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Trumping Home Rule and Sanctuary Jurisdictions

Constraints on Federal Actions to Induce State and Local Collaboration in National Programs

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President Donald Trump's January 25, 2017, executive order targeting "sanctuary cities"[1] has garnered a fair amount of attention. In Section 9 of that order, President Trump stated that it was "the policy of the executive branch" to ensure that states and their political subdivisions cooperate with federal immigration officials, and threatened to cut federal grant money to non-cooperating jurisdictions.[2]

While the executive order was issued with great fanfare about punishing uncooperative states and municipalities, federal power to effectively enforce the order is quite thin—thanks in large part to U.S. Supreme Court opinions authored by Chief Justice William Rehnquist, Chief Justice John Roberts, and their more "conservative" Court colleagues. Those opinions reflected a strong commitment to a type of federalism that takes states seriously, and rejects federal attempts to "commandeer" (*i.e.*, dragoon) the states into spending their resources carrying out national programs. The limits on the federal government's authority to force states to do its bidding is exemplified by the ongoing challenges of various cities and states to the sanctuary cities executive order.

This paper will review briefly 225 years of the ups and downs of federal authority vis-à-vis the states. It will point out that federal-state tensions are nothing new. In fact,

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[1] Executive Order, "Enhancing Public Safety in the Interior of the United States," January 25, 2017; Exec. Order No. 13,768, 82 Fed. Reg. 8799; https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united.

[2] Section 9(a) of the President's executive order specifically targeted "jurisdictions that willfully refuse to comply with 8 U.S.C. 1373." As discussed below, that federal statute bars federal, state and local governments from prohibiting their employees from sharing information about individuals' immigration status with federal immigration officials. The statute does not require that state or local governments collect immigration status information in the first place. The President's executive order seems to have been substantially narrowed by an interpretive memorandum later issued by Attorney General Jeff Sessions. *See,* Vivian Yee and Rebecca R. Ruiz, "Sessions Narrows Order Against Sanctuary Cities," New York Times, May 23, 2017, available at: https://www.nytimes.com/2017/05/22/us/politics/sanctuary-cities-jeff-sessions.html.

those tensions were built into the Constitution on purpose, to prevent the national government from accumulating too much power. The checks and balances between the federal and state governments were meant to function regardless of policy or partisan divisions, and regardless of who was in power at any particular point in time. Depending on social and political conditions, and depending on the composition of the U.S. Supreme Court, our country goes through centralizing periods followed by shifts of power back toward the states. The national government's power has certainly grown over time. But the pullbacks continue to occur (as they should). And, as noted above, the courts' decisions cut both ways. For example, the Constitutional restraints on the federal government that Chief Justice Roberts relied on in striking down key elements of the Affordable Care Act (a/k/a "Obamacare") are precisely the restraints that Democratic governors and mayors will effectively employ to fend off most of the Trump administration's attempts to penalize state and local jurisdictions that decline to collaborate with Immigration and Customs Enforcement personnel.

If these built-in constitutional limits continually slow things down, frustrate presidents, and drive congresses crazy—that was precisely the Founders' intention in 1787. And, while some justices appear to have shifted their approach to the Constitution's constraints on federal power depending on the subject matter involved, hopefully a majority of the Supreme Court's justices (and particularly Chief Justice Roberts) will stick to federalism philosophies they have espoused over the course of their respective careers.

Back to the Basics: John Marshall, the Federalist

To fully appreciate the Constitution's constraints on any federal administration's attempts to force state cooperation, we have to go back to introductory Constitutional Law. We'll see some of the same themes that characterize the federal versus state debate today.

In *The Federalist*, No. 39, James Madison had insisted that states' rights advocates who opposed the new Constitution's stronger national government powers need not fear. Madison and his erstwhile colleagues, Hamilton and Jay, had hijacked the label "federalist" for their side of the debate, suggesting that they were advocating an approach that was nicely balanced between a "federal" approach (then understood to mean that substantial power remained in the states) and "national" approach (meaning strong powers lodged in what we today call the "federal government"). In *The Federalist* No. 39, Madison recounted all of the significant powers remaining with the states in the proposed Constitution, and the many controls that the states would

continue to have over an over-weaning national government. In the last paragraph of that essay, Madison wrote:[3]

> The proposed Constitution, therefore, is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.

