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NFIB v. Sebelius: Proportionality in the Exercise of Congressional Power

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NFIB v. SEBELIUS: PROPORTIONALITY IN THE EXERCISE OF CONGRESSIONAL POWER

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Abstract

With its opinion on the constitutionality of the Affordable Care Act (ACA), the U.S. Supreme Court sparked much discussion regarding the implications of the case for other federal statutes. In particular, scholars have debated the significance of the Court's recognition of an anticoercion limit to the Spending Clause power.

When it recognized an anticoercion limit for the ACA's Medicaid expansion, the Court left considerable uncertainty as to the parameters of that limit. This essay sketches out one valuable and very plausible interpretation of the Court's new anticoercion principle. It also indicates how this new principle can address a long-standing problem with congressional exercise of the Commerce Clause power—the federalization of local crime.

Specifically, I argue first that we can best understand the Court's anticoercion principle not by parsing the text of its spending power analysis in isolation, but by identifying a common strand of principle that the spending power analysis shares with the Court's analysis of the individual mandate to purchase health care under the federal taxing power. Both analyses suggest a common principle of proportionality for the exercise of federal powers.

If that is true for a Medicaid expansion enacted under the spending power and an individual mandate enacted under the taxing power, it also may—and should—be true for a criminal prohibition enacted under the commerce power, the primary source of authority for federal criminal statutes. If so, then the Court could find that Congress exceeds its authority when it imposes more severe sentences than do states for misconduct that is essentially local in nature.

INTRODUCTION

With its opinion on the constitutionality of the Affordable Care Act (ACA),[1] the U.S. Supreme Court sparked much discussion regarding the implications of the

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[1] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25, 26, 29 and 42 U.S.C.), *amended by*

case for other federal statutes. In particular, scholars have debated the significance of the Court's recognition of an anticoercion limit for the Spending Clause.[2] While the Court suggested in past cases that an exercise of the spending power could excessively pressure states to do the federal government's bidding,[3] the Court never actually found a federal offer of funds to be unconstitutionally coercive. That changed with the Court's holding in *National Federation of Independent Business v. Sebelius*[4] (*NFIB*), which addressed the validity of the ACA's Medicaid expansion.[5]

But while the Court recognized an anticoercion limit to the Spending Clause, it left considerable uncertainty as to the parameters of that limit. The majority identified multiple features of the Medicaid expansion that were troubling, and it may be that all of the features must be present to make other exercises of the spending power unconstitutional. Or it may be that only some of the features must be present.

In this Essay, I discuss the Court's anticoercion limit by looking beyond the specifics of *NFIB*'s analysis of the Medicaid expansion. In doing so, I consider the significance of an important principle that seemed to animate the Court's thinking—a principle of proportionality. The Court worried about the federal government's ability to exploit its broad powers in ways disproportionate to the problems it is trying to address.[6] *NFIB* signals a stricter application by the Court of the proportionality principle to federal action.

More specifically, I argue first that we can best understand *NFIB*'s anticoercion limit not by parsing the text of its spending power analysis in isolation, but by identifying a common strand of principle that the spending power analysis shares with *NFIB*'s analysis of the individual mandate to purchase health care under the federal taxing power. Both analyses rely on a principle of proportionality for the exercise of federal powers. That is, Congress acts within its authority when its penalties are commensurate with the degree of noncompliance with federal law. However, Congress overreaches when it comes down too hard on those who do not obey its commands.

Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (codified in scattered sections of 20, 26, and 42 U.S.C.).

[2] *See* Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Business v. Sebelius, 93 B.U. L. REV. 1, 46–71 (2013).

[3] *See infra* p. 467.

[4] 132 S. Ct. 2566 (2012).

[5] *See id.* at 2604. The Court held that while Congress could proceed with its expansion of the Medicaid program, it could not condition all of a state's Medicaid funding on the state's willingness to participate in the Medicaid expansion. *See id.* at 2607. Rather than losing all of its Medicaid funds by not participating in the expansion, a state will lose only the funds that are tied to the expansion. The features of the Medicaid expansion are described, *infra*, at p. 465.

[6] *See infra* pp. 468–71.

I then consider how greater attention to proportionality can be extended beyond the spending and taxing powers to address a long-standing problem with exercises of the Commerce Clause power—the federalization of local crime. Commentators have argued that the federal government has usurped the prerogatives of states by converting local crimes into federal crimes and by imposing more severe sentences under federal law than a defendant would receive under state law.[7] A meaningful principle of proportionality can address the problem of more severe sentences under federal law. By applying proportionality concerns, the Court could find that Congress exceeds its authority when it imposes more severe sentences than do states for misconduct that is essentially local in nature.

