Will the Supreme Court Impose Strict Additional Limits on Congress's Power to Tax and Spend for the General Welfare?

The Constitution at a Crossroads

Introduction

"It would, however, necessitate invalidation of the entire Affordable Care Act."

> Brief of State Petitioners in *Florida v. Department of Health and Human Services*, arguing that the Supreme Court should strike down the Affordable Care Act in its entirety because, according to the states, the Act's expansion of Medicaid is invalid under the Spending Clause

This nation's system of cooperative federalism –pursuant to which states and local governments work in partnership with the federal government in solving nationwide problems such as health care, environmental degradation and discrimination – is built upon the Constitution's Spending Clause and rulings by the Supreme Court that allow the federal government to condition generous grants of federal money upon state and local participation in these national efforts. For this reason, the Supreme Court's decision to review the claim by 26 states that the Patient Protection and Affordable Care Act (ACA) unconstitutionally coerced states into participating in the expansion of the federal/state Medicaid program was an unsettling surprise. In contrast to the claims against the ACA's mandatory coverage provision, there was no split in lower court rulings on the constitutionality of the Medicaid expansion: not a single lower court judge ruled for the states on this claim. Indeed, no court has *ever* ruled that *any* Spending Clause statute runs afoul of the Supreme Court dictum that forms the basis of the states' claim: "'in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[1]

So why did the Court decide to review this claim? Could this particular claim of coercion succeed where all others have failed and be the basis of a ruling by the Supreme Court striking down "the entire Affordable Care Act"? The Supreme Court will answer these momentous questions in the next few months. What is clear now is that the states, represented by former Solicitor General Paul Clement, have woven together an argument about coercion that is designed to appeal to the Court's

[1] *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 589-90 (1937)).

conservative majority and to capitalize on a sharp ideological split that has emerged on the Court over the past 15 years about the meaning of constitutional federalism and the scope of federal powers under the Spending Clause. As a result, in addition to being a critical test of the Supreme Court's jurisprudence under the Commerce Clause, the ACA litigation will likely produce the most important Spending Clause ruling in several decades. Even if the Supreme Court, like every lower court, ultimately rejects the states' coercion argument in this case, its ruling could make important new law on the ability of the federal government to use the Spending Clause to enlist states in federal-led efforts. With the state challenge to the ACA's Medicaid expansion pending before the Court, the Spending Clause is very much at a crossroads.

The Text and History of the Spending Clause

Providing Congress with the power to tax and spend was of central importance to the drafters of our Constitution: they had witnessed the disastrous consequences of the Articles of Confederation's failure to provide for such a power. Under the Articles, Congress had some powers, but was given no means to execute those powers. Congress could not directly tax individuals or legislate upon them; it could raise money only by making requests to the states. This created such an ineffectual central government that, according to George Washington, it nearly cost Americans victory in the Revolutionary War, and he lamented the dire situation in which his soldiers had been placed as a result of Congress's inability to levy taxes to support the Army.[2]

This historical foundation explains why the Spending Clause is the first and one of the most sweeping powers the Constitution confers upon Congress, providing the power "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."[3] As Alexander Hamilton made clear in the Federalist Papers, the power to tax and spend for the common defense and general welfare is "an indispensible ingredient in every Constitution,"[4] and it was essential for the Constitution to "embrace a provision for the support of the national civil list; for the payment of the national debts contracted, or that may be contracted; and, in general, for all those matters which will call for disbursements out of the national treasury."[5]

While the need for tax revenues was universally recognized by the signers of the Constitution, disputes broke out almost immediately about the precise meaning of the Spending Clause's text. The most sweeping reading, posed by anti-Federalist opponents of the Constitution, argued that the Spending Clause "amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare."[6] Madison made short work of this unduly