Sound muddled or confusing? It was meant to be. But then, the respective powers of the states and the national government were *meant* to be muddled. That was the point—to keep things complicated so no one could accumulate too much power.

During the Constitutional Convention, James Madison initially advocated for a strong national government, but he compromised on that. Ironically, a decade later he (along with Thomas Jefferson) had swung around 180 degrees and appreciated the multiple checks on the national government that he had helped build into the Constitution as a price of its ratification. On the other hand, Chief Justice John Marshall was always an ardent nationalist, and never changed his stripes. Marshall backed John Adams' Federalist administration, and in 1800 was one of Adams' midnight appointments to the federal bench before the pro-state, anti-federal Thomas Jefferson rolled into power. Chief Justice Marshall was Jefferson's second cousin, but there was no love lost between them. Marshall had supported a powerful national government since his dreary days at Valley Forge with George Washington, when a weak Congress and self-absorbed states ignored the cold, hungry and badly-equipped Continental Army. So when, twenty-two years later, the Federalist Adams dropped Marshall onto the Supreme Court, the new Chief Justice donned his robe with a serious mission, *i.e.*, to strengthen the Court as an institution and to strengthen and preserve federal power, the Jeffersonians notwithstanding.

So the Marshall Court was marked by decisions that were, by and large, strongly centralist in character—at least by the standards of the day.

- In *Fletcher v. Peck*, 10 U.S. 87 (1810) established that state laws could not violate express restraints on states imposed by the Constitution.

[3] The Federalist No. 39 (James Madison)(Liberty Fund ed. 2001) 199.

- The Court in *Martin v. Hunter's Lessee*, 14 U.S. 204 (1816), established the authority of the Supreme Court to overturn state supreme court decisions.
- In *McCulloch v. Maryland*, 17 U.S. 316 (1819), Chief Justice Marshall held for a unanimous court that the states could not burden the operation of a nationally-chartered entity properly formed by Congress.
- In *Gibbons v. Ogden*, 22 U.S. 1 (1834), Marshall's Court ruled that the State of New York could not allow a monopoly steam vessel service in a manner that blocked New Jersey boats from traveling across the Hudson (*i.e.*, in interstate commerce) to New York.

All of these decisions expanded the power of the federal courts and the national government. However, as Chief Justice Marshall grew older, and then passed away, and as new voices joined the Court (particularly justices appointed by Andrew Jackson), the pendulum started to swing back toward state power vis-à-vis the national government. Key cases included:

- *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829), which allowed the State of Delaware to permit weirs on navigable waterways because Congress had not affirmatively restricted the states' sovereign police powers in that regard.
- *Mayor of the City of New York v. Miln*, 36 U.S. 102 (1837), where the Court, now led by Chief Justice Roger Taney, permitted New York—notwithstanding federal control over immigration—to reject potential new immigrants and to take "precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts…[and] to guard against the physical pestilence."
- In *Cooley v. Board of Wardens*, 53 U.S. 299 (1851), the Taney Court held that that Congress' constitutional power to regulate commerce did not deprive states of the power to regulate who could pilot vessels, and what fees might be required of ships that did not use local pilots. The Court ruled that while Congress *could* have exercised what today we call "field preemption," it hadn't done so.

The Federal Government Goes to Sleep (and Then Begins to Awaken)

In a number of ways the Taney Court gradually ratcheted back on federal power vis-à-vis the states, and local governments too, and that Court tended to support the exercise of state police power against federal interference. Of course, slavery (and states' rights) advocates took a very different approach when it came to applying national power to enact and enforce federal fugitive slave laws. A number of northern states and cities had attempted to interfere with slave-catching in their jurisdictions. But at that time, the Constitution had an effective provision *mandating* state cooperation

with slave catchers and barring state interference with slavery,[4] and that provision provided the legal basis for the national government to demand state and local collaboration with the fugitive slave laws. *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