A broad principle of proportionality would serve two valuable roles. First, it would tie legal rules to a fundamental principle of law. Second, it would bring greater consistency to different parts of constitutional doctrine.

In the next section, I discuss *NFIB*'s analysis of the Medicaid expansion under the federal spending power. I then explain how a principle of proportionality can be derived by reading the Court's analysis of the spending power in conjunction with its consideration of the individual mandate to purchase health care coverage under the federal taxing power. Finally, I show how extending a principle of proportionality to the federal commerce power can address the federalization of local crime.

NFIB AND THE UNDULY COERCIVE MEDICAID EXPANSION

In its analysis of the ACA's Medicaid expansion, the *NFIB* Court reminded us that Congress may not "commandeer" state legislatures and force them to do the federal government's bidding.[8] As the Court held in *New York v. United States*,[9] Congress can encourage states to enact particular policies, but it always must give states the option not to do so.[10] Otherwise, state autonomy would be gutted.[11] Thus, for example, Congress may offer states the opportunity to implement a new program for their residents according to federal standards or let the federal government assume responsibility for implementation.[12] The ACA includes that kind of option with the health insurance exchanges.[13] Each state can operate its own exchange, or the federal government will operate one for the state.[14]

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[7] *See infra* p. 471.

[8] *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2660 (quoting New York v. United States, 505 U.S. 144, 161 (1992)).

[9] 505 U.S. 144 (1992).

[10] *See id.* at 161.

[11] *See id.* at 161–63.

[12] *Id.* at 167–68.

[13] *See* 42 U.S.C. § 18031 (2006 & Supp. V 2011).

[14] Health insurance exchanges will serve as a marketplace at which health insurers can offer their plans, and individuals or employers can purchase plans. These health insurance exchanges will operate as the health insurance policy analogue to travel marketplaces like

Congress also may encourage states to do its bidding by exercising its spending power.[15] If federal legislators want states to raise their drinking age from eighteen to twenty-one, for example, Congress can send more highway construction funds to the states that adopt the higher drinking age.[16] States can choose whether to enact the desired federal policy and receive additional funds, or they can reject the federal policy and receive less funding. The Medicaid expansion followed the spending power model for encouraging cooperation by states. As with Medicaid generally, states may choose whether or not to participate in the expansion, and Congress encourages state participation by giving states federal dollars for every dollar that the states spend.[17]

The ACA's Medicaid expansion operates by extending eligibility to all persons who earn up to 138% of the federal poverty level of income.[18] In the past, Medicaid eligibility extended only to persons who were poor and also fell into one of several categories.[19] This "categorical eligibility" included children, pregnant women, single parents caring for children, and persons with disabilities, but it did not include able-bodied adults without children or adults in two-parent families.[20]

The Medicaid expansion has two important effects. First, all indigent persons qualify for Medicaid.[21] Categorical eligibility is no longer the coin of the realm.[22] Second, the income threshold for losing Medicaid eligibility is uniform across states.[23] Currently, adults can lose their Medicaid eligibility at incomes below 50% of the federal poverty level in some states, while retaining it up to 200% of the federal poverty level in other states.[24]

As mentioned, Congress maintained the spending power model for encouraging state cooperation with the ACA's Medicaid expansion. States are free to choose whether to participate, and the program provides a strong financial incentive for participation. Currently, the federal government matches every dollar a state spends on Medicaid benefits with at least another dollar.[25] Put differently,

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Expedia or Travelocity, where airlines, hotels, and car rental companies offer their services to customers.

[15] *See New York*, 505 U.S. at 167.

[16] *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987).

[17] *See infra* p. 467.

[18] Huberfeld et al., *supra* note 2, at 25.

[19] David Orentlicher, *Rights to Healthcare in the United States: Inherently Unstable*, 38 AM. J. L. & MED. 326, 331 (2012).

[20] *Id.* Many states expanded their Medicaid programs beyond the basic categories of eligibility. *Id* at 331–32.

[21] *See* 42 U.S.C. § 1396a(a)(10)(A)(i)(I)–(VIII) (2006 & Supp. V 2012).

[22] However, the ACA maintains different tracks to eligibility. Some people still will qualify because they are children or single adults caring for children, while other people will qualify under the Act's expansion provisions. *See id.*

[23] *See id.* at § 1396a(a)(10)(A)(i)(VIII).

[24] *Adult Income Eligibility Limits at Application as a Percent of the Federal Poverty Level (FPL), January 2013*, THE HENRY J. KAISER FAM. FOUND., http://www.statehealthfacts.org/comparereport.jsp?rep=130&cat=4 (last visited Aug. 7, 2013).

