non-federal state or local funds must be spent, including “maintenance of effort” and similar requirements.
- c. Conditions that relate to policy matters other than the manner in which federal, state, or local funds must be spent.

(c) The conditions described in () (b) (2) (b) and () (b) (2) (c) shall be deemed “coercive federal condi-

Use a non-political state budget office to perform the analysis on the budget and report on the three different kinds of conditions. The “coercion” label then attaches by operation of law.

There are hundreds of sources of federal funds in the state budget, but most of the money (and leverage) is in the top 10 or 20 programs. The dollar threshold in your state should be set high enough to capture only those programs.

tions,” and the related federal funds shall be deemed “coercive federal funds.”

(d) The Attorney General is hereby authorized to bring suit in federal court to enjoin the application of any and all such “coercive federal conditions.”

(e) It is the policy of the state of [_____] that federal programs that contain coercive federal conditions are unconstitutional and incompatible with the federal structure of the United States Constitution, and with the Constitution’s guarantee of a democratic representative government for the states.

The attorney general is authorized to challenge the conditions in court, so the state can gain flexibility without risking the return of federal funds to the state.

It is the policy of the state of [_____] to work with other states in ending all such federal programs, and replacing them as necessary with state programs that reflect the preferences of the residents of the state of [_____]. The governor shall consult with the governors of other states to develop a coordinated approach to issues relating to coercive federal funding programs.

Federal funds put states in a “prisoner’s dilemma.” States must work together to fight back.

(Endnotes)

- 1 See, Office of Management and Budget, Historical Table 12.1, “Summary Comparison of Total Outlays for Grants to State and Local Governments: 1940–2021”, <https://www.whitehouse.gov/omb/budget/Historicals>.
- 2 297 U.S. 1.
- 3 483 U.S. 203.
- 4 132 S. Ct. 2566 (2012).
- 5 132 S. Ct. at 2602 (internal citations omitted).
- 6 NFIB v. Sebelius (internal quotations and citations omitted).
- 7 NFIB v. Sebelius.
- 8 *Id.*
- 9 *Id.* at 2603-04 (emphasis supplied).
- 10 483 U.S. at 213-14.
- 11 483 U.S. at 215-218 (some citations omitted, emphasis supplied).

