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## The Corner

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### Are States Protected from Federal 'Coercion' or Not?

By Mario Loyola May 16, 2011 3:49 P.M.

Last week, writing for the [Texas](#) Public Policy Foundation, I filed [an amicus brief](#) in the 11th Circuit Court of Appeals on behalf of the 26 state attorneys-general who are challenging the constitutionality of Obamacare. The case is on appeal from the federal district court for northern Florida, where Judge Vinson [struck down the law](#), holding that the individual mandate exceeds the power of Congress to regulate commerce “among the several States.” Most attention has focused on this aspect of Judge Vinson’s ruling.

Our brief, however, focuses on another part of Judge Vinson’s ruling, namely his extraordinary finding of summary judgment for the government on the Medicaid expansion provisions of the new health-care law. (See pp. 6–13 of the ruling.) The states had argued that these provisions, which require states to expand Medicaid rolls and absorb part of the cost themselves, constitute an unconstitutional commandeering of state governments through a coercive use of conditional federal [funds](#). This issue tests the limits of the Spending Clause (rather than the Commerce Clause) of the Constitution. Among the controlling cases is *South Dakota v. Dole* (1987), in which the Supreme Court upheld a federal law that threatened states with the loss of five percent of federal highway funds if they did not raise their drinking age to 21. Writing for the majority, Chief Justice Rehnquist noted, “Our decisions have recognized that, in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’” But in the years since *Dole*, federal courts have barely paid lip service to the principle of coercion, while in fact upholding virtually every conditional federal grant. Judge Vinson concluded that the federal courts had failed to develop any meaningful doctrine of coercion, and implicitly the federal spending power is unlimited with respect to conditional federal grants. This ruling was perhaps a blessing in disguise. He essentially called the Supreme Court’s bluff: Either affirm coercion in this case, or drop the pretense of a coercion doctrine.

Developing this theme in our brief, we argue that the practice of federal grants to the states conditioned on state compliance with federal policy preferences must have some limit, otherwise there is no way to protect state autonomy or the structure of our Constitution from federal coercion. We argue that if there is no limit in a doctrine of coercion, than it must follow that the whole practice of conditional federal grants is unconstitutional:

If from the *Dole* Court’s discussion of coercion one were to devise a hypothetical conditional federal grant program to make sure that some such program would qualify as coercive, one might hypothesize an enormous federal grant program, far-reaching conditions, the threatened loss of all [funding](#) for non-compliance, and, for good measure, an onerous change in the conditions of the already consented-to and established program, that would both increase the expense of the program to the States and further reduce their regulatory autonomy. In other words, one would hypothesize something like Medicaid and the Medicaid expansion provisions of the ACA. Though an issue of material fact arguably exists as to whether State consent remains a prerogative of the States “in theory and in fact,” it is virtually impossible to imagine what conditional federal grant program could possibly qualify as coercive if the one in the case at bar does not.

One conceptual problem for the Court is that, if the Medicaid expansion provisions of the ACA do not constitute coercion under *Dole*, then the judgment below must ultimately be vindicated: The spending power is not in fact limited by any coercion doctrine, or by any other protection for State sovereignty. But that would be the same as to hold that *Dole* itself

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Other protection for state sovereignty, but that would be the same as to hold that Dole itself was wrongly decided. This is because the discussion of coercion in Dole was no mere dictum. The Spending Clause cases of the Supreme Court have all recognized the danger of inducement rising to the level of compulsion, and vitally presupposed that the danger could be guarded against because Courts would be able to distinguish between encouragement and compulsion. [...] If conditional federal grants have no limit in a doctrine of coercion, then the exercise of the power to make them has no limit, save such as may be self-imposed by the federal government. But that is precisely the unlimited spending power rejected by the Framers, and by virtually every major Spending Clause case of the Supreme Court since.


Oral argument is scheduled for June 8 in the U.S. Court of Appeals for the 11th Circuit.

— *Mario Loyola is director of the Center for Tenth Amendment Studies at the Texas Public Policy Foundation.*

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**complete curmudgeon** It is the standard tactic for America's ruling class. First they confiscate our money. Then they return some small portion of it to us if, and only if, we behave in a manner they find acceptable.  
05/16/11 18:38  
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So the boy scouts can't believe in God if they want to meet in a school building. Carter mandated a speed limit of 55 by threatening federal highway funds. The medicaid programs in the states only function as they do if the feds grants waivers to the states.

This is a serious threat and we should take this ruling seriously.

