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**Crossing the Constitutional Line in Spending
From Persuasion to Compulsion:
A Reply to Gillian Metzger**

by David G. Oedel

In her remarks at the 2011 Annual Meeting of the Association of American Law Schools (AALS),¹³⁰ Professor Gillian Metzger of Columbia University Law School offered an interesting critique of the Spending Clause¹³¹ claim now being pursued by a majority of the states in the United States in the constitutional challenge to health care reform.¹³² The states claim that the changes to Medicaid are beyond the power of Congress to effect constitutionally under the Spending Clause of the United States Constitution because the changes are coercive and also violate the “general restrictions” identified by the Supreme Court of the United States in *South Dakota v. Dole*.¹³³

Professor Metzger’s overriding point that the Spending Clause claim will be a “very hard sell” has subsequently been borne out by Judge Roger Vinson. Though holding the individual mandate to be unconstitutional, Judge Vinson also ruled against the states’ Spending Clause claim in *Florida ex rel. Bondi v. U.S. Department of Health & Human Services*¹³⁴ on January 31, 2011.¹³⁵ When Professor Metzger made her remarks on January 7, 2011, days before Judge Vinson’s decision (the first decision on the merits of that claim by any court hearing a

130. See *Our Pending National Debate: Is Health Care Reform Constitutional*, 62 MERCER L. REV. 633 (2011).

131. U.S. CONST. art. I, § 8, cl. 1.

132. See *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at *1 & n.1 (N.D. Fla. Jan. 31, 2011). The twenty-six states collectively suing the federal government over health care reform are Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Indiana, Idaho, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. *Id.* Their co-plaintiffs include two individuals and the National Federation of Independent Business. *Id.* at *1. The twenty states that had been litigating the case in 2010 prior to the November 2010 elections were joined in January 2011 by Iowa, Kansas, Maine, Ohio, Wisconsin, and Wyoming. See *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1127 & n.1 (N.D. Fla. 2010) (noting the twenty original plaintiffs).

133. 483 U.S. 203, 207-08 (1987).

134. No. 3:10-cv-91-RV/EMT, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011).

135. *Id.* at *7, *33. Judge Vinson’s order granting summary judgment, like many of the court papers in the most prominent challenges to health care reform, is conveniently collected on the ACA Litigation Blog, at <http://acalitigation.wikispaces.com/file/view/District+Court+final+opinion.pdf>.

challenge to health care reform), she correctly predicted the general outcome of the first judicial review of the states' Spending Clause claim. Professor Metzger argued that the coercion claim is undermined factually to the extent the costs of Medicaid's changes will be disproportionately shouldered by the federal government, not the states. Professor Metzger also suggested that the final design of health care reform reflected compromises that in some ways acceded to state interests and federalism, even if the states were not at the table. As to the latter point, however, she did not articulate specifically how health care reform acceded to state interests—perhaps because, with twenty-six states suing in this action alone, that is a tough case to make.

On more legal-analytical grounds, Professor Metzger observed that “it is very difficult to come up with a judicially manageable standard for when changes to a spending program go too far and become coercive.”¹³⁶ According to Professor Metzger, courts have so far declined to find any conditional federal spending to be coercive (whether in earlier challenges to prior changes to Medicaid or in other settings) because of that line-drawing difficulty.

The Spending Clause claim will presumably soon be the subject of an appellate review of Judge Vinson's decision in *Bondi*, in which twenty-six states lodged and joined. Those states will offer their own arguments after appeals are filed, as will the federal government. However, writing on February 28, 2011, only as a constitutional law scholar replying to Professor Metzger, not as counsel to Georgia in the litigation or as a commenter on Judge Vinson's own decision, the Author will briefly sketch some personal reactions to Professor Metzger's specific arguments offered at the AALS 2011 annual meeting.

Professor Metzger is undoubtedly right that reasonable doubt shrouds the precise potential extent of federal raiding of the state fiscs under health care reform. She is also right that, whatever the degree of the statutorily preordained raiding of state fiscs (modest by Professor Metzger's predictions and standards), any raiding will inevitably hurt one state more than another. Some states may even view those raids to be sufferable in light of countervailing benefits.

Nonetheless, such questions are largely irrelevant to a determination of whether federal coercion of some states is occurring. One can detect the tangential, off-the-mark character of Professor Metzger's argument by recalling that it is no defense to a charge of theft that the accused stole only a little from a particular victim; a particular victim could afford to be robbed; the thief could have taken more; the thief was

136. See Gillian Metzger, *Defense of the Constitutionality of Health Care Reform*, 62 MERCER L. REV. 633, 637 (2011).

planning to be generous with the proceeds of the theft; multiple victims may have had different circumstances both before and after the victimization; the victim might have gotten some side benefits from the victimization; or one “partner” may have consented to an intimate relationship, while another “partner” may not have consented to the same sort of relationship (with radically different legal results).

