

MODULE 4

The Taxing and Spending Power

Butler • Davis • Sabri • South Dakota v. Dole • NFIB v. Sebelius • Landor

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Where Modules 3 and 3A leave us

Module 3A: Congress cannot order a State to act. Module 4: when may it pay one?

McCULLOCH, ELEMENT TWO — IS THERE A POWER THAT COVERS THIS?

- Module 3 asked it about the commerce power. Module 4 asks it about the power to tax and to spend.

WHEN CONGRESS COMMANDS — MODULE 3A

- It cannot order a State legislature to legislate: New York.
- It cannot order State officers to enforce federal law: Printz.

WHEN CONGRESS PAYS — MODULE 4

- New York itself says Congress may attach conditions to federal money.
- The State can say no. So the question is whether no was a real option.

NFIB: a State may not be forced into a federal program, whether by command or by money.

What Article I actually says about money

One sentence. Two readings of the words “general Welfare.”

“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States ...”

MADISON — THE NARROW READING

- General welfare is not a power of its own.
- It names the purposes the other enumerated powers serve.
- Spending adds nothing to what Congress can reach.

HAMILTON — THE BROAD READING

- General welfare is a power of its own.
- Congress may tax and spend for it even where no other power reaches.
- Read Madison's way, the words would be superfluous.

Medicaid, highway money, disaster relief and school funding all depend on which reading wins.

Butler, 1936: Hamilton wins the argument

A tax on processors of farm goods, paid out to farmers who agreed to plant less.

THE HOLDING THAT LASTED

- The power to tax and spend is a power of its own.
- It is not limited by the other enumerated powers.

THE STATUTE

- Agricultural Adjustment Act, 1933.
- A tax on processors of farm goods.
- Paid to farmers who planted less.

GENERAL WELFARE

- Not defined precisely.
- A standard, not a rule.
- Congress gets substantial deference.

WHAT THIS BUILT

- Medicaid, highway money, disaster relief, school funding.
- None of it needs another power in Article I.

And the statute was struck down anyway.

Butler: why the statute fell anyway

The power is broad. This use of it reached into what the States kept.

WHY THE ACT FELL

- “The act invades the reserved rights of the states.”
- Farm production was a local matter, reserved to the States.
- Money cannot do indirectly what the commerce power could not do directly.

WHAT SURVIVED, AND WHAT DID NOT

- The result did not. Nobody today doubts Congress may pay farmers.
- The reading of general welfare did.
- Keep the two apart on the exam.

CARRY THIS INTO DOLE

- The limit on spending comes from outside the spending power: from what the Constitution leaves to the States.

Butler uses the Tenth Amendment to strike a statute in 1936. Darby calls it a truism in 1941. What changed?

Davis, 1937: a very broad taxing power

The Social Security Act upheld, one year after Butler.

THE TAXING POWER

- As broad as the taxing power of the States: property, wages, the employment relationship, every part of a business.
- “Natural rights” are no shield against the tax.

BUT NO COERCION OF THE STATES

- Congress may induce a State. It may not coerce one.
- The tax credit for State unemployment funds was an inducement.
- “[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties.”

Same Term as Jones & Laughlin. The commerce switch and the spending switch are one event.

Sabri, 2004: guarding federal money

Bribes to a city councilman, in a city that took federal money. The two never touched.

THE STATUTE

- 18 U.S.C. § 666(a)(2).
- A federal crime to bribe an official of any entity that gets over \$10,000 a year in federal money.
- No link to the federal dollars required.

TWO POWERS, STACKED

1. Spending: Congress gives the agency money.
2. Necessary and proper: Congress protects that money by punishing bribery of the agency's officials.

WHY NO LINK IS NEEDED

- “Money is fungible, bribed officials are untrustworthy stewards of federal funds ...”
- “[M]oney can be drained off here because a federal grant is pouring in there.”

Thomas concurred only in the judgment: he would rest it on the Commerce Clause, and he doubted this reading of McCulloch.

Dole, 1987: twenty-one, or lose five percent

Congress did not set a drinking age. It put a condition on highway money.

THE DEAL

- Raise your drinking age to 21.
- Or lose 5% of your federal highway funds.
- South Dakota let 19-year-olds buy 3.2% beer. It sued.

WHAT CONGRESS CAN DO

1. Impose conditions on the States as the price of federal money.
2. Pursue broad policy objectives outside the enumerated powers.

The second is the point. If a condition had to be something Congress could enact directly, spending would add nothing.

“Even if Congress might lack the power to impose a national minimum drinking age directly,” the condition stood.

What Congress must do

My board lists four. The Court's own count is five.

1 **GENERAL WELFARE** Substantial deference to Congress. The Court doubts courts can enforce it at all.

2 **EXPRESS CONDITION** Unambiguous, so the State makes an informed choice.

3 **NEXUS** Related to the federal interest in the program. My gloss: relatively loose.

4 **OTHER LIMITS** No inducing a State to do what the Constitution forbids it to do.

5 **NO COERCION** Pressure may not turn into compulsion. The Tenth Amendment point on my board.

Landor, 2026: “Dole proceeds to add a fifth rule” — funding conditions may not turn pressure into compulsion.

NFIB: the mandate is not commerce

Five Justices agreed the Commerce Clause could not support the individual mandate.

THE CHIEF JUSTICE'S ARGUMENT

- “The power to regulate commerce presupposes the existence of commercial activity to be regulated.”
- Congress may regulate people who are acting. It may not make them act so it can regulate them.

WE ALREADY HAVE THIS

- Factor six on my Commerce Clause test: regulate, not compel.
- Five votes, but no opinion of the Court.

AND McCULLOCH ELEMENT THREE

- Roberts: the mandate is not a “proper” means.
- Not consistent with a Constitution of enumerated powers.