But generally speaking, with the exception of the temporary growth of federal power during the Civil War, most of the Nineteenth Century saw a very modest national government. Most of the political action lay with the states. The feds were focused primarily on foreign affairs, currency, the postal service, immigration, expansion and settlement of territory to the west, and the management of Indians and public lands. Apart from the money supply, Washington D.C. did little to control the Nation's growing economy. This was how most Americans liked it, at least until the federal government's *laissez-faire* approach was seen as permitting a small number of "Robber Barons" to get very rich at the expense of the bulk of the population.[5]

Toward the end of Nineteenth Century, labor strife, corruption in state government, and awareness of income disparity, all led to a shift in public perceptions. Middle class voters were simultaneously troubled by the country's wide income disparities, business corruption of politics, and labor strife.[6] This led, among other things, to widespread support of an increased role for the federal government in regulating the national economy. The public's changing attitude resulted in national legislation like the Interstate Commerce Act in 1887 (regulating interstate railroads) and the Sherman Anti-Trust Act in 1890 (regulating monopolies).[7]

Back and Forth with the Commerce Clause

But the U.S. Supreme Court had not moved along with the general public (or, for that matter, with the more progressive state courts).[8] In *United States v. E.C. Knight*,[9] the Court gutted the Sherman Antitrust Act. In at 8-1 decision, it ruled that a the American Sugar Refining Company's moves to control almost all of the nation's sugar

[4] U.S. Const. Art. IV, sec.2, cl. 3: "No person held to service or labor in one state, under the laws thereof, escaping to another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

[5] See, generally, Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (2009).

[6] *See, generally,* Richard Hofstadter*, The Age Of Reform: From Bryan To F.D.R*. (New York, 1955), 144-146; Gabriel Kolko, *The Triumph Of Conservatism: A Reinterpretation Of American History, 1900-1916* (1963); Stanley P. Caine, "The Origins of Progressivism," in The Progressive Era, ed. Lewis L. Gould (1974).

[7] For an overview of the shift in American political thought towards greater government regulation of the economy—particularly federal regulation—*see*, Nancy Cohen, The Reconstruction of American Liberalism 1865-1914 (2002).

[8] *See*, Hugh Spitzer, *Pivoting to Progressivism: Justice Stephen J. Chadwick, the Washington Supreme Court, and Change in Early 20th-Century Judicial Reasoning and Rhetoric*, 104 Pac. N.W.Q. 107 (2013).

[9] 156 U.S. 1 (1895).

companies could not be blocked by the federal government because the various companies' refineries not were engaged in "interstate commerce." Instead, each company was manufacturing sugar within a state, and the federal government lacked the authority to extend its arm into the manufacturing process. Never mind that the American Sugar Refining managed to control the prices nationwide. What is particularly relevant is Chief Justice Fuller's reasoning:[10]

> "It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive. The relief of the citizens of each state from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the states to deal with…. The power to regulate commerce is the power to prescribe the rule by which *commerce* shall be governed, and is a power independent of the power to suppress monopoly."

In other words, the Court held that while the federal government could regulate the *channels* of commerce, it could not regulate manufacturing. This business-friendly stance was repeated in a number of cases over the ensuing four decades. There were some exceptions. For example, in *Champion v. Ames*,[11] the Supreme Court upheld the national regulation of the sale of lottery tickets where those tickets had originated in Paraguay, moved to Texas, and then to California. The Court held that "lottery tickets are subjects of traffic and therefore are subjects of commerce" so that federal controls were appropriate.[12] Chief Justice Fuller, joined by three of his more conservative colleagues, wrote a vigorous dissent; he maintained that the power to suppress lotteries belonged solely to the States and not to Congress, and that the statute was essentially an exercise of federal police power that violated the Tenth Amendment.[13] One wonders whether the subject matter of the case (regulating shady lottery ticket dealers) affected in the outcome, and later we'll see a similar tension within the Court in how it addressed federal regulation of home-grown marijuana in *Gonzales v. Raich*.[14]

Other early 20th-century Supreme Court cases rejecting Congress' regulatory powers as not falling within the Commerce Power included:

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[10] 156 U.S. 11-13 (emphasis added).
[11] 188 U.S. 321 (1903),
[12] 188 U.S. at 354.
[13] 188 U.S. at 365.
[14] 545 U.S. 1 (2005). Discussed below at p. 11.