Coercion is the compulsion of another to engage in something against that other’s will, with the effect, in this constitutional setting (at least according to Justice Benjamin Cardozo), of “destroying or impairing the autonomy of the states.”¹³⁷ The more targeted question, therefore, unlike Professor Metzger’s question about whether the particular coercion is factually significant when even bigger things may be at stake, is whether the federal government’s changes to Medicaid have been forced upon these complaining states against their respective wills, leaving their autonomy impaired or destroyed.

These states claim that their respective wills lie trampled and impaired, yet even now the states defy the congressional act. Do they have a factually supportable claim? The fact that some states have seriously explored the possibility of opting out of the changes to Medicaid, but not a single state can see how it can responsibly opt out, suggests that the expansion of Medicaid is coercive. The fact that 100% of the states are compliant (because the states view it as such a fine program, according to President Barack Obama’s Administration’s strained characterization),¹³⁸ while more than 50% of that identical population of states is suing to stop the expansion, strongly suggests the presence of unconstitutional coercion. Another indication of strident state dissent is the fact that the majority of states are seeking waivers from the federal government concerning Medicaid’s expansions and cost burdens to the states after the passage of Medicaid “reform,” while the Obama Administration’s Department of Health and Human Services is questioning its own legal authority to grant waivers.¹³⁹

To reiterate, because coercion is not a question of potentially modest or incidental future *effects* but instead a question of present *compulsion*,¹⁴⁰ the courts need to weigh the factual evidence of whether states

137. Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 586 (1937).

138. See *Health Reform in Action*, WHITE HOUSE, <http://www.whitehouse.gov/health-reform> (last visited Mar. 27, 2011).

139. Sara Murray, et al., *Governors Scramble to Rein in Medicaid*, WALL ST. J., Feb. 28, 2011, <http://online.wsj.com/article/SB10001424052748704430304576170842026286166.html> (“More than half the states want permission to remove . . . people from the Medicaid insurance program. . . . [T]he Obama Administration . . . says it may lack the authority to allow such cuts.”).

140. See *Steward Mach.*, 301 U.S. at 586.

today have any meaningful choice to opt out of Medicaid's expansion when all fifty states are capitulating, yet more than twenty-six of the states are suing to stop the expansion.¹⁴¹ That stark juxtaposition by itself strongly suggests that there is, as a factual matter, no meaningful choice for the complaining states. Furthermore, the juxtaposition suggests the presence of compulsion in an indirect form of the death penalty for citizens of those states that would have the temerity to opt out. The Obama Administration has insisted repeatedly in the Florida litigation that Medicaid clearly and unambiguously requires that no federal funding will be offered for the poor and sick of any state opting out of the changes.¹⁴²

As to Professor Metzger's legal-analytical objection that there is no judicially manageable standard for distinguishing between coercive spending and other constitutionally acceptable forms of spending, Professor Metzger has at least one very strong point: No court has so far made such a ruling. This suggests that there exists a longstanding native judicial caution in the area of constitutional limits on the spending power. However, courts are generally accomplished at line-drawing—for instance, in distinguishing between unconstitutional conditions imposed by states in connection with things like public employment,¹⁴³ unemployment benefits,¹⁴⁴ and land use.¹⁴⁵ Courts are quite capable of drawing such lines in other settings as well—for example, allowing duress to negate a conclusion of guilt in criminal cases despite the existence of *mens rea* (as in criminal law);¹⁴⁶ distinguishing between commandeering instead of providing real options for state legislatures and executive officers (as in Tenth Amendment¹⁴⁷ jurisprudence);¹⁴⁸ and judging the difference between duress and hard bargaining (as in classic contractual analysis).¹⁴⁹ There seems to be nothing categorically different about line-drawing in this setting of the spending power than in many other parallel legal settings.

141. See *Bondi*, 2011 WL 285683, at *1 n.1.

142. See, e.g., Memorandum in Support of Defendants' Motion to Dismiss, *McCollum*, 716 F. Supp. 2d 1120 (No. 3:10-cv-91-RV/EMT), 2010 WL 2663348 at *20-22.

143. See, e.g., *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

144. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963).