[25] *See* 42 U.S.C. § 1396b(a)(3)(F)(i) (2006 & Supp. V 2012).

the federal government covers at least 50% of the cost of Medicaid benefits. For some states, the federal government covers over 70% of the cost (i.e., a nearly three to one match).[26] The Medicaid expansion provides an even stronger incentive for state participation; in the first few years, the federal government will pick up the *full* cost for newly eligible beneficiaries, before gradually reducing its share to 90%.[27] In other words, the Medicaid match will be no less than nine to one for the expansion population in all states.

So far, so good. But here's the rub. In some of its previous spending power decisions, the Court warned Congress that there were limits on the extent to which the federal government can try to encourage states to do its bidding.[28] At some point, a financial incentive to follow federal policy can turn from a reasonable offer into compulsion.[29] At some point, the states really have no choice but to adopt the federal policy. Congress had never reached that point before, but it did with the Medicaid expansion.[30]

The constitutional problem for the expansion lay in the fact that while states could decline to participate, the ACA threatened them with the loss of all of their Medicaid dollars.[31] That is, states not only would forgo the nine to one match for the expansion, but they also might forfeit all of the federal funding that they have been receiving from the federal government under pre-ACA Medicaid. According to the Court, this was too high a price to pay for nonparticipation.[32] Congress can use the nine to one match as an incentive, but it cannot place funds from the other parts of the Medicaid program at risk. If Congress could withhold all of a state's Medicaid dollars, it could withdraw funds that amount to more than 10% of the typical state's total budget.[33] That would be like putting "a gun to the head" of the states.[34] The states would not really be free to choose whether to participate in the Medicaid expansion. If Congress could exercise that much clout to make states do the federal government's bidding, the two-government system that the Constitution created would collapse. Power would be vested "in one central government, and individual liberty would suffer."[35]

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[26] *See, e.g.*, Federal Financial Participation in State Assistance Expenditures, 76 Fed. Reg. 74061, 74062–63 (Nov. 30, 2011); Huberfeld et al., *supra* note 2, at 18.

[27] *See* 42 U.S.C. § 1396d(y)(1) (Supp. IV 2011).

[28] *See* South Dakota v. Dole, 483 U.S. 203, 211–12 (1987).

[29] *Id.*

[30] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2634 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Prior to today's decision . . . the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.").

[31] *See id.* at 2604.

[32] *See id.* at 2604–05.

[33] *See id.* at 2605; *see also* VERNON K. SMITH ET AL., KAISER COMMISSION ON MEDICAID AND THE UNINSURED, MOVING AHEAD AMID FISCAL CHALLENGES: A LOOK AT MEDICAID SPENDING, COVERAGE AND POLICY TRENDS 11 (2011), *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8248.pdf.

[34] *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2604.

[35] *Id.* at 2602.

If the Medicaid expansion represented undue coercion, what other exercises of the spending power also might be unconstitutional? What principle did the Court establish to guide Congress in its future spending power legislation? In the next section, I will discuss the principle of proportionality that seemed to animate the Court's analysis.

UNDUE COERCION AND A PRINCIPLE OF PROPORTIONALITY

One might read the *NFIB* opinion narrowly and discern only an "anti-leveraging" principle in the decision.[36] According to the Court, what made the Medicaid expansion unconstitutional was the effort by Congress to coerce states into adopting a new federal program by making the price of nonparticipation the loss of substantial funds from another federal program that the states had previously adopted.[37] If Congress had included the Medicaid expansion when it passed Medicaid originally, it would have been valid. But Congress may not leverage a state's prior major commitment to a federal program to compel a state's participation in another federal program.[38] Thus, as discussed, Congress could not withdraw all of a state's existing Medicaid funding if the state failed to participate in the Medicaid expansion. It only could deny states the matching dollars for the Medicaid expansion if the states declined to participate.

Other readings of *NFIB* also are quite plausible. Rather than adhering strictly to the antileveraging factors identified by the Court, one also could identify a broader principle based in contract law to explain the Court's spending power analysis.[39] Indeed, the majority observed that the Court had "repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a *contract*.'"[40] Hence, the *NFIB* Court was concerned about the extent to which the Medicaid expansion did not treat the states fairly as partners in contract. For example, the Court viewed the expansion as a unilateral and dramatic modification of the Medicaid program.[41] Under a contract law approach, it makes sense to say that Congress has less leeway when it modifies the terms of its contractual

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[36] Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause after* NFIB, 101 GEO. L.J. 861, 864–65 (2013).

[37] *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2603–06.

[38] *See* Bagenstos, *supra* note 36, at 870–71.

[39] *See* James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011–2012 CATO SUP. CT. REV. 67, 71.

[40] *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2602 (quoting Barnes v. Gorman, 536 U.S. 181, 186 (2002)).

