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Anti-Anti-Evasion in Constitutional Law

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ANTI-ANTI-EVASION IN CONSTITUTIONAL LAW

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I. INTRODUCTION

In a previous article, we identified "anti-evasion doctrines" (AEDs) that the U.S. Supreme Court develops in various areas of constitutional law to prevent the circumvention of constitutional principles the Court has sought to enforce.[1] In many cases, we observed that AEDs were developed to backstop decision rules[2] that were designed as rules, and that the AEDs performed this function by taking the form of standards.[3] Canvassing the benefits and tradeoffs of optimiz-

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1. Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773.

2. "Decision rules" are those doctrines the Court develops to "implement" constitutional principles, or what Mitch Berman calls "constitutional operative propositions." *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 15 (2004). For "implementation" of the Constitution through decision rules, see RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

3. Denning & Kent, *supra* note 1, at 1779-96.

ing constitutional principles by using AEDs, we concluded that they were likely worth the costs in additional complexity and possible increase in decision costs to judges.[4]

But the Court's use of AEDs is not foreordained. In this Article, we take up the phenomenon of *anti-anti-evasion*, in which the Court *declines* to design AEDs to prevent alleged evasions of constitutional principle. As was true of AEDs, examples can be found across constitutional law. In this Article, we identify a number of occasions in which the Court engages in anti-anti-evasion, then seek to understand the reasons why it does so. In the end, we hope to shed light on the practice of anti-anti-evasion, as well as to illuminate our earlier study with a working hypothesis of when the Court will and when it will not backstop its decisions with subsequent AEDs.

Part II provides a brief overview of our theory of AEDs. Part III furnishes several examples of anti-anti-evasion from constitutional law. Part IV discusses the types of reasons given by the Court when it declines the invitation to create AEDs, which we argue are not sufficient to explain fully the decision to engage in anti-anti-evasion. Accordingly, Part V includes our working hypothesis that the Court will not create AEDs where it believes that the constitutional principle is adequately protected by robust political safeguards—primarily in cases involving taxing or spending decisions, including the provision of government-subsidized goods and services. Our hypothesis is partially confirmed, moreover, by the Court's resolution of the constitutional issues surrounding the Affordable Care Act in the much-awaited *National Federation of Independent Business v. Sebelius*[5] (*NFIB*) case, which we also discuss in Part V. A brief conclusion follows.

II. AN OVERVIEW OF AEDS

Our prior work identified a pattern in the Court's constitutional jurisprudence that we termed "anti-evasion doctrines." In numerous and varied areas of constitutional doctrine, the Court initially implements a constitutional principle via a decision rule that typically resembles an *ex ante* rule.[6] That decision rule, in turn, is bolstered or backstopped by a subsequent AED—that is, by a later decision rule that is designed to prevent circumvention of the constitutional principle through formal compliance with the earlier decision rule.[7] Just

4. *Id.* at 1796-1815.

5. 132 S. Ct. 2566 (2012).

6. Denning & Kent, *supra* note 1, at 1793.

7. *Id.*

as the initial decision rule tends to take the form of a rule, the AED tends to be formulated as an *ex post* standard.[8]

AEDs tend to be one of four types of constitutional "tests." First, they occur as "pretext tests," asking whether government is, under the guise of a constitutionally permissible objective, actually attempting to regulate in a manner that the Constitution proscribes.[9] Second, they take the form of "proxy tests," which ferret out regulations that depend on a purportedly neutral characteristic, but in reality use that characteristic as a proxy for some other, prohibited characteristic.[10] Third, AEDs are packaged as "purpose tests" that ask whether the law has been "developed or applied for constitutionally illegitimate reasons."[11] Finally, AEDs occur as "effects tests" that focus on the effects of a regulation rather than its explicit content.[12]

Although each of these tests has a slightly different emphasis, as AEDs, they share a common doctrinal purpose—i.e., to prevent indirect violations of a constitutional principle through formal compliance with the Court's decision rules.[13] Put differently, AEDs attempt to optimize constitutional enforcement by ensuring that governmental officials cannot easily evade or undermine constitutional commands by manipulating gaps left open in the decision rules developed to implement those commands.[14] Despite their utility and ubiquity, however, the Court does not employ AEDs in every circumstance. Notable areas of constitutional doctrine exist where the Court has declined to create or develop an AED, raising the question with which this Article primarily is concerned: What does it mean when the Court engages in such anti-anti-evasion?