145. See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834-36 (1987).

146. See, e.g., *Dixon v. United States*, 548 U.S. 1, 7 (2006).

147. U.S. CONST. amend. X.

148. See, e.g., *New York v. United States*, 505 U.S. 144, 161-62 (1992) (commandeering of state legislature); *Printz v. United States*, 521 U.S. 898, 904-05 (1997) (commandeering of local law enforcement officers).

149. See, e.g., *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 300-03 (1942).

In fact, the federal government has itself firmly pressed the notion that duress involving the federal government is an appropriate subject for the Supreme Court to judge. In *United States v. Bethlehem Steel Corp.*,¹⁵⁰ the federal government urged the Court to weigh the federal government's own claim that it had been subjected to contractual duress in shipbuilding contracts with Bethlehem Steel entered into long before the First World War.¹⁵¹ That case lies in fascinating juxtaposition to the present case of the expanded Medicaid "partnership" between the federal government and the states. In *Bethlehem Steel*, the Supreme Court rejected, on its face, the federal government's factual claim that it was coerced by a single corporation much smaller than the federal government itself (somewhere between a sixth and a quarter of the federal government's financial might).¹⁵² Conversely, a court today might well take judicial notice that the federal government has exercised its relative muscle to coerce individual states, which on average have far less the financial size of the federal government (and even less in terms of practical might, as the states cannot engage in deficit-spending), into accepting the Medicaid expansion.

The factual financial-power disparities today between the individual states and the federal government far outstrip the disparities that gave rise to the federal government's claim of duress and coercion in *Bethlehem Steel*. During World War I (the time of the federal government's ship-building contracts in *Bethlehem Steel*),¹⁵³ Bethlehem Steel was considerably more financially mighty than the typical state today, as gauged by the relative size and power of such a counter-party or "partner" compared to the federal government at the respective times—Bethlehem Steel had revenue of \$2.96 million in 1917,¹⁵⁴ which was 15% of the total budgeted spending of the federal government during that war year and 27% of the budgeted tax receipts for the federal government that same year (\$1.10 billion).¹⁵⁵

In stark contrast, in 2010, during another period of national financial exigency involving a great recession and two wars, the total budgeted spending of the federal government was \$3.55 trillion, and its revenues

150. 315 U.S. 289 (1942).

151. *Id.* at 294-95.

152. *Id.* at 301.

153. *Id.* at 292.

154. *Bethlehem Earnings: Gross Sales for 1917 Reach Total of \$296,000,000*, N.Y. TIMES, Jan. 30, 1918, available at <http://query.nytimes.com/mem/archivefree/pdf?res=F-70617FD3B5B11738DDDA90B94D9405B888DF1D3>.

155. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, HISTORICAL TABLES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2012, at 21 (2011), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/hist.pdf>.

were \$2.38 trillion.¹⁵⁶ Meanwhile, in 2010 the average state's revenue (29.5% of which was made up of federal transfers, chief among them being transfers for Medicaid) was \$29.6 billion.¹⁵⁷ In other words, the average state today has revenue (much of that revenue from the federal government) that is about 1.2% as much as overall federal revenue and about 0.8% of federal spending. Not counting federal transfers, state revenues in 2010 were, on average, \$20.72 billion per state, which was about 0.9% of federal revenue and about 0.6% of federal spending.¹⁵⁸

When the Court decided *Bethlehem Steel* in 1942, the federal government argued that it had been coerced under duress by an entity much smaller than itself.¹⁵⁹ Today, states (that are, on average, roughly 1% the financial size of the federal government) insist, more plausibly, that it is facially coercive for the federal government to threaten to withhold 100% of Medicaid funding from any state that might dare stray from the federal order to expand Medicaid radically. States are making this claim because federal Medicaid funding is the single largest transfer from the federal government to the states, and its disappearance could well mean death for thousands of state citizens. If the federal government could seriously press the issue that it was being coerced by Bethlehem Steel (which was threatening to cut off nothing from the federal government other than Bethlehem Steel's possible future services in building steel ships) in 1942,¹⁶⁰ then the federal government in 2011 cannot reasonably claim that the judiciary is incapable of evaluating the claims of these individual states that they have been threatened by the federal government with a coercive scheme of all-in-or-all-out Medicaid expansion.

The great, prescient Justice Benjamin Cardozo saw this sort of potential lying latent in the arguments about the federal government of his own day. Justice Cardozo clearly anticipated that the Court might one day be forced to draw a line against federal coercion of the states, even though he ruled with the Court that the questions of his day—for instance, whether federal spending on state unemployment insurance was coercive, and whether spending on social security was within the general welfare—did not necessitate an articulation of those constitution-

156. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, A NEW ERA OF RESPONSIBILITY: RENEWING AMERICA'S PROMISE 114 (2009), available at <http://www.gpo.access.gov/usbudget/fy10/pdf/fy10-newera.pdf>.