[41] *See id.* at 2602–06. To be sure, critics have observed that the Court unfairly characterized the Medicaid expansion as a new program that dramatically changed the nature of Medicaid. *See id.* at 2630 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); Huberfeld et al., *supra* note 2, at 25.

relationships with the states rather than when it sets terms of the contract at the time the contractual relationship is formed.[42]

While the antileveraging and contract law interpretations make a good deal of sense, it makes more sense to identify an interpretation that takes account not only of the spending power part of the opinion, but also the taxing power part of the opinion (which addressed the constitutionality of the individual mandate to purchase health care coverage). When two powers lie in the same clause of Article I, Section 8,[43] they likely reflect a common guiding principle.[44] Indeed, in its Spending Clause analysis of the Medicaid expansion, the *NFIB* Court relied on a previous taxing power decision.[45]

A common principle was at work in both the spending power analysis of the Medicaid expansion and the taxing power analysis of the individual mandate—a principle of proportionality. If Congress wants to encourage individuals or states to do its bidding under the taxing or spending power, it has to employ penalties that are commensurate with the degree of noncompliance with federal law. A closer look at the Court's discussion of the individual mandate will illustrate this point.

Under the ACA, most Americans will have to carry a health insurance policy. There are exceptions for persons with low income, undocumented immigrants, members of certain religious groups, and others. Most people will satisfy the insurance mandate through employer-sponsored coverage, Medicare, or Medicaid. But some people will have to purchase their own private health care policy.[46] After rejecting the Commerce Clause as authority for the mandate, the Court upheld the mandate as a valid exercise of the taxing power[47]—failure to carry health care coverage will subject individuals to a tax that amounts to 2.5% of their household income.[48]

In relying on the taxing power, the Court had to overcome an important objection. Challengers to the mandate characterized the levy for noncompliance as

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[42] While principles of contract modification reflect the antileveraging concerns that worried the *NFIB* Court, *see* Blumstein, *supra* note 39, at 74–77, a contract law approach would have broader implications than an antileveraging approach.

[43] As is the case for the taxing and spending powers. *See* U.S. CONST. art. I, § 8, cl. 1.

[44] *Cf.* THE FEDERALIST NO. 40 (James Madison) (observing that construction of a constitution should give meaning to each part of an expression such that they "conspire to some common end").

[45] *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2602–03 (citing Steward Machine Co. v. Davis, 301 U.S. 548, 586, 587, 589, 590, 591 (1937)). *Steward Machine* involved the question whether Congress unduly pressured states to enact specific unemployment compensation laws by abating a tax on businesses if they paid into a federally approved state compensation plan. *Id.* at 2603. However, the *NFIB* court observed that there was no undue coercion in *Steward Machine*. *Id.*

[46] *Id.* at 2580.

[47] *See id.* at 2593–2600.

[48] *Id.* at 2580. There also are minimum and maximum levels for the tax. *Id.*

a penalty rather than a tax, and the statute itself talked in terms of a penalty.[49] While the Court cited a few differences between penalties and taxes,[50] a key factor was the size of the levy.[51] The Court distinguished the liability for noncompliance with the ACA mandate from the liability for noncompliance with a child labor law that Congress adopted in 1919.[52] Congress had characterized the levy under the child labor law as a tax, but the Court found it to be an unconstitutional penalty in *Bailey v. Drexel Furniture*,[53] in part because companies would have to pay 10% of their net income for employing child labor, "no matter how small their infraction."[54] As the *Drexel Furniture* Court pointed out, a company could forfeit the full 10% even if it employed a single child for a single day.[55] Such an "exceedingly heavy burden," wrote Chief Justice John Roberts in *NFIB*, is in the nature of a penalty rather than a tax.[56] In contrast, the ACA will impose a much smaller burden on those who fail to purchase health care coverage. People earning $35,000 a year, for example, will pay only $60 in any month during which they do not carry health care insurance.[57] In short, Congress can impose the individual mandate through its taxing power because the magnitude of the tax is not disproportionately high.

Note the contrast with the Court's spending power analysis. As discussed earlier, when the Court limited the conditions that Congress could impose on the Medicaid expansion, the Justices cited the substantial burden that states would have borne under the ACA's terms if they declined to participate in the expansion.[58] For the individual mandate, on the other hand, the Court emphasized the mild burden on individuals who decline to buy health care coverage.[59] In judging the validity of the two provisions, the Court was very concerned that the ACA's sanctions not be disproportionately high. Congress overreaches when it imposes penalties for noncompliance that are unduly harsh. Minor degrees of misconduct should not trigger the same level of punishment as major kinds of misconduct.

A requirement of proportionality has much value: it provides a principle for containing federal authority and, therefore, for ensuring that the national government fulfills the framers' intent of a government of limited power.

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[49] *See id.* at 2594. If the levy constituted a penalty, the mandate would have failed because the Court had found that it was not authorized under the Commerce Clause power. *See id.* at 2593.

