WISCONSIN LEGISLATIVE COUNCIL

IssueBrief

March 2021

Conditions on Federal Funding: Constitutional Considerations

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The U.S. system of government grants certain powers to the federal government and reserves all other powers to the states and the people.[1] One of Congress's enumerated constitutional powers is the spending power – the power to spend federal funds. In general, courts have held that Congress has broad authority to attach conditions when exercising its spending power. However, courts have recognized outer limits on such conditions, including when the conditions arguably compel states to take certain actions. A motion recently filed in federal court argues that a prohibition on certain state tax cuts in the American Rescue Plan Act of 2021 (ARPA) is unconstitutionally coercive.[2] This issue brief provides background information that may be useful for understanding the key constitutional provisions and case law relating to conditions on federal funding.

LIMITS ON CONGRESS'S SPENDING POWER

Congress's spending power derives from the Spending Clause in Article 1, Section 8 of the U.S. Constitution, which empowers Congress to "provide for the common defense and general welfare of the United States." Federal courts have consistently interpreted the Spending Clause to allow Congress to impose conditions when spending federal funds. Congress may "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." [*Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).] In addition, such federal policy objectives need not be independently authorized by another power enumerated in the U.S. Constitution. [*United States v. Butler*, 297 U.S. 1, 66 (1936).]

However, Congress's ability to impose conditions on federal funds is not unlimited. In *South Dakota v. Dole*, the U.S. Supreme Court articulated five restrictions on conditions imposed by Congress on a grant of federal funds to a state. [483 U.S. 203 (1987).] Specifically, to be constitutional, a federal funding condition must be all of the following:

- In pursuit of the general welfare.
- Unambiguous.[3]
- Related to a federal interest in particular national projects or programs.
- Not otherwise prohibited by the U.S. Constitution.
- Not coercive.

[*Id.* at 207-08.]

"NOT COERCIVE"

Although all five of the restrictions listed above are important, the last restriction – prohibiting a federal funding condition that is coercive – has been particularly important in past cases evaluating federal funding granted to states.

Rooted in the Tenth Amendment

Federal courts have characterized the "not coercive" requirement as being rooted in the Tenth Amendment to the U.S. Constitution and the anti-commandeering doctrine. The Tenth Amendment

reserves powers that are not given to the federal government under, and not prohibited by, the U.S. Constitution, to the states or to the people. [U.S. Const. amend. X; *United States v. Darby*, 312 U.S. 100, 124 (1941).] A corollary to the Tenth Amendment, the anti-commandeering doctrine recognizes that Congress may not commandeer the legislative process of the states by directly compelling states to enact or enforce a federal program. [See, *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).] The anti-commandeering doctrine also protects states from federal attempts to prevent certain state action. [*Murphy v. National Collegiate Athletic Ass'n.*, 584 U.S. ___ (2018).]

In other words, the anti-commandeering cases emphasize that the U.S. Constitution does not "confer upon Congress the ability to require the states to govern according to Congress's instructions." [*New York*, 505 U.S. at 162.] The "not coercive" restriction evaluates whether Congress has used a federal funding condition to do so.

The Question: Does it Encourage State Policy Choices, or Compel Them?

When determining whether a given condition is impermissibly coercive, federal courts have sought to distinguish whether a funding condition merely "encourages" or "entices" states to adopt the policy required by the condition or, instead, actually compels states to do so. The U.S. Supreme Court has characterized that analysis as depending on the "voluntariness of the states' choice to accept or decline" a particular condition, and has emphasized that "theoretical voluntariness is not enough." [*NFIB v. Sebelius*, 567 U.S. 519, 555 (2012).] Stated another way, a state's decision to accept or decline federal funds subject to the conditions must be truly voluntary.

Amount of Funds Affected is an Important Consideration

In the relatively few U.S. Supreme Court opinions on point, the Court has considered the percentage or amount of funding to which a given condition applies as one key factor in that analysis. For example, in *South Dakota v. Dole*, the State of South Dakota argued that Congress exceeded its spending power by requiring states to establish a minimum drinking age of 21 years as a condition for receiving certain federal highway funds. When concluding that the condition was not unconstitutionally coercive, the U.S. Supreme Court emphasized that it only applied to five percent of the appropriated federal highway funds, which accounted for a relatively small portion of South Dakota's state budget. [*Dole*, 483 U.S. at 211.]

In contrast, in a more recent decision, *National Federation of Independent Business (NFIB) v. Sebelius*, the U.S. Supreme Court invalidated a condition of the Affordable Care Act that required states to expand their Medicaid programs or forego not just Medicaid expansion funding but **all** federal Medicaid funding. The Court noted that federal Medicaid funding accounted for 10 percent of some states' total budgets. Given that substantial budgetary impact, the *NFIB* Court characterized the funding condition as "economic dragooning that leaves the states with no real option but to acquiesce in the Medicaid expansion." [567 U.S. at 523.]

However, the Court has declined to provide a bright-line test specifying what amount or type of funds affected by a federal funding condition fall on the coercive, rather than encouraging or enticing, side of the line. Thus, it is difficult to predict the outcome in current and future cases, including in the litigation challenging the tax provisions under the ARPA, with any certainty.

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[1] When exercising constitutionally valid power, federal authority "trumps" any conflicting state law. [U.S. Const., art. VI, cl. 2.]

[2] Section 9901 of the ARPA prohibits states from using certain funds provided under the act "to either directly or indirectly offset a reduction in the net tax revenue of such state ... ." On March 16, 2021, the attorneys general of 21 states submitted a letter to U.S. Treasury Secretary Yellen requesting further clarification regarding that prohibition.

[3] The Court has clarified that requiring federal funding conditions to be unambiguous "enables states to exercise their choice knowingly, cognizant of the consequences of their participation." [*Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).]