

Saving Congress from Itself: Emancipating the States & Empowering Their People

James L. Buckley

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“The United States faces two major problems today,” writes James L. Buckley: “runaway spending that threatens to bankrupt us and a Congress that appears unable to deal with long-term problems of any consequence.” Contributing significantly to both, he argues, are the more than 1,100 federal grants-in-aid programs Congress has enacted—federal grants to state and local governments, constituting 17 percent of the federal budget, the third-largest spending category after entitlements and defense, with costs that have risen from \$24.1 billion in 1970 to \$640.8 billion in fiscal 2015. His “modest proposal”? Do away with them entirely, thereby saving Congress from itself while emancipating the states and empowering their people. If that sounds like a program for reviving constitutional federalism, it is.

Judge Buckley has the distinction of having served in all three branches of the federal government, first as a senator from New York from 1971 to 1977, then as Undersecretary of State for Security Assistance in the Reagan administration and later as president of Radio Free Europe/Radio Liberty, and finally as a judge on the United States Court of Appeals for the District of Columbia Circuit, to which he was appointed in 1985 and from which he took senior status in 1996. But it was after he retired to his home in Sharon, Connecticut, that he began drawing on this wealth of experience, on his local newspapers, and on work of the Cato Institute’s Chris Edwards to put together the ideas and evidence that fill this slim volume, culminating in his modest proposal.

And evidence there is—example after example of how Congress taxes Americans across the country and then, after deducting Washington’s share of the monies, sends the rest to the far corners of the nation to underwrite projects that local special interests may want but that local taxpayers, if they had a direct say in the matter, would never support with their own money, but now do in the belief that the federal government is paying the bill.

Take the author’s favorite example, a \$430,000 grant from the Federal Safe Routes to School Program for widening sidewalks bordering two streets leading to a local school in Plymouth, Connecticut, population 12,000—the stated purpose, to fight obesity

by encouraging children to walk or bicycle to school. If Plymouth parents had been offered that money to battle their children's obesity, Buckley writes, "it is anything but obvious that broadening sidewalks would have been their weapon of choice." They accept the money "because they know that those recycled dollars will otherwise be spent widening sidewalks in another state"—a fitting example of the perverse incentives set in motion by this five-year program, financed by \$612 million of federal highway trust funds. (Note the ambiguity in "federal highway.")

There was a time in America when the federal government focused mainly on national concerns, the states on state and local matters, like the health and welfare of their citizens. That division of powers, the Constitution's federalism, was never exact, of course, and it shifted over time, but it remained largely intact for a century and a half. During the New Deal, however, it was upended. Today, under the kind of "cooperative federalism" at issue here, the federal government's tentacles reach into almost every area of life, areas once thought the exclusive domain of state and local governments—or of no governments at all. And the costs, monetary and nonmonetary alike, are richly catalogued in this book.

For the federal government, start with the expense of administering often overlapping programs that might otherwise be initiated and administered by state or local governments alone. Today there are 82 federal teacher training programs, for example, even though education is a traditional state function over which Congress has no constitutional authority whatever. A 2011 GAO report lists more than 100 programs dealing with surface transportation, 80 with economic development, 20 with homelessness, 47 with job training, and on and on, leading the report to conclude that variations within and among agencies make it all but impossible for Congress to conduct its oversight functions.

But huge as those costs are, they pale in comparison with those imposed on the states, starting with the bureaucracies that states have to create to administer the federal programs and running to the unfunded mandates, the federal rules that are imposed (e.g., the Davis-Bacon Act requires that local union wages be paid for federal projects), the distortion of state priorities, and the loss of local control and local accountability. As Buckley writes, "one of the most insidious aspects of grants-in-aid programs is the diffusion of responsibility that makes them so attractive to federal and state officials alike.

Each can claim credit for the highways or school lunches or whatever that the grants help finance and each can point a finger at the other should anything go wrong with them.”

We got to this state of affairs through the demise of federalism, of course. The story is doubtless familiar to *Cato Journal* readers, so I'll simply summarize it. Among the “auxiliary precautions” James Madison crafted to control government and protect liberty, perhaps none is more complex than his “compound republic,” which helps explain why so much constitutional litigation has concerned this one issue. The Tenth Amendment, mischievously called the “states’ rights” amendment, outlines the doctrine. Reaffirming the very theory of the Constitution, it shows that the federal government has only those powers that the people gave it, as enumerated mainly in Article I, Section 8, all of which pertain to national concerns; the balance of powers, if not prohibited to the states, are reserved to them—or to the people, never having been given to either government. And states’ powers, Madison wrote in *Federalist* 45, “extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State”—to be checked through state constitutions.

As it emerged from the Constitution, then, federalism maximized liberty not only by empowering the federal government to address truly national matters that were inadequately addressed under the Articles of Confederation, like national defense, international and interstate commerce, immigration, and protection for intellectual property, but by making states compete for the allegiance of their citizens. Individuals were presumed, by their choices, to maximize their own liberty. If local or state governments themselves failed on that score, their citizens could simply vote with their feet. That’s “competitive federalism.”