[50] *See id.* at 2595.

[51] *Id.*

[52] *Id.* at 2595–96.

[53] *Child Labor Tax Case*, 259 U.S. 20, 20 (1922).

[54] *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2595.

[55] *Child Labor Tax Case*, 259 U.S. at 34.

[56] *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2595.

[57] *Id.* at 2596 n.8.

[58] *See supra* pp. 467–68.

[59] *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2595–96.

While the Court may be giving considerations of proportionality new emphasis, the principle has a long pedigree. As the *NFIB* opinion observed, the Court's requirement of proportionality for the taxing power dates back to the 1922 *Drexel Furniture* case.

While proportionality considerations played a key role in *NFIB*, the Court also cited other factors. In concluding that the individual mandate was a valid exercise of the taxing power, for example, the Court observed that the mandate will be enforced by the IRS rather than another government agency and that there is no scienter requirement typical of punitive statutes.[60] Similarly, in concluding that the Medicaid expansion was unduly coercive, the Court invoked not only concerns about the magnitude of the funds that states would lose for not participating in the expansion; it also cited the fact that the expansion represented a major modification of the Medicaid program and that Congress tried to leverage the states' prior commitments to Medicaid to induce them to sign up for the expansion.[61] Still, even if proportionality considerations do not tell the whole story, they played a major role in the Court's thinking. With a more modest penalty, the Medicaid expansion would have survived fully, and with a more severe penalty, the individual mandate would not have survived.

In the wake of *NFIB*, the Court left itself with many questions about the implications of its decision. For example, how coercive must a financial incentive be to run afoul of the spending power limitations? As the Court observed, federal funding for Medicaid represents an unusually large chunk of a state's overall spending.[62] Will the funding that might be forfeited for failing to participate in any other federal programs be deemed so substantial that it leaves states without any real choice?[63]

In addition to applying the *NFIB* decision to other exercises of the spending or taxing powers, the Court also could extend its logic to exercises of the commerce power. In the remainder of this Essay, I discuss how the Court's concerns about proportionality could apply to a criminal prohibition enacted under the commerce power, the primary source of authority for federal criminal statutes. By extending the principle of proportionality to federal criminal prohibitions, the Court could provide an answer to the problem of the federalization of local crime.

THE FEDERALIZATION OF LOCAL CRIME AND *NFIB*

For quite some time, judges, prosecutors, scholars, and practitioners have worried about the extent to which Congress has federalized local crime. Many

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[60] *See id.* at 2596. The Court also identified an additional factor that reflected proportionality concerns: there were no legal consequences for people who choose to pay the penalty rather than purchase health care insurance. People who pay the levy rather than purchase insurance would "have fully complied with the law." *Id.* at 2597.

[61] *See id.* at 2603–06.

[62] *See id.* at 2605; *see also* SMITH ET AL., *supra* note 33, at 11.

[63] *See* Huberfeld et al., *supra* note 2, at 61–64 (gleaning a "Quantitative Coercion" principle from *NFIB*).

articles have discussed the concern, [64] including an American Bar Association report on the problem.[65]

Congress has federalized local law enforcement in two important ways. First, it has converted many local crimes into federal crimes. As experts have observed, Congress often turns garden-variety offenses like theft and assault into violations of federal law.[66] Simple carjacking or arson also can trigger federal prosecutions.[67] Second, Congress typically imposes harsher sentences than would be imposed under corresponding state laws. Instead of receiving probation or diversion into a treatment program, defendants may spend several years in prison.[68] Congress has been able to substitute its view about the appropriate length of sentences across a wide range of crimes.[69]

As a result of the federal intrusion, state governments have lost control over decisions whether to prosecute certain kinds of wrongdoing and over decisions regarding the severity with which wrongdoing should be punished. To a substantial extent, the federal government has assumed the kind of broad police power that the constitutional framers reserved for the states.[70]

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[64] *See generally* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005) [hereinafter *Many Faces*]; Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995) [hereinafter *New Principles*]; Kathleen F. Brickey, *The Commerce Clause and Federalized Crime: A Tale of Two Thieves,* 543 ANNALS AM. ACAD. POL. & SOC. SCI. 27 (1996).

[65] *See* TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW 13 (1998).

[66] *See id.* at 30–31.

[67] *See* Brickey, *supra* note 64, at 30–31.

[68] *See* Beale, *Many Faces*, *supra* note 64, at 761–62; Beale, *New Principles*, *supra* note 64, at 998–99. Federal sentences generally are higher than state sentences, particularly for drug or weapon offenses. *See* TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, *supra* note 65, at 30–31.