[2] *See* 18 THE WRITINGS OF GEORGE WASHINGTON 453 (John C. Fitzpatrick, ed. 1931) (Letter to Joseph Jones, May 31, 1780). *See also* WASHINGTON: WRITINGS 393 (John Rhodehamel, ed. 1997) (Circular to State Governments, Oct. 18, 1780); *id*. at 502-503 (Letter to Lund Washington, March 19, 1783).
[3] U.S. CONST., art. I, § 8.
[4] THE FEDERALIST PAPERS NO. 30 (Hamilton), at 134
[5] *Id.*
[6] THE FEDERALIST PAPERS NO. 41, at 259 (Madison).

expansive interpretation of the clause in Federalist 41, asserting that "[n]o stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction."[7]

A more serious disagreement broke out later between Madison and Hamilton about whether the power to tax and spend for the general national welfare was confined to the enumerated legislative fields delegated to Congress. While not endorsing the sweeping "every power" interpretation advanced by the anti-Federalists, when it came to taxation and spending, Hamilton interpreted the Spending Clause literally as a broad grant of authority to Congress to tax and spend for the general welfare. He declared in his important 1791 Report on Manufacturers that that the phrase "general welfare" was "as comprehensive as any that could have been used," and it was deliberately chosen because "the constitutional authority of the Union, to appropriate its revenues . . . necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition."[8]

Madison resisted this literal interpretation. Most definitively in a series of letters written towards the end of his career, Madison took the position that the Spending Clause was essentially a preamble to the other enumerated powers and not an independent grant of authority. In an 1830 letter to Andrew Stevenson,[9] he described the Spending Clause as "a mere introduction to the enumerated powers, and restricted to them." The next year, in a letter to James Stephenson,[10] Madison added that "with respect to the words 'general welfare,' I have always regarded them as qualified by the detail of powers connected with them. To take them in a literal and unlimited sense would be a metamorphosis of the Constitution into a character which there is a host of proofs was not contemplated by its creators."

The Spending Clause from the New Deal to *South Dakota v. Dole*

The Supreme Court ultimately resolved this disagreement among these two preeminent Founders, and set the basic principles of its Spending Clause jurisprudence, during the New Deal era, when the Court was confronted with important new federal spending programs established to respond to the Great Depression.

In the first of these cases, *United States v. Butler,*[11] the Court determined that Hamilton's interpretation was the only one that matched the text of the Spending Clause. Noting that this dispute had previously been addressed by Justice Joseph Story, who "in his Commentaries, espouses the

[7] *Id.*
[8] Alexander Hamilton, Report on Manufactures, December 5, 1791, available at http://press-pubs.uchicago.edu/founders/documents/a1_8_1s21.html.
[9] James Madison, Supplement to November 27, 1830 Letter to Andrew Stevenson, available at http://press-pubs.uchicago.edu/founders/documents/a1_8_1s27.html.
[10] Letter from James Madison to James Robertson, April 20, 1831, available at http://en.wikisource.org/wiki/James_Madison_letter_to_James_ Robertson.
[11] 297 U.S. 1 (1936)

Hamiltonian Position,"[12] the Court in *Butler* agreed: "We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one."[13]

The problem with Madison's position, according to *Butler*, was that it could not be squared with the Constitution's enacted text: "[t]he necessary implication from the terms of the grant is that the public funds may be appropriated 'to provide for the general welfare of the United States.'"[14] Madison's position, on the other hand, would make the Spending Clause "mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers."[15] Accordingly, *Butler* held that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[16] There was no dissent on any of these important points.[17]

The Court built upon *Butler* in two important decisions the following year upholding different components of the Social Security Act of 1935. In *Helvering v. Davis*,[18] the Court upheld the Act's most famous component – the taxing of individuals and employers to provide for retirement security benefits for elderly Americans. The *Helvering* Court began by reaffirming the *Butler* Court's resolution of the dispute between Madison and Hamilton, declaring this dispute "settled by decision."[19] *Helvering* then established a broadly deferential standard for reviewing congressional decisions about the general welfare, holding that "whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II it is not for us to say. The answer to such inquiries must come from Congress, not the courts."[20]