The lethal exception, to ensure union, was the convention’s compromise over slavery, of course. The Framers hoped it would wither away over time. It did not. It took a civil war and the Civil War Amendments to end slavery, and the Fourteenth Amendment, in particular, to bring the states under the Bill of Rights, thus “completing” the Constitution at last by incorporating in the document the grand principles of the Declaration of Independence. That marked also a fundamental change in our federalism. National power was enhanced not to restrict but to better secure liberty—to more

effectively limit state governments. Federalism doesn't always entail the devolution of power, therefore. If its aim is liberty, it can go in the other direction.

But as the 20th century was dawning, a nascent Progressivism sought to reverse this course. Expressly rejecting the Founders' limited government vision and distrusting free markets regulated mainly under the common law, Progressives envisioned a world in which social engineers—elites like themselves—would plan vast areas of life through social and economic legislation. Their early efforts, directed mainly toward the states, were often rebuffed by the courts. Yet they fared little better at the federal level when they joined Franklin Roosevelt's administration.

After the landslide election of 1936, however, Roosevelt unveiled his infamous Court-packing threat. It failed politically, but the Court got the message. The upshot of "the switch in time that saved nine" was a constitutional revolution in three main steps. In 1937 the Court opened the floodgates for the modern redistributive and regulatory state by eviscerating the Constitution's very centerpiece, the doctrine of enumerated powers. In 1938 it bifurcated the Bill of Rights, reducing economic liberty to a second-class status. And in 1943 it jettisoned the non-delegation doctrine, thereby enabling Congress to delegate ever more of its law-making authority to the burgeoning executive branch agencies it had been creating.

Federalism stood now on its head. With the structural limits on Congress's power effectively gone, federal programs exploded. No problem, it seemed, was too small or local for Congress's attention as members fell over one another bringing home the bacon. And since Progressives had earlier brought about the Sixteenth and Seventeenth Amendments, there was now plenty of bacon flowing to and through Washington thanks to the income tax, while thanks to the direct election of senators, members of that chamber could ignore their state legislatures' interest in protecting states as states and attend instead to the interests of their constituents.

Before judging this as entirely Washington's fault, however, we would do well to consult a dense 2012 tome by Professor Michael Greve, *The Upside-Down Constitution*, for it turns out that the demise of federalism is more complicated than it seems, and the states themselves are far from blameless. As Greve explains in exquisite detail, today's *cooperative* federalism entails federal-state

collusion. Congress “induces” cooperation by offering up gobs of federal money for local projects, provided states themselves contribute some funds. Although a state may have other more pressing needs, it’s hard to turn down “free” money, especially if it enriches local interests craving federal funding, and if, as noted above, the funds thus forgone then fund other states’ federal programs. And on the regulatory side, as history shows, elites in “progressive” states impose “enlightened” economic regulations—favoring coercive unions, say, or minimum wage increases—putting them at a competitive disadvantage vis-à-vis other states, so they press *Congress* to impose those regulations on the entire nation. Once a program is established, of course, the “iron triangle” takes over as congressional committee, executive branch agency, and those same local interests all work to ensure its perpetuity. Perverse incentives endure in this classic prisoner’s dilemma.

Buckley engages these issues to a certain extent. But his discussion of Congress’s power to tax and spend for the “general welfare”—the power Congress cites as its authority to enact these grants-in-aid programs—is off center. He believes, for example, that the Court got it right in *Helvering v. Davis*, the 1937 decision upholding the Social Security Act’s old-age insurance provisions, citing three rationales the Court offered: “because the insurance was ‘plainly national in area and dimensions,’ that ‘laws of the separate states cannot deal with [old-age insurance] effectively,’ and that ‘[o]nly a power that is national can serve the interests of all.’ In so ruling,” he continues, “the Court has given us a simple, coherent standard for determining the legitimacy of Congress’s handiwork: the laws it enacts must serve a purpose that can only be achieved through action at the national level.” With that “test,” he believes, we can distinguish, for example, Medicare and Medicaid: “Medicare is a package of medical benefits that attach to the individual wherever he might be. Only a national government can keep track of a mobile population. Qualification for Medicaid, by contrast, is determined state by state.”

Clearly, that will not do if the question is whether Congress has the authority to enact either program. Medicaid recipients, after all, are as mobile as Medicare recipients; and states could determine qualifications for Medicare as easily as for Medicaid. Moreover, the three criteria the Court offered as justifying federal old-age insurance schemes, cited just above, are nothing but conclusory. States offered

old-age assistance long before passage of the Social Security Act. And if states cannot deal with old-age assistance separately, what makes us think they can do so collectively?