[69] The federalization of crime not only raises serious concerns about the balance of federal and state power. It also raises serious concerns about equity among different defendants. Two associates in crime may receive vastly different sentences when one is prosecuted by state law enforcement officials and the other by federal officials. *See* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 648–49 (1997) (discussing United States v. Palmer, 3 F.3d 300 (9th Cir. 1993), in which one defendant was assessed court costs and fees of $176 by a state court while his partner in a marijuana-growing operation was sentenced to ten years in prison by a federal court).

[70] *See* Beale, *Many Faces*, *supra* note 64, at 754–55. To be sure, writers often exaggerate the problem. For example, it is common to read that Congress has enacted some 4,500 criminal statutes and perhaps half of them since the 1970s. But many of those statutes rarely lead to prosecutions. In fact, 95% of felony convictions occur in state courts, and federal prosecutions are concentrated on matters of national concern. *See* Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 3, 6–7, 18 (2012). Still, for those defendants who receive a multiyear prison sentence rather than avoiding incarceration altogether, it is no comfort that federal prosecutors generally leave prosecution of local crime to the states.

NFIB provides a partial, but important, response to the federalization of local crime. Defendants still will have to rely on *United States v. Lopez*[71] and *United States v. Morrison*[72] if they want to argue that Congress lacks authority to make certain conduct a federal crime.[73] While *NFIB* held that Congress may not use the Commerce Clause to regulate *inactivity*,[74] that limit will not help defendants charged with engaging in criminal *activity*. Nevertheless, defendants may be able to invoke *NFIB* to challenge the severity of their sentences. The Court's principle of proportionality can readily be applied to judgments concerning the appropriate length of a felon's sentence.[75]

EXTENDING THE PRINCIPLE OF PROPORTIONALITY TO FEDERAL CRIME STATUTES

Principles of proportionality are fundamental to criminal prohibitions.[76] We believe it unfair when a convict receives a punishment that is too harsh or too lenient when considering the nature of the crime,[77] and we believe it unfair when

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The primary concern is that federal penalties are being imposed for local crimes that states are addressing with their own law enforcement systems. Congress rightly intervenes when criminal activity is national in scope. Federal prosecution also may be needed when states fail to enforce their laws against discrimination or other serious misconduct. But as an American Bar Association task force observed, Congress often defines new federal crimes "in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need." TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, *supra* note 65, at 14–15.

[71] 514 U.S. 549 (1995).

[72] 529 U.S. 598 (2000).

[73] In *Lopez* and *Morrison*, the Court drew a distinction between the regulation of economic activity and the regulation of noneconomic activity. According to the Court, the Commerce Clause permits Congress to regulate only economic activity. Hence, in *Lopez*, the Court struck down a federal statute that prohibited the possession of a gun in a school or within 1000 feet of the grounds of a school. *See Lopez*, 514 U.S. at 567–68. In *Morrison*, the Court rejected a provision that made it a federal crime to commit a crime of violence that was motivated by the victim's gender. *See Morrison*, 529 U.S. at 627.

[74] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591 (2012).

[75] The Supreme Court has employed a principle of proportionality when defendants challenge the severity of their sentences under the Eighth Amendment's ban on cruel and unusual punishment. However, that principle has been helpful to defendants in recent decades only when challenging death sentences or sentences of life in prison without parole. *See* Nancy Gertner, *On Competence, Legitimacy, and Proportionality*, 160 U. PA. L. REV. 1585, 1588–89 (2012); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 692–95 (2005).

[76] *See* Weems v. United States, 217 U.S. 349, 367 ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense."); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 6.01, at 49 (5th ed. 2009) ("'Proportionality' is an important and recurring concept in the criminal law.").

[77] *See* Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?"*, 1 CRIM. L.F. 259, 278–81 (1990) (discussing philosophical underpinnings of proportionality in criminal sanctions).

different defendants receive different punishments for the same misconduct.[78] As is commonly said, the punishment should fit the crime.[79]

Accordingly, basic considerations of justice would be well served if Congress were limited by a meaningful principle of proportionality when it exercises its Commerce Clause power to establish sentences for criminal misconduct.[80] Indeed, principles of proportionality already guide interpretation of the Eighth Amendment's ban on cruel and unusual punishment in criminal cases, as well as the Due Process Clause's limits on damages in civil cases. The Supreme Court has imposed requirements of proportionality when judging the acceptability of sentences for felons[81] and when judging the acceptability of punitive damage awards against tortfeasors.[82]

As the examples of criminal sentences and punitive damage awards indicate, proportionality requirements generally have been applied when the federal or a state government exercises its power against the individual, and the question is whether the exercise of power too greatly infringes on personal liberty. But it also is important to employ proportionality review when the question is whether the federal government's exercise of power compromises state government autonomy. The framers of the Constitution wanted to protect people from excessive federal power that might be exercised against them directly or that might be exercised against them indirectly through federal regulation of state governments.[83] A sensible application of the proportionality principle suggests that Congress exceeds its authority when it imposes more severe sentences than do states for misconduct that is local in its nature and in its impact.

