

MEMORANDUM

To: Interested Members
From: House Judiciary Committee Democratic Staff
Re: Constitutionality of Faso-Collins Amendment
Date: March 24, 2017

The Faso-Collins amendment, incorporated into the Manager's amendment, would violate Constitutional limits on the Federal Spending Power, the Due Process and Equal Protection Clauses and the Tenth Amendment (reserving all undelegated powers to the States). Requiring New York State to change how its counties fund its portion of Medicaid expenses is not related to a legitimate Federal interest, no rational Federal purpose has been proffered for the provision, and it would severely intrude on traditional state prerogatives.

If the Faso-Collins amendment were ever enacted, it quickly would be invalidated by the Federal courts. The irony of this "buyout" is that the "payment" supposedly being delivered in exchange for votes – the unconstitutional provision – is the legislative equivalent of a check on a closed bank account, which will never deliver the promised benefits.

For the last 51 years, New York State has chosen to fund a portion of its share of the Medicaid Program by using funds from county property taxes. Fifteen other States structure Medicaid funding through a similar legally authorized system.

The Faso-Collins amendment specifies that any State that had an allotment of Disproportionate Share Hospital (DSH) funds that was more than 6 times the national average, and that requires subdivisions with populations of less than 5,000,000 to contribute toward Medicaid costs, shall have its reimbursement reduced by the amount of contributions by such subdivisions. (This effectively limits the application to New York State, and carves out New York City.) Under the amendment, New York State is at risk of losing \$2.3 billion of its \$32 billion in Federal Medicaid funds.

This provision is unconstitutional, and could be struck down for several reasons:

Violation of Limits on Spending Power -- Article I of the Constitution grants Congress spending power to "provide for the . . . general Welfare." In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Supreme Court held that any spending condition imposed on the States must be related to the Federal interest in that particular project or program and that Congress cannot coerce the States into compliance with the Federal government's objectives. In *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), the Supreme Court found provisions of the Affordable Care Act which required all States to comply with the law's Medicaid expansion violated this spending authority, noting the "Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." The Faso-Collins language does not appear to be related to any Federal interest in the use or allocation of Federal Medicaid funds: it does not further Medicaid's purposes and has nothing to do with ensuring the proper disbursement of Federal funds. Indeed, because the provision applies to counties in a single State – and leaves the very same system undisturbed in 15 other States – it could not possibly be justified by any legitimate Federal interest.

An additional line of Supreme Court cases, including *New York v. United States*, 505 U.S. 144, 167, 172 (1992), has held that conditions on Federal grants must be “reasonably related to the purpose of the [Federal] expenditure” because otherwise “the spending power could render academic the Constitution’s other grants and limits of Federal authority.” Likewise, in *Massachusetts v. United States*, 435 U.S. 444, 461 (1978), the Supreme Court noted that it has “repeatedly held that the Federal Government may impose appropriate conditions on the use of Federal property or privileges and may require that State instrumentalities comply with conditions that are reasonably related to the Federal interest in particular national projects or programs.” (Emphases added). Under these precedents, the Faso-Collins language would be held to be an arbitrary exercise of Federal power which intrudes on only one particular State’s sovereign tax powers, and is unrelated to any Federal interest or purpose in the Medicaid Program.

As Yale Law School Professor Abbe Gluck wrote in a post on the Balkinization blog today, the Faso-Collins “amendment is likely unconstitutional. The protection from federal interference of the internal functions of a state government is one of the bedrocks of state sovereignty protected by the limitations on Congress’s powers in Article I of the Constitution and the reservation of power to the states in the Tenth Amendment.” She further reasoned that “Even if one could argue that this is an exercise of the federal spending power under Article I, for Congress to legally use that power, the conditions on a state’s use of federal funding have to be tied to a reasonable federal purpose. . . It is hard to see a reasonable federal purpose here other than garnering more GOP votes for the struggling repeal bill.” (available at <https://balkin.blogspot.com/2017/03/is-gop-aca-repealer-unconstitutional-on.html?m=1>)

Violation of Due Process and Equal Protection -- Under the Fifth Amendment, the Federal government is not permitted to deprive its citizens of equal protection or due process of law. Those clauses have been interpreted on numerous occasions to prevent the government from discriminating between the treatment of the sovereign States absent a rational basis. For example, in *Helvering v. David*, 301 U.S. 619, 640 (1937), the Supreme Court warned that Congress does not possess the right to demonstrate a “display of arbitrary power” in its treatment of the various States. In this regard, in 2009, when an earlier Senate version of the Affordable Care Act sought to provide special treatment for Nebraska with respect to Medicaid reimbursements, 13 Republican State attorneys general wrote to Congress (available at <http://www.law.columbia.edu/sites/default/files/microsites/career-services/files/Letter%20to%20the%20Honorable%20Nancy%20Pelosi%20and%20the%20Honorable%20Harry%20Reid.pdf> and attached) asserting the provision was unconstitutional (the provision was ultimately dropped). In the case of the Faso-Collins language, there is no legitimate policy justification for developing a special rule limiting Medicaid funds for New York as compared to all other States, including 15 States which have sharing agreements with their counties. Nor has a justification been offered for why New York City should be excluded from the application of the special rule. As such, it is clear that the provision is discriminatory, “arbitrary” and has no rational basis.

Abrogation of Tenth Amendment Principles -- The Tenth Amendment provides in relevant part that powers not delegated to the Federal government or prohibited to the States are reserved for the States. This has been read to prevent the federal government from “commandeering” the states to serve its own purposes. In *Printz v. United States*, 521 U.S. 898 (1997), the Supreme Court held that Congress cannot commandeer State officers to implement Federal policy – in that case requiring criminal background

checks for handgun purchases pursuant to the Brady Handgun Violence Prevention Act. The Faso-Collins language commandeers New York State government to facilitate the partisan political ends of a faction in the U.S. Congress, which would seem well outside the proscriptions of *Printz*. In fact, by essentially ordering New York to reorganize its internal affairs, the Faso-Collins amendment may run even further afoul of Tenth Amendment principles than was the case in *Printz* given the lack of a Federal purpose and the interference with the core sovereign function of how a State chooses to use its taxing power.

It is of particular constitutional concern that the Faso-Collins provision directly interferes with New York's internal decisions about how to structure its own tax and spending policies, and how to allocate those responsibilities between the State and its subdivisions – which is a core function of a sovereign entity protected by the Tenth Amendment (and potentially Article IV § 4 of the Constitution, which provides that the “United States shall guarantee to every State in this Union a Republican Form of Government.”). This is constitutionally significant because in *Reynolds v. Sims*, 377 U.S. 533, 575 (1964), the Supreme Court held that political subdivisions such as counties and cities “have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of State governmental functions.” In *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907), the Court noted that these subdivisions are “created as convenient agencies for exercising such of the governmental powers of the state, as may be entrusted to them” and that the “number, nature, and duration of powers conferred upon these [entities] and the territory over which they shall be exercised rests in the absolute discretion of the state.” The Faso-Collins amendment purports to invoke Federal power to displace New York's sovereign exercise of this “absolute discretion” and, for that reason, violates the Constitution. As Chief Justice John Marshall long ago explained in *Gibbons v. Ogden*, 22 U.S. 1, 198–200 (1824), the States’ “power of taxation is indispensable to their existence. . . . In imposing taxes for State purposes, [States] are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States.”