In *Steward Machine v. Davis*,[21] the Court upheld the Act's unemployment compensation program. Unlike the federally-run Social Security program at issue in *Helvering*, the Act's unemployment benefits program created a federal/state partnership. The federal government collected taxes from employers and then allocated up to 90% of those revenues back to states with unemployment compensation laws meeting minimum federal standards. The *Steward Machine* Court rejected the argument that the "tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states."[22] The Court held that the Social Security Act, rather than harming states, "is an attempt to find a method by which all these public agencies may work together to a common end."[23]

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[12] *Id.* at 66.
[13] *Id.*
[14] *Id.* at 65.
[15] *Id*.
[16] *Id*.
[17] *See id.* at 80-81 (Stone, J., dissenting).
[18] 301 U.S. 619 (1937).
[19] *Id.* at 640.
[20] *Id.* at 644.
[21] 301 U.S. 548 (1937).
[22] *Id*. at 586.
[23] *Id*. at 588.

In embracing the federal/state partnership to provide unemployment compensation, the Court in *Steward* came very close to rejecting altogether the idea that a condition on federal spending could ever be coercive, noting that "every rebate from a tax when conditioned upon conduct is in some measure a temptation" and "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties."[24] The Court wondered aloud whether the notion of coercion "can ever be applied with fitness to the relations between state and nation," and concluded that even if it could, "the point at which pressure turns into compulsion" had not been reached with the Social Security Act.[25]

The central holdings of these New Deal era cases -- *Butler's* resolution of the Hamilton/ Madison debate in Hamilton's favor, *Helvering's* deference to Congress, *Steward Machine's* skepticism about claims of coercion -- remain core principles of Spending Clause doctrine today. Indeed, the Court reaffirmed each of these principles in *South Dakota v. Dole,*[26] the leading Spending Clause case of the modern era, which was written by Chief Justice William Rehnquist and joined by Justices as ideologically diverse as John Paul Stevens and Antonin Scalia. Building upon *Steward Machine* and other prior cases, the *Dole* Court held that "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning the receipt of federal moneys upon compliance with federal statutory and administrative directives.'"[27]

The *Dole* Court also recognized four limits on the Spending Clause. First, the text of the Constitution expressly limits Congress's spending power to the pursuit of "the general Welfare."[28] Second, any conditions Congress places on grants to the States must be clear, thus enabling "the States to exercise their choice knowingly, cognizant of the consequences of their participation."[29] Third, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[30] Finally, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds"[31] — Congress may "not 'induce' the recipient to 'engage in activities that would themselves be unconstitutional.'"[32]

The Rehnquist Court's Federalism Revolution and the Spending Clause

The Court's opinion in *South Dakota v. Dole* remains the touchstone of its Spending Clause jurisprudence, but the ideological consensus about the Spending Clause embodied in the *Dole* opinion has broken down considerably. In particular, over the past 15 years, as part of a significant jurisprudential movement by conservatives on the Court toward limiting the powers of the federal government in the name of protecting state sovereignty, the Court's conservative wing has expressed

[24] *Id.* at 589.
[25] *Id.* at 590.
[26] 483 U.S. 203 (1987).
[27] *Id.* at 206.
[28] U.S. CONST. art. I, § 8; *Dole*, 483 U.S. at 207.
[29] *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).
[30] *Dole*, 483 U.S. at 207 (citation omitted).
[31] *Id*. at 208.
[32] *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003) (plurality) (quoting *Dole*, 483 U.S. at 210).

concerns about *Butler's* reading of the Spending Clause and used those concerns to ratchet up the limits recognized by *Dole*, particularly the requirement that states have "clear notice" about Spending Clause conditions.

