



# Can Carrots Become Sticks?

*Court knows coercion when it sees it*

by JOSHUA DUNN and MARTHA DERTHICK

Can federal grants-in-aid, which entice states to embrace national policies, ever coerce states and thus violate constitutional principles of federalism? More simply, can federal carrots become unconstitutional sticks? That lingering question was answered, although not clearly, in the Supreme

Court's health-care decision. For opponents of federal interventions in education policy, the ruling offers hope that power has swung back to the states.

Even if the states are, in the theory of federalism, separate and sovereign entities, they have never enjoyed much encouragement from the Supreme Court to resist grant-in-aid conditions through litigation. In its few rulings on the subject, the Court

has refused to draw a line on where coercion might lie, and concluded that states were not coerced into cooperating but acted voluntarily in response to financial inducements.

Still without defining a line, the Court ruled 7 to 2 in late June that the Medicaid provisions of the Affordable Care Act impermissibly crossed it. Wherever the line might be, the Affordable Care Act was "surely beyond it." Without invalidating the Medicaid provisions, the Court ruled that the states could choose whether to embrace them.

Chief Justice John G. Roberts wrote that the act was a "gun to the head" of the states, an act of "economic dragooning." By threatening the states with the loss of all of their Medicaid grants unless they agreed to a major expansion of Medicaid that would cover the health-care needs of the entire non-elderly population with incomes below 133 percent of the federal poverty level, the act compelled them to accept not a mere revision of Medicaid but an entirely new program. The financial stakes were large. Medicaid spending accounts for more than 20 percent of the average state's total budget, with federal grants covering from 50 to 83 percent of what the state spends. Federal grants would increase with the new program and cover 100 percent of the added cost through 2016, but would gradually decrease thereafter to a minimum of 90 percent.

It was the size of the stakes that enabled the Court to distinguish *Sebelius* from *South Dakota v. Dole* (1987), a grant-in-aid case in which it had sided with Congress. Under scrutiny then was a federal law that threatened to withhold 5 percent of a state's highway grant if the state did

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not raise its drinking age to 21. The funds at issue constituted less than half of 1 percent of South Dakota's budget. The Court concluded that the new condition was not "so coercive as to pass the point" at which pressure turns into compulsion.

The Court's new ruling has the potential to change the intergovernmental balance of power in all grant-in-aid programs, including those in

education. But will it? In the health-care case, it immediately became clear that with freedom comes a heavy political and economic burden of choosing. Chief Justice Roberts wrote that if the states are to be separate and independent sovereigns, as the Court posited, "Sometimes they have to act like it." But in the real world of politics and policy, they are rational actors, calculating the costs and benefits of federal grant laws. If history is a guide, they weigh the benefits of federal money heavily and hope the costs of the conditions can be avoided or adequately compensated for by political support from constituencies within the state.

In the field of education, states and their local school districts have in recent years chafed under the burdens of No Child Left Behind (NCLB). If Roberts's decision had already been rendered, perhaps at the time of enactment or in later negotiations with the Department of Education (ED), the states would have been in a stronger position. Members of Congress and ED officials might have paused longer to ask if there were limits to what they could get away with.

The Court's ruling invites states to sue. Emboldened by it, perhaps many will, with results that are hard to anticipate. But we believe that their first line of defense in grant programs will remain political, not legal and constitutional, and history says it is not very strong. One of the reasons NCLB passed so easily was that it promised more money to the states.

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