This effort to distinguish Medicare and Medicaid is instructive nonetheless, especially when we see where Buckley goes next. Where the Court went wrong, he believes, is not in *Helvering* but in its companion case, *Steward Machine Co. v. Davis*, which upheld the part of the Social Security Act that offered federal assistance in leveling the impact of various state unemployment compensation taxes. As Buckley writes, “[b]ecause the states were at liberty to decline the federal offer, the Court ruled that the program did not coerce their compliance ‘in contradiction of the Tenth Amendment.’ It therefore held that the program was a legitimate exercise of Congress’s authority to provide for the general welfare.” Like Medicaid, that is, but unlike Medicare or Social Security’s old-age insurance, the unemployment insurance provisions of the Social Security Act were administered through the states, not by the federal government, and both programs were “optional” (albeit, freighted with federal directives).

But why would those considerations be relevant to the core question: Does Congress have authority to enact *any* of those four programs? To answer that, Buckley has focused on the *features* of the programs. And he has because his test—the Court’s test in *Helvering*—is whether a given program “can only be achieved through action at the national level.” That, however, is not the *Constitution’s* test. The Constitution limits Congress not to *national* concerns but to certain *enumerated powers or ends*, as listed in Article I, Section 8, which just happen to be national, by design. Indeed, Congress might propose any number of programs that could be achieved only “through action at the national level,” but if they are not authorized because the powers to enact them have never been delegated by the people and enumerated in the document, then Congress may not enact them.

Like Alexander Hamilton, then, Buckley has read Congress’s power to tax and spend for the general welfare as an *independent* power, which takes us back to a debate early in our history when Hamilton introduced his *Report on Manufactures* in 1791. The debate that followed, before Congress shelved the proposal as beyond its authority, pitted Hamilton against Madison, Thomas Jefferson, and most everyone else. Echoing points he had made a

few years earlier in *Federalist* 41, Madison argued that the words “general welfare” were meant simply as a heading, informed by the 17 powers that followed. Indeed, as South Carolina’s William Drayton would say years later, when faced in 1828 with yet another redistributive bill, “[i]f Congress can determine what constitutes the General Welfare and can appropriate money for its advancement, where is the limitation to carrying into execution whatever can be effected by money?” And as many others would ask when facing similar bills, what was the point of having enumerated Congress’s other powers if it could do whatever it wanted under this sole power?

As history would have it, the Court revisited that early debate in 1936, in *United States v. Butler*, holding the 1933 Agricultural Adjustment Act unconstitutional as “a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government.” But in dicta, the Court came down on Hamilton’s side in the debate: The Spending Clause, it said, “confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States.” A year later in *Helvering*, however, the Court elevated that dictum to law, repeating nonetheless that Congress’s power was still limited to providing for the *general* welfare—Hamilton’s and Buckley’s view, too. “The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.” It fell effectively to Congress, therefore, to police itself on that limitation—the very Congress that as the years went on would be spending with ever greater particularity.

In sum, in dicta the *Butler* Court rejected the view that was held by most of the Founders; the view that prevailed, in the main, for our first 150 years; and the view that, more important still, fit far better the Constitution’s theory and structure. A year later, in the companion cases of *Helvering* and *Steward Machine*, the Court drew on that

dictum to open the floodgates for the modern redistributive state, notwithstanding that the Constitution nowhere entrusts the respective subjects of the three decisions—agriculture, retirement, and unemployment—to the federal government. Is it any surprise that everything from education to childhood obesity to health care and more is entrusted today to the federal government?

Regarding the grants-in-aid programs that are Buckley's concern, the only restraint on federal provision appears to be whether such programs might "coerce" the states—and that is recent. Thus, in 1987, in *South Dakota v. Dole*, the Court upheld a federal statute that withheld a portion of federal highway funds from states that declined to raise their drinking age, finding that the reduction at issue was relatively small. But in 2012, in *NFIB v. Sebelius*, the Court found Obamacare's Medicaid expansion to be beyond Congress's spending power because it coerced states to either accept the expansion or risk losing existing Medicaid funding. In other words, Congress went "too far." That's the kind of "bright line" constitutionalism we've come to as a result of the New Deal's constitutional revolution—a veritable open invitation to political and judicial mischief.

Buckley's "modest proposal" would partially restore our federalism by ending such programs—presumably lowering federal taxes in the process to enable states to collect the revenue needed to run their own programs, although he doesn't go into that issue. It's a tall order, to be sure, given the perverse incentives set in play by the modern reading of the Constitution. Yet recently, nearly half the states declined to participate in Obamacare's Medicaid expansion, even though it would have been "free" for three years; and fully 36 states declined to establish state exchanges under the plan. There may be hope. At the least, if implemented, the proposal would move us closer to the original constitutional design, even if it left in place a host of programs the federal government now runs directly, like Social Security and Medicare, the absence of authority notwithstanding. In the process, it would encourage members of Congress to shift their focus from a thousand and one local concerns to those that are truly national, and that's no small matter. This book's virtue is that it brings this issue to the fore in a clear and compelling way. Its sharp focus on this single issue is its greatest strength.

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