- In *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the Court held that a law banning the interstate transportation of goods manufactured by children in factories was beyond the regulation of interstate.
- *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935)(the "Sick Chicken Case") invalidated the 1933 National Industrial Recovery Act, an important early piece of New Deal legislation regulating wages, prices, and industrial production, including in this instance the sale of potentially diseased chickens.

But then the Court swung around from its 40-year restrictive view of the Commerce Clause, partly due to political and public pressure, but mostly due to gradual changes in membership and outlook. The most famous cases reflecting the shift in Commerce Clause doctrine included:

- *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), upholding the National Labor Relations Act's regulation of union-management relations. In that case, the Court held that labor practices "affecting commerce," burdening and obstructing the flow of interstate commerce, and "bearing a close and substantial relation to interstate commerce," were all fair game for federal regulation.

- In *United States v. Darby*, 312 U.S. 100, 123 (1941), the Court overturned *Hammer v. Dagenhart* and upheld federal wage and hours laws governing the *manufacture* of goods for interstate commerce. The opinion specifically found that Congress could act to suppress "nationwide competition in interstate commerce by goods produced under substandard labor conditions."

- *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) represented perhaps the farthest reach of federal power under the Commerce Clause (at least until Justice Scalia's opinion in *Gonzales v. Raich*). In *Wickard*, the Court permitted the federal government to prohibit an individual farmer's production of wheat to provide seeds for his own use—not exactly interstate commerce, but the Court held that his home-grown wheat, when replicated nationwide by many other agriculturists, could exert "a substantial economic effect on interstate commerce."

The New Deal Court's expansion of federal power continued into the Warren Court period, as exemplified by key civil rights decisions. For example, in *Heart of*

Atlanta Motel v. United States,[15] the Supreme Court relied on *Darby* and upheld Title II of the 1964 Civil Rights Act, ruling that Congress could ban race discrimination by lodging facilities because that discrimination suppressed travel by black Americans and adversely affected interstate travel and commerce. At the same time, in *Katzenbach v. McClung*,[16] the Court relied on *Wickard* and held that a Birmingham, Alabama restaurant ("Ollie's Barbecue") similarly could not discriminate if it served any interstate travelers; the Court's opinion noted "a close and substantial relation between local activities and interstate commerce which requires control of the former in the protection of the latter."[17]

Then, after the election of Richard Nixon, and later Ronald Reagan, the composition of the Supreme Court changed, and with it the Court's view of the extent of federal power under the Commerce Clause. Nixon appointed William Rehnquist to the Court, and Reagan later elevated him to the role of Chief Justice. Rehnquist was a committed believer in "Dual Federalism," the concept that the national and state governments have distinct roles that must be protected. In a number of key decisions—most of them authored by Rehnquist—the Court trimmed the reach of the Commerce Clause. For example, in *United States v. Lopez*,[18] Chief Justice Rehnquist held that the Gun-Free School Zones Act of 1990 could not be used to prosecute an individual for possessing a handgun near a school. Rehnquist emphasized that mere possession of a gun as an activity that was intrastate, noneconomic, and "not an essential part of a larger regulation of economic activity."[19] His language leapfrogged backwards over the Warren and New Deal Courts and echoed the opinions of the late Nineteenth and early Twentieth Century that restricted federal government's Commerce Clause powers. Rehnquist's opinion also echoed several Taney Court opinions[20] by emphasizing the importance of state and local police powers and the national government's limited ability to directly regulate activities that did not restrict interstate commerce. Similarly, in *United States v. Morrison*,[21] Chief Justice Rehnquist overturned key provisions of the federal Violence Against Women Act of 1994, holding that "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[22] Importantly, in construing the Commerce Clause, Rehnquist wrote: "The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was

[15] 379 U.S. 241 (1964).
[16] 379 U.S. 294 (1964).
[17] 379 U.S. at 297.
[18] 514 U.S. 549 (1995).
[19] 514 U.S. at 560.
[20] *See* p. 4, above.
[21] 529 U.S. 598 (2000).
[22] 529 U.S. at 613.

adopted."[23] Well—maybe that principle hasn't been altogether consistent, but Rehnquist wanted to make sure that it bounced back.