This ideological divide is illustrated most clearly in *Davis v. Monroe County*,[33] a case about whether a school district that received federal funds could be held liable in a private suit for "deliberate indifference" to student-on-student sexual harassment. In an opinion by the Court joined by the Court's liberal wing, Justice Sandra Day O'Connor held that, in limited circumstances, such a suit was authorized. Applying *Dole's* clear notice requirement, the Court ruled that Title IX of the Education Amendments of 1972 "makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender."[34] Therefore, according to the majority, "funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment . . ."[35]

Justice Kennedy responded in a sharply worded dissent, writing also on behalf of Chief Justice Rehnquist and Justices Scalia and Thomas. Kennedy's dissent began by expressing concern about *Butler*'s account of the scope of the federal government's powers under the Commerce Clause:

> The Court has held that Congress' power "'to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.' " *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987) (quoting *United States* v. *Butler*, 297 U.S. 1, 66 (1936)). As a consequence, Congress can use its Spending Clause power to pursue objectives outside of "Article I's 'enumerated legislative fields'" by attaching conditions to the grant of federal funds. 483 U.S., at 207. *So understood, the Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach*.[36]

To avoid "obliterate[ing] distinctions between national and local spheres of interest," Justice Kennedy emphasized the need to rigorously enforce the clear notice requirement recognized in *Dole*.[37] The clear notice requirement, he opined, "is not based upon some abstract notion of contractual fairness. Rather, it is a concrete safeguard in the federal system. Only if States receive clear notice of the conditions attached to federal funds can they guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power."[38]

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[33] 526 U.S. 629 (1999).
[34] *Id.* at 650.
[35] *Id.*
[36] *Id.* at 654 (Kennedy, J., dissenting) (emphasis added).
[37] *Id.*
[38] *Id.* at 655.

Monroe County was decided during a decade-long period lasting roughly from 1992 to 2002, which has been called the "federalism revolution" of the Supreme Court under Chief Justice William Rehnquist. It is one of the few cases lost by state and local claimants during this time. . In many other cases, Justice O'Connor sided with the conservative wing in taking steps to police "the boundaries of federal power." These cases included *U.S. v. Lopez*[39] and *U.S. v. Morrison,*[40] in which the Court invalidated two federal laws as beyond Congress's Commerce Clause authority, *New York v. United States*[41] and *Printz v. United States,*[42] in which the Court established an "anti-commandeering principle" that prevented the federal government from directing state officials to administer a federal regulatory program, and a long string of cases including *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[43] in which the Court significantly limited the ability of the federal government to trump the sovereign immunity of States under the 11th Amendment.

Printz deserves special note among these cases, because it forms a central pillar of the coercion claim against the Affordable Care Act. The states argue that "[i]f Congress were free to use its spending power to coerce States into enforcing the federal government's dictates, then the spending power would become the exception that swallows the anti-commandeering rule."[44] *Printz* is also notable for the effort by Justice Scalia to question anyone (or any opinion) that looks toward the views of Alexander Hamilton when it comes to "matters of federalism." Calling Hamilton the "most nationalistic of all nationalists," Scalia in *Printz* declared that "it was Madison's view – not Hamilton's – that prevailed . . ."[45] Although Justice Scalia did not cite *Butler,* his implicit critique of the *Butler* Court for favoring Hamilton's view of the Spending Clause over Madison's was apparent enough.

The state challengers to the ACA have also relied on *Florida Prepaid* because, in passing, the Court in that case took language from *Steward Machine* and *Dole* – cases that recognized that the point at which "pressure turns into compulsion" may never be "applied with fitness to the relationship between state and nation" – and subtly turned that language into a more definitive-sounding suggestion that there is such a line that the federal government cannot cross.[46]

Arlington Central and the Spending Clause in the Roberts Court

With Justice Samuel Alito having succeeded Justice O'Connor (the author of the majority opinion in *Monroe County*), there is some evidence that the concerns expressed by Justice Kennedy in