157. See NAT'L ASS'N OF STATE BUDGET OFFICERS, 2009 STATE EXPENDITURE REPORT 92-95 (2010), available at <http://www.nasbo.org/LinkClick.aspx?fileticket=w7RqO74llEw%3d&tabid=38>.

158. See *id.*

159. *Bethlehem Steel*, 315 U.S. at 294-95.

160. *Id.* at 295, 300-01.

al bounds. Justice Cardozo's own thoughtfully chosen words in both *Steward Machine Co. v. Davis*¹⁶¹ and *Helvering v. Davis*¹⁶² make plain that Justice Cardozo, at least, felt that the line-drawing exercises, both as to the idea of spending coercion and as to the related concept of the "general" welfare, might someday be unavoidable.¹⁶³

In *Steward Machine*, Justice Cardozo wrote about taxing and spending for unemployment insurance as follows:

There must be a showing . . . that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states. . . . To draw the line intelligently between duress and inducement, there is need to remind ourselves of facts. . . .

Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfillment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress. . . . Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact. The point had not been reached when Alabama made her choice. We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power. There would be a strange irony, indeed, if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will. . . .

[I]nducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future.¹⁶⁴

On the same day that the Court decided *Steward Machine*, Justice Cardozo, in *Helvering*, made parallel arguments in the context of a general-welfare discussion concerning Social Security:

161. 301 U.S. 548 (1937).

162. 301 U.S. 619 (1937).

163. See *Steward Mach.*, 301 U.S. at 586-91; *Helvering*, 301 U.S. at 640-41.

164. *Steward Mach.*, 301 U.S. at 586-91.

Congress may spend money in aid of the 'general welfare.' There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision. The conception of the spending power advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. 'When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.'¹⁶⁵

Justice Cardozo recognized that although line-drawing about coercive spending—like line-drawing about the meaning of the general welfare in spending—may be difficult to do in the abstract, those difficulties would melt away in the presence of facts showing coercion or facts showing that spending would be devoted to particular states' welfare instead of the general welfare of all states. The failure of coercion to have factually been shown in *Steward Machine* was clear to Justice Cardozo (writing for the Court) specifically because neither Alabama nor any other state was a party to the litigation, and all states appeared to enthusiastically welcome the unemployment insurance funding.¹⁶⁶ In the present-day

165. *Helvering*, 301 U.S. at 640-41 (citations omitted) (quoting *United States v. Butler*, 297 U.S. 1, 67 (1936)).

166. *Steward Mach.*, 301 U.S. at 590. The Court in *Steward Machine* considered some issues common to the present challenge to health care reform, but that case is distinguishable on a number of critical fronts. The Social Security Act's, 42 U.S.C. §§ 301-1397jj (2006 & Supp. III 2009), unemployment provisions, which were challenged by a private employer in *Steward Machine*, merely "authorized an appropriation for aid to the states for the administration of their [unemployment insurance] laws. No conditions of any great moment had to be met to entitle a state law to recognition for tax-offset purposes, other than that all of the unemployment compensation funds had to be actually used for payments to unemployed workers." Edwin E. Witte, *Development of Unemployment Compensation*, 55 YALE L.J. 21, 32 (1945). As all states willingly and quickly accepted the federal funds, there was no need for a citizen from a non-accepting State to apply directly to the federal trust fund. The Court in *Steward Machine*, however, considered that alternative prospect to have been viable, unlike here as to Medicaid participation, which is all-or-nothing. Moreover, unlike here, no states in *Steward Machine* challenged the unemployment spending law, which Justice Cardozo noted carefully in his decision for the

Medicaid expansion, by contrast, there is “no reasonable possibility”¹⁶⁷ that the general welfare could be advanced if the federal government were to strip selected U.S. citizens of every dime of federal funding for Medicaid simply because their financially desperate state disagreed with the expansive nature of Medicaid reform.

The twenty-six state health care reform case is radically different by the precise factual measure used by Justice Cardozo in *Steward Machine*.¹⁶⁸ Though twenty-six states are suing to stop Medicaid expansion, despite those states supposedly having volunteered for the expansion (at least according to the Obama Administration), not one state has opted out.

Back in 1937, Justice Cardozo was willing to leave the question of coercion to the “wisdom of the future.”¹⁶⁹ Seventy-four years later that future has arrived. It falls on the successors to Justice Cardozo in the judiciary to say that this exercise of national power has gone beyond the line of a meaningfully discrete spending power.