The Tenth Amendment Rises Again

The Tenth Amendment was another constitutional provision that Rehnquist helped bounce back. That provision reads: "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people*."

Ever since *Darby,* the Tenth Amendment had been treated as "but a truism that all is retained which has not been surrendered."[24] Rehnquist didn't see it that way at all. He took the Tenth Amendment seriously, believing that it was a key to the principle that the Constitution made a distinct apportionment of powers between the national government and the states. He and his colleagues drove that home in case after case:

- In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court's opinion by Justice Sandra Day O'Connor held that a federal statute (the Age Discrimination in Employment Act of 1967) could not be held to apply to judges in a state where that state's constitution mandated retirement at age 70. O'Connor noted that in Madison's compound republic, the public was protected by a double division of political power: between the three branches of the federal government, and between the federal government and the states.[25] Justice O'Connor wrote: "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."[26] She went on to rule that Congressional interference with the decision of the people of Missouri to set a judicial retirement age "would upset the usual constitutional balance of federal and state powers."[27]

- In *New York v. United States*, 505 U.S. 144 (1992), Justice O'Connor again addressed that constitutional question "as old as the Constitution,"[28] *i.e.*, the federal-state allocation of powers—in this instance what tools the national government could use to induce (or force) the states to joint regional compacts to handle radioactive waste. In that case, the Court ruled that while the Commerce Clause and the Spending Clause allowed

[23] 529 U.S. at 617-18.
[24] *United States v. Darby*, 312 U.S. at 124.
[25] 501 U.S. at 459.
[26] 501 U.S. at 457.
[27] 501 U.S. at 460.
[28] 505 U.S. at 149.

Congress to attempt to entice states to collaborate, the federal government could not force states to assume ownership and liability for all radioactive waste produced within their borders if they refused to join a regional compact. She labeled this an unconstitutional "commandeering" of the state's powers and legislative processes in order to carry out a federal program.[29]

- In *Printz v. United States*, 521 U.S. 898 [30](1997), Justice Antonin Scalia's opinion for the Court held that the Brady Handgun Violence Prevention Act could not require state and local police officials to perform background checks on gun purchasers. He reiterated that "Congress cannot compel the States to enact or enforce a federal regulatory program…[or to] circumvent that prohibition by conscripting the State's officers directly.

And the Spending Power has Limits Too

The Rehnquist Court's last important doctrinal area on the federal-state power split related to the Spending Power in Art. I, Sec. 8. The Supreme Court had many years before permitted the national government to use the Spending Power to induce states to participate in federal programs, although the Court in 1937 had noted that at some point inducements might reach "the point at which pressure turns into compulsion."[31] In *South Dakota v. Dole*,[32] the Court held that the use of federal grants to encourage states to set their drinking age at 21 years had not reached the point of compulsion. In his opinion for the Court, Chief Justice Rehnquist held that because just "a relatively small percentage of certain federal highway funds" was involved (5% in that instance), there really wasn't any coercion.[33] Justice O'Connor dissented, but not because she disagreed about the small amount not constituting coercion. Her disagreement was based on her view that the drinking age had only "an attenuated or tangential relationship to highway use or safety,"[34] *i.e.*, there was not a sufficiently direct relationship between the highway construction funds being withheld and the drinking age.

In most of the Rehnquist Court federalism decisions, we see the "conservative" members of the Court backing Chief Justice Rehnquist's efforts to control the national government's powers, while "liberal" members of the Court (with personal backgrounds

[29] 505 U.S. at 161.
[30] 521 U.S. at 935.
[31] *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).
[32] 483 U.S. 203 (1987).
[33] 483 U.S. at 211.
[34] 483 U.S. at 215.

in the New Deal and the Civil Rights Movement) backing strong federal powers, including powers to force the states and local governments to comply with federal mandates.