III. EXAMPLES OF ANTI-ANTI-EVASION

When we use the term *anti-anti-evasion*, we mean to describe a situation characterized by the following pattern. At Time *T*, the Court enforces a constitutional principle by articulating certain decision

8. *Id.* at 1780-93 (offering examples). As we noted in our previous article, we think this is the typical pattern revealed in the Court's decisions. But this is not to say that the pattern holds in every instance where an AED is employed. Some AEDs may take more rule-like form to backstop standard-like decision rules, and there are circumstances where the AEDs are pronounced simultaneously with the primary decision rule. *Id.* at 1793 n.159.

9. *Id.* at 1780-84. With the exception of the "proxy test" discussed below, we borrow the terminology for these anti-evasion doctrines from Richard Fallon. *See* FALLON, *supra* note 2, at 77-79 (describing the following doctrinal tests: (1) "forbidden-content tests"; (2) "suspect-content test"; (3) "balancing tests"; (4) "non-suspect-content tests"; (5) "effects tests"; (6) "purpose tests"; and (7) "appropriate deliberation tests").

10. Denning & Kent, *supra* note 1, at 1784-88.

11. *Id.* at 1780 (quoting FALLON, *supra* note 2, at 79); *id.* at 1788-93.

12. *Id.* at 1780, 1788-93.

13. *Id.* at 1793.

14. *Id.* at 1796.

rules that other judicial actors will follow in subsequent cases. Then, at Time *T1*, the Court is presented with a case in which the form of the prior rules is observed, but the regulation at issue nonetheless is alleged to subvert the *substance* of the constitutional principle those prior rules were supposed to implement. This alleged subversion presents the Court with an opportunity to create an AED, but the Court refuses to do so, judging the challenged regulation to satisfy the Constitution's requirements. As we demonstrate in this Part, the Court engages in anti-anti-evasion with some regularity both in cases involving structural limitations on the power of federal and state governments, as well as those involving claims of individual rights.[15]

A. Anti-Anti-Evasion in Structure and Powers Cases

1. The Spending Power

South Dakota v. Dole suggested that the Court would invalidate conditional spending requirements that were so onerous as to be considered "coercive."[16] Until *NFIB v. Sebelius*,[17] however, neither the Court nor the lower courts had applied that suggestion so as to create a full-fledged AED.[18] Indeed, in a recent case[19] involving a federal statute "proscribing bribery of state, local, and tribal officials of entities that receive at least $10,000 in federal funds,"[20] the Court declined to flesh out the "coercion" exception and found the law to be a valid exercise of Congress's power to impose conditions on the receipt of federal funds. In response to the defendant's argument that the penalties were "unduly coercive, and impermissibly sweeping, condition[s] on the grant of federal funds,"[21] the Court responded that the bribery statute was "authority to bring federal power to bear directly

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15. As was true of the examples of anti-evasion doctrines in our earlier article, Denning & Kent, *supra* note 1, at 1779-93, we make no claim that our examples here exhaust the universe of anti-anti-evasion decisions by the Court. Additionally, we do not mean to say that every instance of anti-anti-evasion follows the above-described pattern in precise detail.

16. *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987) ("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.' " (citation omitted)); Denning & Kent, *supra* note 1, at 1783-84 (noting that *Dole* suggested a type of AED).

17. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566 (2012).

18. *See* West Virginia v. U.S. Dep't of Health & Human Servs., 289 F.3d 281, 288-90 (4th Cir. 2002) (discussing judicial treatment of coercion theory); *see also* Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 467-68 (2003) (noting that *Dole*'s coercion test has not fulfilled its promise and that "lower courts have consistently failed to find impermissible coercion").

19. Sabri v. United States, 541 U.S. 600 (2004).

20. *Id.* at 602 (summarizing 18 U.S.C. § 666(a)(2)).