To be sure, defendants have challenged the disparities between state and federal sentences in the past, and they have been unsuccessful. Courts thus far have not found a constitutional barrier to stiffer federal penalties.[84] But *NFIB*'s principle

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[78] *See* James A. McLaughlin, Case Note, *Reducing Unjustified Sentencing Disparity*, 107 Yale L.J. 2345, 2345 (1998).

[79] To be sure, the Supreme Court has not applied the principle of proportionality very effectively. *See* Lee, *supra* note 75, at 681–82 (noting "conceptual confusion over the meaning of proportionality" in the Court's Eighth Amendment jurisprudence).

[80] Considerations of proportionality also apply to civil misconduct. For example, tort liability is measured in terms of the degree of harm caused.

[81] *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012).

[82] *See, e.g.*, BMW v. Gore, 517 U.S. 559, 574–75 (1996). The Court has relied on considerations of proportionality in other contexts as well. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (requiring "congruence and proportionality between the injury to be prevented or remedied and the means adopted [under Section 5 of the Fourteenth Amendment] to that end"); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that the Fifth Amendment's Takings Clause requires a "rough proportionality" between the impact of a proposed private development and a requirement that the developer dedicate some land for a public purpose).

[83] *See, e.g.*, Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after* Garcia, 1985 SUP. CT. REV. 341, 385–89.

[84] Some federal circuits permit trial court judges to deviate from federal sentencing guidelines to avoid disparities in sentencing, but other circuits do not. *See* Ryan Scott

of proportionality provides a new and potentially important rationale for eliminating the disparities between federal and state sentences. As indicated, principles of proportionality are fundamental to the law. In addition, the concerns that animated the Court's analysis when Congress exercises its taxing and spending powers also are relevant when Congress exercises its Commerce Clause authority.

When the federal government metes out much harsher penalties than do the states, the states lose control over a key part of their governmental authority—the power to decide how severely people should be punished for their misconduct. Indeed, that is one of the core powers of a state government.[85] Legislators in California may view marijuana for medical purposes differently than legislators in Oklahoma. Similarly, legislators in Massachusetts may view capital punishment differently than legislators in Georgia. The principles of federalism recognize that states generally should be able to reflect local standards in crafting their criminal statutes.

Of course, there are important principles of criminal law that cannot be overridden by popular opinion. It is wrong to punish the innocent, to punish conduct that merely offends without causing tangible harm, or to criminalize unpopular thoughts rather than harmful actions. But as long as states legislate within the bounds of those fundamental principles, they may implement their own view of the conduct that should be punished and the severity with which it should be punished.[86]

Reynolds, *Equal Justice Under Law: "Post-*Booker*", Should Federal Judges be able to Depart from the Federal Sentencing Guidelines to Remedy Disparity Between Codefendants' Sentences?*, 109 COLUM. L. REV. 538, 552–57 (2009). And the protection against disparities is quite limited. It only is invoked when one defendant receives a more severe sentence than codefendants for the same crime(s). *See id.* at 552; Gertner, *supra* note 75, at 1588. In addition, trial court judges never are required to deviate from federal sentencing guidelines to avoid disparities. *See, e.g.*, United States v. Jones, 696 F.3d 695, 699–700 (7th Cir. 2012) (noting that district court's decision to sentence below guideline range because of sentencing disparity was not required under the Eighth Amendment).

Defendants can prevail, however, if they show that their higher sentences reflected impermissible racial or other invidious bias prohibited by the Equal Protection Clause. *See* Beale, *Many Faces*, *supra* note 64, at 764.

[85] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 615 (2000) (observing that suppression of violent crime "has always been the prime object of the States' police power"); United States v. Lopez, 514 U.S. 549, 564 (1995) (observing that "States historically have been sovereign" in the enforcement of criminal law).

[86] *See* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 1–7 (1995); Kenneth W. Simons, *The Relevance of Community Values to 'Just Deserts': Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635, 639–41, 647–49 (2000). Thus, for example, when rejecting a First Amendment right to disseminate obscene materials, the Supreme Court held that the definition of obscenity should take into account "community standards." Under the three-prong *Miller* test, the trier of fact must first determine "whether 'the average person, applying contemporary community standards' would find that the

When states lose control over their authority to determine the severity of criminal sentences, then we have the same compromise of the two-government system that worried the *NFIB* Court with the Medicaid expansion. The Court acted to prevent one central government from controlling policy for health care coverage of the poor. Yet we have one central government controlling policy for the punishment of criminal conduct.