It All Comes Back with Obamacare (*NFIB v. Sebelius)*

Although members of the Supreme Court characterized as "conservatives" have been fairly consistent in their willingness to restrain federal government mandates on the states, one striking anomaly is *Gonzales v. Raich*,[35] a 2005 decision in which Justice Scalia teamed up with the "liberals" to permit federal drug enforcement agents to confiscate marijuana lawfully grown (under California law) by Angel Raich to treat a personal medical condition. Justice Stevens' majority opinion was based on *Wickard*. While Justices O'Connor, Rehnquist and Thomas vigorously dissented, asserting that the decision breached the "outer limits of Congress' Commerce Clause authority,"[36] Justice Scalia concurred with the majority. Scalia's stated rationale was that "marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market."[37] One wonders if Justice Scalia's approach might have been different if the topic had been something other than controlled substances—his change of federalist heart reminds one of the Supreme Court's willingness to expand the reach of the Commerce Clause in 1906 in *Champion v. Ames*, where the subject matter was gambling.[38]

But all three strands of constitutional doctrine defining (and limiting) the federal government's power to cause the states to act on its behalf—the Commerce Clause, the Spending Power, and the Tenth Amendment—converged in *NFIB v. Sebelius*,[39] the 2012 decision partially upholding and partially striking down "Obamacare." Chief Justice Roberts' opinion for the Court upheld core provisions of the Affordable Care Act against a challenge from a number of (mostly Republican) state attorneys general. Most importantly, he held that the Act's penalty on middle and upper income people who do not purchase health insurance was an appropriate exercise of the federal government's taxing power. But he used the Rehnquist-era Commerce Clause, Spending Power and Tenth Amendment cases to knock out two key provisions of the legislation. First, he held that Congress could not mandate that individuals purchase health insurance. He reasoned that while *Wickard* relied on the Commerce Clause to block a farmer from growing wheat that would affect interstate commerce, that was a *regulation* of existing commerce; however, the national government could not force individuals to *engage* in

[35] 545 U.S. 1 (2005).
[36] 545 U.S. at 42.
[37] 545 U.S. at 40.
[38] *See* p. 6, above.
[39] 567 U.S. ___, 132 S.Ct. 2566 (2012).

commerce in the first place, any more than the national government could mandate that citizens purchase cars or broccoli.[40] Then Roberts overturned the Affordable Care Act provisions that would withdraw all Medicare funds from states that declined to expand the number of enrollees. He relied on the anti-commandeering language of *New York v. U.S.* and the anti-coercion language of *South Dakota v. Dole* to hold that the Medicaid expansion requirement was an unconstitutional attempt to "compel the states to enact or administer a federal regulatory program.[41] He noted that federal Medicaid funds represented 20 percent of some state budgets—greatly exceeding the five percent of highway funds involved in *South Dakota v. Dole*.[42]

Immigration, Sanctuary Cities, Charter Schools, Abortion…and More

As the Trump administration moves forward, we can expect repeats of that administration's attempts to use threats of brute political and financial force to cause the states and local governments to comply with new federal goals. Based on the longstanding stated Republican ideology of down-sizing the federal government and shifting responsibilities to the states, one might expect a GOP administration and Congress to avoid mandating state collaboration with their favored programs. But neither short nor long term consistency should be expected in politics. For example, Secretary of Education Betsy DeVos, who for years demanded local control of education and a reduction of federal influence, is now, as a national office-holder, taking a tough line against states and local districts in pushing her specific policies.[43] And, while short term consistency can be found among common law judges, it seems to fade away over the long haul. American history is replete with strange shifts of position when those changes help one faction or another reach a policy goal. It is often forgotten that it was the New England states that first threatened to secede from the Union—when they opposed the War of 1812 and its adverse effects on trade.[44] After the Civil War, it was the pro-business, libertarian wing of the Supreme Court who were very much "activist judges" in developing novel legal theories to curb federal power (and state regulatory power as well). In recent years, everyone is familiar with the flip of the Republican and Democratic parties—the formerly solid, middle and upper-middle class, sensible Republicans have become populist (and some might say zany), while the formerly populist Democrats have morphed into the staid, centrist grouping that includes many upper middle class adherents who moved over from the old GOP.

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[40] 132 S.Ct. at 2591.
[41] 132 S.Ct. at 2601-04.
[42] 132 S.Ct. at 2604.
[43] Erica L. Green, "ÐeVos's Hard Line on New Education Law Surprises States," New York Times, July 7, 2017, available at: https://www.nytimes.com/2017/07/07/us/politics/devos-federal-education-law-states.html?_r=0.
[44] *See, Why New England Almost Seceded Over The War Of 1812* (WBUR, June 15, 2012), available at: http://radioboston.legacy.wbur.org/2012/06/15/new-england-succession.