I know of only one example of a state refusing to bow to the coercion. For years Arizona refused to launch a medicaid program. They simply did without the money. It was only when the Feds made significant waiver grants that Arizona launched its version of Medicaid.

But hey, even gritty detail laws like mandatory child support were imposed on the states via [financial](#) coercion from the Feds.

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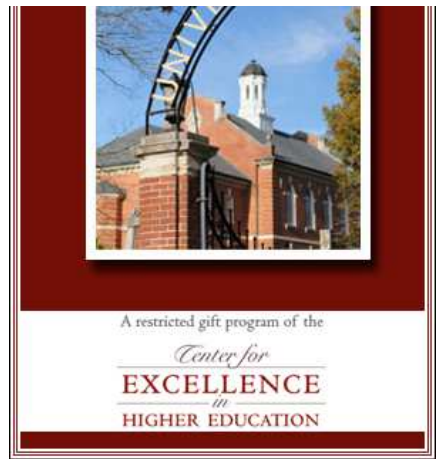


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When the news first broke, the initial tweet said that DSK had been arrested at the hotel, not on board . . .

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#### THE CORNER

##### **A Teachable Moment on American-European Faultlines**

The full story is not out on Dominique Strauss-Kahn and he is innocent of forcible sexual battery until proven guilty, . . .

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#### THE CAMPAIGN SPOT

##### **Bill Bennett to Gingrich: You're Shooting at [Paul Ryan] From Behind!**

I would contend Newt Gingrich's interview with Bill Bennett this morning did not go well for the candidate. I don't . . .

[Go](#)

#### PHI BETA CONS

##### **Forget the Bean-Counting**

There's an article in Inside Higher Ed today ("Bringing Them Back") that begins: Increasing the ranks of women faculty members in . . .

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#### PLANET GORE

##### **Will Electric Cars Catch On?**

Bottled Lightning author Seth Fletcher thinks

...so. Here's a book review: Mr. Fletcher does a good job surveying this old-yet-nascent industry in the U.S. ...  
 Go

THE FEED

**Cindy Crawford is helping fundraise for Mitt Romney?**

During her modeling career, Cindy Crawford was skilled at switching outfits. Now, she's switching presidential candidates, it seems. Eric Fehrmstrom, a ... Go

BENCH MEMOS

**This Day in Liberal Judicial Activism—May 17**

1954—In *Brown v. Board of Education*, a unanimous Supreme Court abandons available originalist justifications for its ruling that state-segregated schools ... Go

EXCHEQUER

**The Federal Fire Sale**

The federal government wants to sell some old buildings and vacant land. This is not a bad idea, so far ... Go

RIGHT FIELD

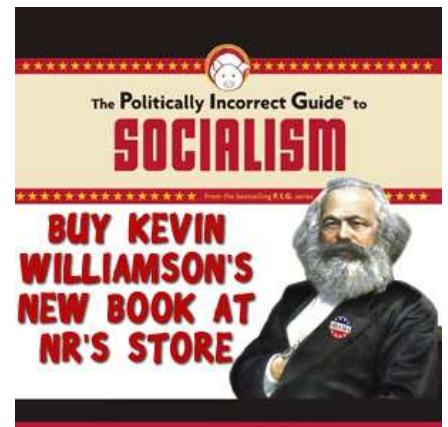
**"The Worst Pitching Performance Ever"**

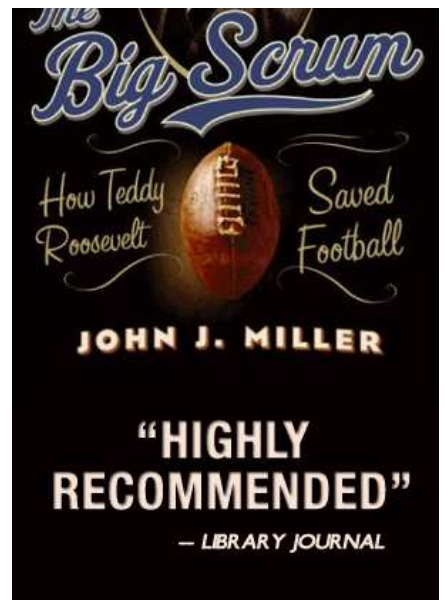
So says SI's Joe Posnanski about Vin Mazzaro's relief appearance against the Indians last night: His line: 2 1/3 innings, 11 ... Go

THE AGENDA

**More Thoughts on Growth and Taxes**

Matt Yglesias raises an interesting argument regarding taxes and growth. First, he says something I find a bit frustrating: How, exactly, ... Go





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