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## Spending Power Bargaining After *Sebelius*

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In the wake of the Supreme Court's Affordable Care Act (ACA) decision,<sup>1</sup> it's easy to get lost in debate over the Chief Justice's stated theory of the commerce power, or what precedential effect it will have under the *Marks* doctrine<sup>2</sup> (given that his only supporters wrote in dissent). Still, the practical implications for existing governance is likely to be small, at least in the foreseeable future. After all, much of the debate over the individual mandate focused on how unprecedented it was: despite months of trying, nobody produced a satisfying example of this particular Congressional tool used in previous health, environmental, or any other kind of federal law.

By contrast, the most immediately significant portion of the ruling—and one with far more significance for most regulatory governance—is the part of the decision limiting the federal spending power that authorizes Medicaid. Congress uses its spending power to persuade states to engage in programs of cooperative federalism all the time, ranging from environmental programs under the Clean Air Act to cooperative management of the national highway system. Last month's decision represents the first time the Court has ever invalidated a congressional act for exceeding its power under the Spending Clause, and the decision has important implications for the way that many state-federal regulatory partnerships work.

These partnerships reflect the complex way that the Constitution structures federal power, through both specific and open-ended delegations of authority. Specific congressional powers include the authority to coin money, establish post offices, and declare war. More open-ended grants of federal authority are conferred by the Commerce, Necessary and Proper, and Spending Clauses, about which we have heard so much in recent weeks. Whatever isn't directly or reasonably indirectly covered by these delegations is considered the realm of state authority. (Of course, there is some overlap between the two, but that's another story and a previous essay.<sup>3</sup>)

The Spending Clause authorizes Congress to spend money for the general welfare. Congress can fund programs advancing specific federal responsibilities (like post offices or Naval training), but it can also fund state programs regulating beyond Congress's specifically delegated authority (such as education or domestic violence). Sometimes, Congress just funds state programs that it likes directly. But it can also offer money *conditionally*—say, to any state willing to adopt a particular rule or program that Congress wants to see. In these examples, Congress is effectively saying, “here is some money, but for use only with this great program we think you should have” (say, health-insuring poor children).

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<sup>1</sup> National Federation of Independent Business vs. Sebelius, 567 U.S. \_\_\_, 2012 WL 2427810.

<sup>2</sup> Marks v. United States, 430 U.S. 188 (1977).

<sup>3</sup> Erin Ryan, *Obamacare and Federalism's Tug of War Within*, REG BLOG, June 21, 2012, at <https://www.law.upenn.edu/blogs/regblog/2012/06/21-ryan-federalism.html> (extended version later published on Environmental Law Profs Blog: [http://lawprofessors.typepad.com/environmental\\_law/2012/06/obamacare-and-federalisms-tug-of-war-within.html](http://lawprofessors.typepad.com/environmental_law/2012/06/obamacare-and-federalisms-tug-of-war-within.html)).

In this way, the spending power enables Congress to bargain with the states for access to policymaking arenas otherwise beyond its reach. A fair amount of interjurisdictional governance takes place within such “spending power deals”—addressing matters of mixed state and federal interest in realms from public health to national security. Federal highway funds are administered to the states through a spending deal, as are funds for public education, coastal management, child welfare, the Medicaid insurance program, and countless others.

Congress can’t just compel the states to enact its preferred policies, but spending power partnerships are premised on negotiation rather than compulsion, because states remain free to reject the federally proffered deal. If they don’t like the attached strings, they don’t have to take the money. Members of the Court have sporadically worried about undue federal pressure, but only in dicta and without much elaboration. In 1987, in *South Dakota v. Dole*, the Court famously upheld the spending bargaining enterprise, so long as the conditions are unambiguous, reasonably related to the federal interest, promote general welfare, and do not induce Constitutional violations.<sup>4</sup> No law has ever run afoul of these broad limits, which have not since been revisited—until now.

In challenging the ACA, 26 states argued that Congress had overstepped its bounds by effectively forcing them to accept a significant expansion of the state-administered Medicaid program, even though Congress would fund most of it. All states participate in the existing Medicaid program, and many feared losing that federal funding (now constituting over 10% of their annual budgets) if they rejected Congress’s new terms. Congress had included a provision in the original law stating that it could modify the program from one year to the next, as it had done nearly fifty times previously. But the plaintiff states argued that this time was different, because the changes were much bigger and because they couldn’t realistically divorce themselves from the programs in which they had become so entangled. Even though they really wanted out, they claimed, now they were stuck. The feds maintained that congressional funds are a conditional gift that states are always free to take or refuse as they please.

In deciding the case, the Court stated a new rule limiting the scope of Congress’s spending power in the context of an ongoing regulatory partnership. Chief Justice Roberts began by upholding the presumption underlying spending power bargaining—that the states aren’t coerced, because they can always walk away from the table if they don’t like the terms of the deal. We mostly dispel concerns about coercion by relying on the states to “just say no” when they don’t like the federal policy. (In a choice rhetorical moment, he offered: “The States are separate and independent sovereigns. Sometimes they have to act like it.”) Accordingly, he concluded that the Medicaid expansion was constitutional in isolation, because states that don’t want to participate don’t have to. No coercion, no constitutional problem.