In any event, we should expect the current Republican President and Republican Congress to ignore their party's tradition, and attempt to use the Commerce Clause and the Spending Power to force blue states and blue cities to cooperate with their policy goals. This should surprise no one. When he was in power, Republican Richard Nixon was a supporter of "big government," price controls and various centralizing schemes. George W. Bush, a tried and true Republican, did little to devolve federal programs or decision-making to the states.[45] One reason is that Presidents, regardless of party, tend to support federal power if it assists them reach their personal political goals.

But the good news is that James Madison and his colleagues wound up designing a balanced federal system that really was meant to stand the test of time, human frailties, and changing factions, policies and political party positions. The other piece of good news is that during his tenure Chief Justice William Rehnquist was a consistent and committed Madisonian federalist. Chief Justice John Roberts is a committed (and hopefully consistent) Madisonian federalist today. While judges certainly can be inconsistent on occasion (witness Justice Scalia's position in *Raich*), we can hopefully count on Roberts not to embarrass himself by shifting the strong views that he expressed, in *NFIB v. Sebelius*, about the Commerce Clause, the Spending Power and the Tenth Amendment.

What this means is that as the Trump administration attempts to withdraw funds from "sanctuary" states, counties and cities that decline to actively assist Immigration and Customs Enforcement, it will meet stiff legal challenges if and when it tries to reduce federal aid to those states or municipalities by more than five or ten percent, or if tries to reduce federal aid in areas altogether unrelated to immigration enforcement. Several lawsuits challenging Trump's January 25, 2017, executive order have already been filed, and right out of the box, the City of San Francisco successfully obtained a nationwide temporary restraining order from Federal Judge William H. Orrick III of the Northern District of California.[46] In his order, Judge Orrick relied heavily on *NFIB v. Sebelius* and Justice Roberts' reasoning on the Spending Power and the Tenth Amendment.[47] Chicago has now filed a lawsuit challenging the U.S. Department of Justice's apparent intent to cut funding to that city for police assistance.[48] We can expect the same type of pushback—likely successful—if Congress attempts to cut federal education grants to states that decline to sign on to other federal efforts, such a

[45] *See, e.g.*, Tim Conlan and John Dinan, eds., *U.S. Federalism and the Bush Administration*, Publius, the Journal of Federalist (Summer, 2007).
[46] Order Granting the County of Santa Clara's and City and County of San Francisco's Motions to Enjoin Section 9(a) of Executive Order 13768 (April 25, 2017, Case No. 17-cv-00485-WHO).
[47] *Id.* pp. 37-41.
[48] *The City of Chicago v. Jefferson Beauregard Sessions III* (U.S. Dist. Ct. No. Dist. Ill., Case No. 17-CV-5720).

program requiring states to share public school funds with private schools (including religious schools) through voucher programs. In Washington State, that would run into serious state constitutional problems, and the state's government would actively challenge a national program that was inconsistent with state law and policy.

Historically, states have exercised a broad array of tools to protect themselves from the national government, challenging attempted federal preemption, lobbying, participating in federal programs in such a way that those programs become "captured" and changed, or simply refusing to play ball (the ultimately successful approach of many states with respect the "No Child Left Behind" project).[49] But an often successful tool is the sustained legal challenge, just like the Republican attorneys general that reduced the effectiveness of Obamacare in *NFIB*, or New York's challenge of the federal nuclear waste program in *New York v. United States*, or Montana and Arizona law enforcement officials blunting the Brady Handgun Violence Protection Act in *Printz*. And it doesn't matter which party is driving a particularly federal policy or program—some state isn't going to like it, and that state will use the tried and true Madisonian tools in its attempt to do so. William H. Rehnquist and John G. Roberts played a large role in shaping the constitutional federalism tools we are living with today, and we can expect those tools to be an effective tool in challenges to the Trump administration and future administrations as well.

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[49] *See, generally,* John D. Nugent, *Safeguarding Federalism: How States Protect Their Interests in National Policymaking* (2009).