[39] 514 U.S. 549 (1995).
[40] 529 U.S. 598 (2000).
[41] 488 U.S. 1041 (1992).
[42] 521 U.S. 898 (1997).
[43] 527 U.S. 666 (1999).
[44] State Petr. Br. at 21.
[45] *Printz*, 521 U.S. n.9.
[46] *See Florida Prepaid*, 527 U.S. at 687 (1999)("in cases involving conditions attached to federal funding, we have acknowledged that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *quoting South Dakota v. Dole,* 483 U.S. 203, 211 (1987), *quoting Steward Machine,* 301 U.S. at 590).

his *Monroe County* dissent may now be held by a five-justice majority on the Court. In the first and, to date, the only Spending Clause case decided by the Roberts Court, *Arlington Central School District v. Murphy,*[47] Justice Alito wrote the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas and Kennedy, holding that parents who successfully challenge a school board placement decision under the Individuals with Disabilities Education Act (IDEA) cannot recover the costs of retaining expert witnesses to support their claim. Justice Alito opined that the IDEA failed *Dole's* "clear notice" test, despite a congressional Conference Report on the IDEA stating, in part: "the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses. . ."[48] In Justice Alito's words: "the legislative history is simply not enough. In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds."[49]

This conclusion brought a blistering dissent from Justice Breyer, who asserted that none of the Court's prior rulings "suggest[] that *every spending detail* of a Spending Clause statute must be spelled out with unusual clarity."[50] Justice Breyer accused the majority of abusing the clear notice test to disregard the clear intent of Congress regarding the meaning of the IDEA and thereby reach "a result no Member of Congress expected or overtly desired."[51] More generally, Justice Breyer warned that the majority's application of the clear notice rule was thereby undermining the deference due to Congress established by cases going back to *Helvering v. Davis* and risked creating "a set of judicial interpretations that can prevent the program, overall, from achieving its basic objectives or that might well reduce a program in its details to incoherence."[52]

Coercion, Commandeering and the ACA Litigation

The foregoing account of the historical evolution of Spending Clause doctrine sets the stage for the constitutional challenge brought by a collection of states against the Affordable Care Act's expansion of the federal/state partnership under Medicaid.

Under Supreme Court case law from *Butler* to *Dole*, the claims against the ACA are clear losers, which is why even the most sympathetic lower court judges have rejected them. The states have not even attempted to assert that any of the four limitations on the Spending Clause recognized by the Court in *South Dakota v. Dole* have been violated. To the contrary, as the states have conceded, the ACA is completely clear in terms of notifying states about what is expected if they wish to continue to participate in the Medicaid program. Nor is there any question that the Act provides a generous financial incentive for the states to continue to

[47] 548 U.S. 291 (2006).
[48] H. R. Conf. Rep. 99–687, at 5.
[49] *Arlington*, 548 U.S. at 304.
[50] *Id.* at 317 (Breyer, J., dissenting).
[51] *Id.* at 324.
[52] *Id.* at 318.

participate in the federal program – under the Act's terms, the federal government will start by paying 100 percent of the costs of adding additional low income Americans. In essence, the states' principle claim is that the ACA offers *too* generous a deal to the States: one they cannot afford to refuse:

> There is no plausible argument that a State could afford to turn down such a massive federal inducement, particularly when doing so would mean assuming the full burden of covering its neediest residents' medical costs, even as billions of federal tax dollars extracted from the State's residents would continue to fill federal coffers to fund Medicaid in the other 49 States.[53]

To succeed in this challenge to the ACA, the states must convince the Court to do what the Court in *Steward Machine* essentially deemed impossible – draw and enforce a line between appropriate financial pressure and unconstitutional coercion. The states call "a judicially enforceable" coercion doctrine "a constitutional necessity," fusing together the concern Justice Kennedy expressed in *Monroe County* about the breadth of the Spending Clause with the "anti-commandeering" rule established in *Printz* to argue that the Court must police coercion so that the spending power does not "become the exception that swallows the anti-commandeering rule."