And the mandate was upheld anyway. Butler's shape, running the other way.

NFIB: the mandate stands as a tax

Congress called it a penalty. The Court asked what it does.

THE CHILD LABOR TAX CASE TEST, RUN BACKWARDS

AMOUNT

- Drexel, 1922: 10% of net income. A punishment.
- NFIB: less than the price of insurance.

INTENT

- Drexel: only those who knowingly hired children.
- NFIB: no scienter at all.

WHO COLLECTS

- Drexel: enforced in part by the Labor Department.
- NFIB: the IRS, on a return. No prosecution.

SIDE NOTE — THE ANTI-INJUNCTION ACT

- A penalty for the statute, so the suit was not premature.
- A tax for the Constitution, so the mandate stands.

Same payment, two answers. Incoherent, or exactly right?

Expand Medicaid, or lose all of it

The Spending Clause half of NFIB, and the half that made new law.

THE CONDITION

- Cover everyone under 65 below 133% of the poverty line.
- Or lose all federal Medicaid money, not just the new money.

WHAT WAS AT STAKE

- “The threatened loss of over 10 percent of a State's overall budget ...”
- Dole put 5% of highway money at risk.

Seven Justices agreed this was unconstitutional — in a case remembered as five to four.

The mandate half is a taxing case the Government won. The Medicaid half is a spending case it lost.

Why the Medicaid condition was coercion

Seventy-five years after Steward Machine, the coercion rule decides a case.

1 ALL OF THE MONEY

- Not 5%. Every existing Medicaid dollar.
- The Chief Justice: “a gun to the head.”

2 RELIANCE AND NOTICE

- States had built their health systems on Medicaid since 1965.
- “[A] shift in kind, not merely degree.”

3 SO: NO REAL CHOICE

- The doctrine assumes the State can say no.
- Here, no meant losing its health system.

WHAT THE COURT DID NOT DO

- It drew no line. Five percent of highway money is fine; all of Medicaid is not; everything between is open.

Where would you draw the line — and could a court draw it?

The remedy: amend the condition

The Court did not strike the expansion down. It removed the threat and left the offer.

WHAT THE COURT ORDERED

- Not invalidation.
- The Secretary may not withhold existing Medicaid money from a State that declines.

SO THE STATES CHOOSE

- Expand, and take the new money.
- Or decline, and lose only the new money.
- Some States expanded at once, some later, some have not.

WHAT THE REMEDY TELLS YOU

- The Court cured coercion by shrinking the penalty. It never questioned the condition itself.

If the problem was that the State had no real choice, is a smaller penalty an answer?

Who agreed with whom in NFIB

Read the vote issue by issue. Most of this case is not an opinion of the Court.

5	TAXING POWER	Opinion of the Court, Part III-C: Roberts, joined by Ginsburg, Breyer, Sotomayor and Kagan. The mandate stands.
5	COMMERCE CLAUSE	Roberts alone, plus the four joint dissenters writing separately. Five votes, no opinion of the Court.
7	SPENDING POWER	Roberts, Breyer and Kagan, plus the four joint dissenters: the threat to all Medicaid money is coercive.
5	THE REMEDY	Roberts, Breyer and Kagan, with Ginsburg and Sotomayor concurring in the judgment: keep the expansion, drop the threat.
4	JOINT DISSENT	Scalia, Kennedy, Thomas and Alito would have struck the whole Act. A dissent because they lost.

Counting to five is not the same as finding an opinion of the Court.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); id. (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); id. (joint dissent).

Landor, 2026: who is bound by the deal

Prison officers shaved a Rastafarian inmate's head. He sued them personally under a federal statute.

THE CASE

- RLUIPA is a Spending Clause statute.
- Louisiana took the prison money and agreed to answer suits.
- Landor sued the officers themselves, for damages.

THE HOLDING, 6-3

- A spending condition binds only those who knowingly and voluntarily agreed.
- The officers never agreed. No personal damages under the statute.

WHAT IT CHANGES HERE

- Coercion is Dole's “fifth rule.”
- Sabri protects federal money from graft. It is not a power over everyone the money pays.

Your client's head was shaved in a State prison. Whom can you sue, and for what?

Questions for discussion: the nursing home

A county nursing home. Seventy percent of its revenue is Medicaid.

THE FACTS

- Congress conditions all federal Medicaid money in the State on a new staffing ratio, adopted by the State.
- Each facility must report quarterly.
- Anyone injured by a violation may sue for appropriate relief.
- The State has not adopted the ratio. The agency says payments stop in ninety days.

QUESTIONS FOR DISCUSSION

1. Which of Dole's five would you lead with, and why?
2. Is the ninety-day cutoff in the statute, or did the agency add it?
3. Staffing ratios for Medicaid money: a tighter fit than drinking age for highway money?
4. Dole and NFIB protect the State. Your client is not a State. What do you argue?
5. After Landor, could a resident sue your administrator personally under this statute?

Module 4, and my view of the tax holding

One line per case, and where I come down.

THE LINE, ONE CASE AT A TIME

- Butler: spending is its own power, limited from outside.
- Davis: a very broad taxing power. Induce, do not coerce.
- Sabri: spending plus necessary and proper guards the money.
- Dole: conditions are fine, subject to five rules.
- NFIB: the mandate stands as a tax. The Medicaid threat was coercion.
- Landor: only those who agreed are bound.

MY VIEW — MINE, NOT THE COURT'S

- Taxing and regulating are different powers.
- Roberts would not let Congress dress a tax up as a regulation.
- I respect that. If you tax people, say so, and answer for it.

NEXT — MODULE 5

- The tariff case. Watch for the same thread: taxing is not regulating.