But then the decision takes a key turn. What *would* be a problem, he explained, would be if Congress were to penalize states opting out of the Medicaid expansion by cancelling their existing programs. Given how dependent states have grown on the federal partnership to administer these entrenched programs, this would be unconstitutionally coercive. By his

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<sup>4</sup> 483 U.S. 203 (1987).

analysis, plaintiffs chose the original program willingly, but were being dragooned into the expansion. To make the analysis work, though, he had to construe Medicaid as really being *two separate programs*: the current model, and the expansion. Congress can condition funding for the expansion on acceptance of its terms, but it can't procure that acceptance by threatening to defund existing programs (analogizing to gun-point negotiating tactics). The decision requires Congress to allow dissenting states to opt out of the Medicaid expansion while remaining in the older version of the program.

Justice Ginsburg excoriated this logic in dissent, arguing that there was only one program before the Court: Medicaid. For her, the expansion simply adds beneficiaries to what is otherwise the same partnership, same purpose, same means, and same administration: "a single program with a constant aim—to enable poor persons to receive basic health care when they need it." She criticized the Chief Justice for enforcing a new limitation on coercion without clarifying the point at which permissible persuasion gives way to undue coercion, and she pointed out the myriad ways this inquiry requires "political judgments that defy judicial calculation."

On these points, Justice Ginsburg is right. The decision offers no limiting principle for future judges or legislators evaluating coercive offers. "I-know-it-when-I-see-it" reasoning won't do when assessing the labyrinthine political dimensions of intergovernmental bargaining, but neither the decision nor the conservative justices' dissent provides more than that. Moreover, the rule is utterly unworkable. No present Congress can bind future congressional choices, so every spending power deal is necessarily limited to its budgetary year as matter of constitutional law. But after this decision, Congress can never modify a spending power program without potentially creating two tracks—one for states that like the change and another for those that prefer the original (and with further modifications, three tracks, *ad infinitum*). The decision fails to distinguish permissible modifications from new-program amendments, leaving every bargain improved by experience vulnerable to legal challenge. And it's highly dubious for the Court to assume responsibility for determining the overall structure of complex regulatory programs—an enterprise in which legislative capacity apexes while judicial capacity hits its nadir.

Nevertheless, the decision exposes an important problem in spending power bargaining that warrants attention: that is, how the analysis shifts when the states are not opting in or out of a cooperative federalism program from scratch, but after having developed substantial infrastructure around a long-term regulatory partnership. It's true that the states, like all of us, sometimes have to make uncomfortable choices between two undesirable alternatives, and this alone should not undermine genuine consent. But most of us build the infrastructure of our lives around agreements that will hopefully last longer than one fiscal year (lay-offs notwithstanding). The Chief's analysis should provoke at least a little sympathy for the occasionally vulnerable position of states that have seriously invested in an ongoing federal partnership that suddenly changes. (Indeed, those sympathetic to the ACA but frustrated with No Child Left Behind's impositions on dissenting states should consider how to distinguish them.)

It's important to get these things right, because as I describe in my new book, [\*Federalism and the Tug of War Within\*](#), an awful lot of American governance really is negotiated between state

and federal actors this way.<sup>5</sup> Federalism champions often mistakenly assume a “zero-sum” model of American federalism that emphasizes winner-takes-all competition between state and federal actors for power. But countless real-world examples show that the boundary between state and federal authority is really a project of ongoing negotiation, one that effectively harnesses the regulatory innovation and interjurisdictional synergy that is the hallmark of our federal system. Understanding state-federal relations as heavily mediated by negotiation betrays the growing gap between the rhetoric and reality of American federalism—and it offers hope for moving beyond the paralyzing features of the zero-sum discourse. Still, a core feature making the overall system work is that intergovernmental bargaining must be fairly secured by genuine consent.

Supplanting appropriately legislative judgment with unworkable judicial rules doesn't seem like the best response, but the political branches can also do more to address the problem. To ensure meaningful consent in long-term spending bargains, perhaps Congress could provide disentangling states a phase-out period to ramp down from a previous partnership without having to simultaneously ramp up to new requirements—effectively creating a COBRA policy for states voluntarily leaving a state-federal partnership. Surely this beats the thicket of confusion the Court creates in endorsing judicial declarations of new congressional programs for the express purpose of judicial federalism review. But in the constitutional dialogue between all three branches in interpreting our federal system, the Court has at least prompted a valuable conversation about taking consent seriously within ongoing intergovernmental bargaining.

*--Versions of this essay first appeared on OUP Blog (<http://blog.oup.com/2012/07/spending-power-bargaining-after-obamacare/>) and later on ACS Blog and Environmental Law Profs Blog in early July, 2012.*

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<sup>5</sup> ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (Oxford, 2012), Part IV (“Negotiating Federalism”). See also, Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011).