The United States has responded that "Petitioners challenge to the Act's Medicaid expansion lacks any support in this Court's precedents, invites standardless decisionmaking and intractable problems of administration, and is wrong as a matter of constitutional principle."[54] The U.S. makes powerful arguments in its briefs to support each of these propositions, which prevailed in the lower courts, even among judges who found the ACA's mandatory coverage provision unconstitutional. Most of these arguments were presented to the Supreme Court in an effort to convince the Court not to review these Spending Clause claims. So the question is whether the Court took these cases anyway simply to hear all the claims against the ACA in a single sitting or whether the conservative wing of the Court is poised and ready to strike out in a bold new direction and impose significant new limitations upon the federal government's exercise of its Spending Clause authority.

The Spending Clause at a Crossroads

With the Spending Clause challenges to the Affordable Care Act pending before the Supreme Court, the Spending Clause is very much at a crossroads.

Even if the Court rejects the states' argument and reaffirms the *Butler/Steward Machine/Dole* Spending Clause framework, the ideological fights that have played out in cases like *Monroe County* and *Arlington Central* will certainly continue. These statutory fights draw

[53] State Petr. Br. at 20.
[54] Brief for Respondents (Medicaid) at 15, *Florida v. DHHS* (11-400).

less attention, but, as commentators such as Simon Lazarus have explained,[55] the conservative wing of the Supreme Court has succeeded in significantly narrowing the reach and crippling the enforceability of many important federal laws through the use of sub-constitutional tests such as the "clear notice" rule.

The more important question is what happens if a majority of the Court accepts the states' invitation to impose new curbs on Congress' spending. If successful, these claims could bring down the Affordable Care Act, to date the most significant legislative accomplishment of the Obama presidency. This would be an enormously significant ruling even if the Court somehow limited its ruling only to that. But that seems unlikely; one of the most powerful points made by the United States is that the expansion of Medicaid under the ACA is essentially indistinguishable from prior expansions of Medicaid and other Spending Clause statutes. A ruling in favor of the States could thus call into question a myriad of conditions on federal spending and a large number of state-administered programs that are federally funded and supervised.[56]

In his dissent in *Barnes v. Gorman*[57] – a Spending Clause case decided between *Monroe County* and *Arlington Central* -- Justice John Paul Stevens described Justice Scalia, the author of the majority opinion in *Barnes,* and his conservative colleagues, as "fearless crusaders" because of their willingness to embrace changes to Spending Clause doctrine that could have "potentially far-reaching consequences that go well beyond the issues briefed and argued in this case."[58] The resolution of the ACA case will test the accuracy of Justice Stevens' description. If the Court's conservative majority accepts the states' invitation to revisit Spending Clause principles that have been in place since the New Deal, we will in fact be living in a brave new world, where settled understandings about the Spending Clause and the federal balance are settled no more.

[55] Simon Lazarus, *Stripping the Gears of National Government: Justice Stevens' Stand Against Judicial Subversion of Progressive Laws and Lawmaking* (September 29, 2011). Northwestern University Law Review, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1935952.

[56] *See* Brief of David Satcher *et al*. as *Amici Curiae* Supporting Respondents, *Florida v. DHHS* (No. 11-400) at 8-10 (discussing threats to federal spending programs involving education, jails and prisons, child welfare, vocational rehabilitation, and child support enforcement. *See also* Brief of Senate Majority Leader Harry Reid, House Democratic Leader Nancy Pelosi *et al*. as *Amici Curiae* Supporting Respondents, *Florida v. DHHS* (No. 11-400) at 34-35 (mentioning similar threats to federal spending programs including conservative statutes such as the Solomon Amendment, which effectively provides military recruiters with equal access to educational institutions, and the No Taxpayer Funding for Abortion Act, which would cut federal funding for health-benefit plans that cover abortion).

[57] 536 U.S. 181 (2002) (Stevens, J., dissenting).

[58] *Id*. at 192.