In the Florida litigation, the Obama Administration seized on selective parts of Justice Cardozo’s statements cited above, in particular those suggesting that the courts should generally defer to Congress on spending and determinations of the general welfare.¹⁷⁰ The Obama Administration, however, over-reads those lines about presumptions and squeezes them for much more. The Obama Administration would have it that any and all questions about coercion and the general welfare are, categorically, political questions immune from judicial review.

The federal government’s retreat to the political question doctrine seems like a dubious gambit given the more recent history of the Court as to political questions. The political question doctrine has rarely been followed by the Court in its modern era, beginning with *Baker v. Carr*.¹⁷¹ Despite a long prior history of repeatedly holding redistricting

5-4 majority:

Who then is coerced through the operation of this statute? . . . Not the state. Even now she does not offer [such] a suggestion. . . . We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers. . . .

In ruling as we do, we leave many questions open.
301 U.S. at 589-90.

167. *Helvering*, 301 U.S. at 641 (quoting *Butler*, 297 U.S. at 67).

168. See *Steward Mach.*, 301 U.S. at 589-90.

169. *Id.* at 591.

170. See Memorandum in Support of Defendants’ Motion to Dismiss, *supra* note 142, at *38-39.

171. 369 U.S. 186 (1962).

to be a political question, the Court, beginning in *Baker*, embarked on a careful, evolving search for ever-more-perfect tests for redistricting—line-drawing in a rather literal sense.¹⁷²

Whether one believes that the Court should have applied the political question doctrine in a case like *Bush v. Gore*,¹⁷³ even a casual Supreme Court observer can fairly note that the Court views its general role as appropriately being able to enter even the most political of thickets, especially in extreme situations in which the political process appears to have broken down. After the notoriously fractured procedure leading to the enactment of health care reform, together with the more particular sense that the states were largely excluded from any meaningful participation in deciding whether or how to expand Medicaid, it seems unlikely that the political question doctrine will prove to be an independent bar to judicial consideration of the extent of the spending power.

This prediction may be especially credible at a time when the public and the majority of states seem sour, bitter, and spitting about federal spending that may have outstripped the nation's native ability to fund that spending. In other words, it would not likely be seen by the public as fundamentally illegitimate for the Court now to suggest that Congress may finally have gone beyond its constitutional bounds in this latest congressional paroxysm of entitlement spending, especially when Congress relied in part on unwilling states to fund expansion of the Medicaid entitlement and when those states under almost any predictive scenario will have to make painful cuts in other areas to accommodate Medicaid's expansion. This is far afield from the rushed, partisan backdrop to *Bush*. Here, in the context of health care reform, the public would more likely applaud the Court for attempting to fulfill its intended role of deliberately reminding the political branches that the Constitution is not a license to obliterate the autonomy of the states through creative—more accurately, destructive—use of the spending power.

The careful, knowledgeable Professor Gillian Metzger makes good, safe points about legal precedent and has already predicted well in this emerging constitutional controversy. What she has not done quite as well is make room for the broader sweep of history that is now unfolding in the American constitutional firmament. Meanwhile, a seemingly manic and manipulative national government has gone past its own political and financial abilities to tax and spend, resorting to pressing the states to fund and follow the federal bidding against the wills of a majority of those states.

172. *Id.* at 210-11.

173. 531 U.S. 98 (2000).

True, the states' Spending Clause argument is a sobering one—something unprecedented in the case law and something that will shift congressional practice going forward if the states' view is credited. For all its novelty though, the states' argument has deep roots, not only in specific words like “provide for,” “general welfare,” “[c]ommerce,” and “necessary and proper,”¹⁷⁴—chosen so carefully by the brilliant framers in that hot summer of 1787—but also in the subtle, eloquent predictions of the judiciary's later luminaries like Justice Cardozo.

Contrary to its own assertions and practice, even the modern Congress does not have a blank check, payable to anyone for anything Congress might crave. Congress cannot constitutionally crowd out the autonomy and potential alternative visions of the states. The framers imagined (and the ratifiers likely expected) that they were imposing real, practical limits on federal spending. They all deeply respected the potential of states to add to the national experiment without being bullied into bankruptcy or pauper-hood by a central authority like King George—or Queen Fed-Med.

This case tests the federal spending limits. The states can and will win this challenge in the end, but only if judges and justices like Benjamin Cardozo rise to fulfill their roles in helping the nation think through and resolve one of the most central constitutional challenges of our own time.

(continued on next page)

174. See U.S. CONST. art. I, § 8, cl. 1, 3, 18.