Indeed, the intrusion into state authority is greater when Congress calls the shots on the prosecution of local crime than when Congress calls the shots on the implementation of health care policy. States have struggled for decades to meet the health care needs of their indigent residents, and no state could provide health care coverage for its poor without federal support. In fact, no state foots more than half of the costs of its Medicaid program.[87] A major federal role is critical to ensure that access to health care becomes universal. In contrast, much of federal criminal law is superfluous to the prosecution of local crime. The federal government often passes criminal laws even when the states are dealing with the problem in an effective manner.[88]

To protect state control over law enforcement, the Supreme Court should extend its principle of proportionality to federal sentences for misconduct that reflects local criminal activity. If it becomes a federal crime to rob or assault someone, the potential penalty for the federal crime should not exceed the potential penalty for the corresponding state crime. Congress should not be able to substitute its judgment for that of state legislatures when local crime is at stake.

Further, a principle of proportionality for assessing the constitutionality of a prison term under the Commerce Clause would nicely complement existing doctrine for judging whether a prison term violates the Eighth Amendment's ban on cruel and unusual punishment. As the Court recently observed in *Miller v. Alabama*,[89] the "concept of proportionality is central to the Eighth Amendment."[90] More specifically, the question is whether the sentence is proportionate in terms of the type of offender and the nature of the offense.[91] Thus, for example, juveniles

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work, taken as a whole, appeals to the prurient interest." Miller v. California, 413 U.S. 15, 24 (1973).

[87] *See* THE KAISER COMM'N ON MEDICAID & THE UNINSURED, MEDICAID: A PRIMER 31 (2013), *available at* http://www.kff.org/medicaid/upload/7334-05.pdf.

[88] *See* Beale, *Many Faces*, *supra* note 64, at 755–56 (observing that when a particular crime attracts wide media attention, legislators may not be able to resist the temptation to intervene); Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 825 (2000) (cataloguing various instances of federal criminal law being passed in response to highly publicized crimes). Federal intrusion compromises state authority in other ways. For example, federal procedural rules may be less protective than state procedural rules. Under federal law, it can be easier to receive approval for a search warrant or a wiretap or to obtain a conviction on the basis of an accomplice's uncorroborated testimony. *See* Beale, *Many Faces*, *supra* note 64, at 768–69.

[89] 132 S. Ct. 2455 (2012).

[90] *Id.* at 2463 (quoting Graham v. Florida, 130 S. Ct. 2011, 2021 (2010)) (internal quotation marks omitted).

[91] *Id.*

should not be treated as harshly as adults, and petty thefts should not be treated as harshly as murders. As indicated, proportionality review under *NFIB* also could consider the nature of the offense and ensure that federal sentences are not greater than state sentences for the same local crime.

To be sure, the Eighth Amendment requirement of proportionality is not a very strict one,[92] and federal sentences are not cruel and unusual merely because they exceed the length of state sentences. But there should be a stricter standard for proportionality under the Commerce Clause than under the Eighth Amendment. Eighth Amendment considerations identify sentences that are prohibited to both state and federal governments. In other words, the Eighth Amendment applies to sentences that are so severe that they are never permissible. Commerce Clause analysis, on the other hand, would identify sentences that are permissible under state law but impermissible under federal law. The concern here is not that the sentences are too severe, but that the degree of severity should be determined at the state level rather than by Congress.[93]

CONCLUSION

While the Supreme Court's analysis of the Medicaid expansion apparently yielded an anticoercion principle specific to the spending power, there is good reason to find a broader principle of proportionality that applies more generally to the exercise of power by Congress. Not only does a principle of proportionality help explain the spending power and taxing power sections of *NFIB*, it also supplies an important limiting principle for the commerce power. A requirement of proportionality for the Commerce Clause promotes a fundamental principle of justice and provides an important response to the long-standing concern with the federalization of local crime.

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[92] *See, e.g.*, Gertner, *supra* note 75, at 1588–89.

[93] Note that it would not be unusual to hold Congress to a higher standard than state legislators when the Commerce Clause power is at stake. While states may punish crimes of violence motivated by the victim's gender, the federal government may not. *See* United States v. Morrison, 529 U.S. 598, 613–17 (2000). Similarly, while states may require individuals to purchase health care insurance, the federal government may not use its commerce power to do so. Rather, as *NFIB* indicates, Congress must rely on its taxing power to enact a mandate to purchase health care insurance. When Congress tries to use its commerce power to intrude into matters of local concern, the Court prevents it from doing so. *See* United States v. Lopez, 514 U.S. 549, 563–66 (1995) (rejecting a ban on the possession of guns near schools on the ground that K–12 education and community crime are matters of local concern); *Morrison*, 529 U.S. at 617–18 (rejecting a federal civil remedy for victims of gender-motivated violence because noneconomic, violent crime is a matter of local concern).