21. *Id.* at 608.

on individuals who convert public spending into unearned private gain, not a means for bringing federal economic might to bear on a State's own choices of public policy."[22] In *NFIB*, however, seven members of the Court fleshed out the "coercion" language of *Dole*, holding that because the Affordable Care Act radically expanded Medicaid's coverage—to the point of fundamentally remaking the program—Congress could not penalize states' refusal to participate in the new program by withholding *all* Medicaid funds, including those for the existing program.[23] We explore the significance of the Court's implementation of an AED after years of anti-anti-evasion in spending cases below.[24]

2. The Copyright Clause

In *Eldred v. Ashcroft*,[25] challengers argued that the Copyright Term Extension Act, which lengthened by twenty years the term of existing and future copyrights in the United States, violated Congress's Article I, Section 8 power to create copyrights for "limited Times."[26] For existing works, the plaintiffs argued, "[t]he 'limited Tim[e]' in effect when a copyright is secured . . . becomes the constitutional boundary, a clear line beyond the power of Congress to extend."[27] Alternatively, they argued that extensions of existing copyrights should be subject to a heightened standard of review to ensure that they conformed to the purposes of the Clause.[28]

Relying on "[t]ext, history, and precedent,"[29] the Court rejected these arguments. First, the Court concluded that nothing about the word "limited" prevented the copyright extension from being applied to existing copyrights.[30] Second, "[h]istory reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime."[31] The Court concluded that "the CTEA is a rational enactment; we are not at liberty to second-guess congressional determinations and policy

22. *Id.*

23. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2605-06 (2012) (opinion of Roberts, C.J., Breyer & Kagan, JJ.); *id.* at 2666 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

24. *See infra* Part V.

25. 537 U.S. 186 (2003).

26. U.S. CONST. art. I, § 8, cl. 8; *Eldred*, 537 U.S. at 193.

27. *Eldred*, 537 U.S. at 193.

28. *Id.* at 218.

29. *Id.* at 199.

30. *Id.*

31. *Id.* at 200.

judgments of this order, however debatable or arguably unwise they may be."[32]

Significantly, for our purposes, the Court rejected the petitioners' argument that "permitting Congress to extend existing copyrights allows it to evade the 'limited Times' constraint by creating effectively perpetual copyrights through repeated extensions."[33] According to the Court, the petitioners failed to produce evidence that the retroactive extension was motivated by a desire to create, or had the effect of creating, a perpetual copyright.[34]

3. The Dormant Commerce Clause Doctrine and Subsidies

The dormant Commerce Clause doctrine (DCCD) describes the judge-made rules inferred from the Constitution's grant of authority over interstate commerce to Congress. The DCCD prohibits state and local governments from, with a few exceptions, discriminating against or otherwise unduly burdening interstate and foreign commerce.[35] States may not, for example, grant a tax credit to incentivize in-state production of a commodity, but disallow the credit when production occurs outside the state.[36] However, the Court has never held that a discriminatory cash subsidy—which has an identical economic effect—violates the DCCD.[37] When a discriminatory tax credit in Maine was challenged,[38] the town seeking to preserve the exemption argued

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32. *Id.* at 208.

33. *Id.*

34. *Id.* at 199-200 ("[T]here is no cause to suspect that a purpose to evade the 'limited Times' prescription prompted Congress to adopt the CTEA."); *id.* at 209-10 ("Critically, we again emphasize, petitioners fail to show how the CTEA crosses a constitutionally significant threshold with respect to 'limited Times' that the 1831, 1909, and 1976 Acts did not."). *But see id.* at 243 (Breyer, J., dissenting) ("The economic effect of this 20-year extension—the longest blanket extension since the Nation's founding—is to make the copyright term not limited, but virtually perpetual."). Justice Breyer went on to suggest that while Congress might not have intended to act unconstitutionally, it might have intended to test the limits of its power, a tendency that AEDs can deter. *Compare id.* at 256, *with* Denning & Kent, *supra* note 1, at 1802 (suggesting that AEDs can raise costs to official actors seeking to regulate to the very limit of their power by blurring the lines separating permissible from impermissible actions).

35. *See generally* Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417 (2008).

36. *See, e.g.*, New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988).

37. *See, e.g.*, W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 n.15 (1994) ("We have never squarely confronted the constitutionality of subsidies, and we need not do so now. We have, however, noted that '[d]irect subsidization of domestic industry does not ordinarily run afoul' of the negative Commerce Clause." (citations omitted)); *see also infra* notes 76-91 and accompanying text (discussing Court's refusal to treat tax expenditures as the equivalent of direct public support for religion). *See generally* Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965 (1998) (discussing analysis of subsidies under the DCCD).

38. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997). Maine exempted from property taxes charities that primarily benefitted Maine citizens. *Id.* at 567.

that it was economically indistinguishable from a cash subsidy and should be treated the same way.[39] The Court declined this invitation for similar treatment, in part on the strength of precedent that started from "the premise that there is a constitutionally significant difference between subsidies and tax exemptions."[40]

4. Use Taxes

Before the Court's decision in *Complete Auto Transit v. Brady*[41] rationalized the Court's DCCD tax jurisprudence, a welter of quite formal rules determined the constitutionality of state and local taxes.[42] One of the rules was that states may not tax interstate commerce *qua* interstate commerce.[43] When Washington sought to offset the loss of revenue from goods purchased out-of-state, yet used in Washington, by imposing a corresponding "use" tax on the privilege of using goods bought elsewhere, challengers argued that the tax was *really* a tax on interstate commerce itself, motivated by a desire to create a protective tariff on goods imported into the state.[44] For the Court, Justice Cardozo rejected those arguments. First, he accepted Washington's argument that it was *not* imposing a tax on the sale of the item, but merely its use within the state. Citing a number of cases, he wrote that "[t]hings acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination."[45] Moreover, noting the credit Washington gave for any sales tax paid on the purchase, Cardozo observed that the same amount of tax was levied on interstate sales as on intrastate sales.[46]

To the argument that "a tax upon the use, even though not unlawful by force of its effects alone, is vitiated by the motives that led to its adoption," which "cause it to be stigmatized as equivalent to a protective tariff,"[47] Cardozo had two responses. First, he noted that impermissible motive alone is usually insufficient to invalidate an

39. *Id.* at 589.

40. *Id.* at 590.

41. 430 U.S. 274 (1977).

42. For an overview, see 1 JEROME R. HELLERSTEIN, WALTER HELLERSTEIN & JOHN A. SWAIN, STATE TAXATION ¶¶ 4.01-4.13 (3d ed. 1998 & Supp. 2012).

43. *See, e.g.*, Freeman v. Hewit, 329 U.S. 249, 254 (1946).

44. Henneford v. Silas Mason Co., 300 U.S. 577, 582-83, 586 (1937).

45. *Id.* at 582.

46. *Id.* at 584. Again, the Court noted that similar taxes had been upheld in a variety of other circumstances. *Id.* at 585 (citing cases regarding taxes that equally affect interstate and intrastate sales).

47. *Id.* at 586.

otherwise valid measure.[48] Second, he argued that the use tax was truly laid on property imported then placed into use, as opposed to property merely imported. This was a distinction with a difference, he maintained:

> Catch words and labels, such as the words "protective tariff," are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard. A tariff, whether protective or for revenue, burdens the very act of importation, and if laid by a state upon its commerce with another is equally unlawful whether protection or revenue is the motive back of it. But a tax upon use, or, what is equivalent for present purposes, a tax upon property after importation is over, is not a clog upon the process of importation at all, any more than a tax upon the income or profits of a business.[49]

Current doctrine permits "compensatory taxes" placed on out-of-state, but not in-state, goods, in order to compensate for taxes paid by the latter, but not by the former.[50] The use tax is the paradigmatic compensatory tax; few other taxes claimed to be compensatory have survived judicial review.[51]

5. The Import-Export Clause

Article I, Section 10, Clause 2 of the Constitution prohibits states from laying "imposts or duties" on "imports or exports" without congressional consent, save for those "absolutely necessary" for carrying out inspection laws. In the nineteenth century, the Supreme Court held[52]—probably incorrectly[53]—that the Clause applied only to foreign imports and exports.[54] Before *Michelin Tire Corp. v. Wages*[55] was decided in 1976, the rule was that taxes could not be imposed on imported goods until they ceased to be "imports," which was held to be the point at which goods were taken out of their "original package" and commingled with other property at rest in the taxing jurisdiction.[56] The *Michelin Tire* case overturned more than a century of case

48. *Id.*

49. *Id.*

50. *See generally* HELLERSTEIN, HELLERSTEIN & SWAIN, *supra* note 42, ¶ 4.14[3][c][i].

51. *Id.* ¶ 4.14[3][c][ii] ("The Court's most recent encounters with the 'complementary' or 'compensatory' tax doctrine continue its modern trend of evaluating states' 'complementary tax' arguments with considerable skepticism.").

52. Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 136 (1868).

53. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 621-37 (1997) (Thomas, J., dissenting); Brannon P. Denning, *Justice Thomas, the Import-Export Clause, and* Camps Newfound/Owatonna v. Harrison, 70 U. COLO. L. REV. 155 (1999).

54. *Woodruff*, 75 U.S. (8 Wall.) at 136.

55. 423 U.S. 276 (1976); *see generally* Walter Hellerstein, Michelin Tire Corp. v. Wages*: Enhanced State Power to Tax Imports*, 1976 SUP. CT. REV. 99.

56. *See generally* HELLERSTEIN, HELLERSTEIN & SWAIN, *supra* note 42, ¶ 5.01.

law and held that a nondiscriminatory ad valorem property tax on imported property present in the taxing jurisdiction on tax day did not violate any of the general goals of the Import-Export Clause.[57] While admitting that the Clause did not distinguish between discriminatory and nondiscriminatory imposts and duties,[58] the Court refused to read "imposts and duties" broadly to encompass the taxes at issue in the case.[59] The Court pointed out that "the Clause is not written in terms of a broad prohibition of every 'tax.' "[60] It contrasted the specific language of Article I, Section 10, with the broader language of Article I, Section 8, which authorized Congress "to 'lay and collect *Taxes*, Duties, Imposts, and Excises.' "[61] The Court concluded:

> [S]ince prohibition of nondiscriminatory ad valorem property taxation would not further the objectives of the Import-Export Clause, only the clearest constitutional mandate should lead us to condemn such taxation. The terminology employed in the Clause—"Imposts or Duties"—is sufficiently ambiguous that we decline to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate.[62]

6. The Commerce Clause

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[63] In the late 1930s, the Court began taking an expansive view of those activities that qualify as interstate commerce. In *NLRB v. Jones & Laughlin Steel Corp.*, for example, the Court recognized that Congress possesses the authority to regulate seemingly intrastate activity that has "a close and substantial relation to interstate commerce."[64] Similarly, in *United States v. Darby*,

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57. *Michelin Tire*, 423 U.S. at 285-86. The Court described these three goals as follows:

> [1] [T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and [3] harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.

Id. (footnotes omitted).

58. *Id.* at 290.

59. *Id.*

60. *Id.*

61. *Id.* (emphasis added).

62. *Id.* at 293-94.

63. U.S. CONST. art. I, § 8, cl. 3.

64. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

the Court held that "[t]he power of Congress over interstate commerce . . . extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end . . . ."[65]

In *Darby*, the Court utilized this view of the Commerce Clause to uphold Congress's authority to regulate labor conditions via the Fair Labor Standards Act ("FLSA").[66] When initially enacted, the FLSA was applicable only to private economic activity, specifically excluding state and local government employers from its provisions.[67] Over time, however, Congress amended the statute so that it eventually applied to state and local governments as well.[68] In *National League of Cities v. Usery*, the Court struck down the amendments on the ground that they violated state sovereignty and were thus outside the scope of the Commerce Clause power.[69]

Although not explicit in its decision, the Court in *Usery* seemed concerned that Congress was utilizing the Court's prior decision rules implementing the Commerce Clause in a way that enabled evasion of other constitutional principles. Through its amendments to the FLSA, Congress was impermissibly regulating the states and their political subdivisions under the pretext of regulating commercial activity.[70] To curb such evasion, the Court established a decision rule that prohibited Congress from using its admittedly plenary Commerce Clause power "to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[71] As applied by subsequent decisions, *Usery* thus created a standard-like balancing test focusing on the type of federal regulation, the state/local function involved, and the interests of both sovereigns.[72] This test can be viewed, in other words, as a type of AED.

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65. United States v. Darby, 312 U.S. 100, 118 (1941).

66. *Id.* at 121-26.

67. *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 836 (1976) (discussing history of the FLSA).

68. *Id.*

69. *Id.* at 851-52.

70. *Cf.* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 562 (1985) (Powell, J., dissenting) (reading *Usery* as establishing a rule "for determining whether Commerce Clause enactments transgress [i.e., evade] constitutional limitations imposed by the federal nature of our system of government").

71. *Usery*, 426 U.S. at 855.

72. *See, e.g.*, Hodel v. Va. Surface Mining & Recl. Ass'n, 452 U.S. 264, 287-88 (1981); *see also Garcia*, 469 U.S. at 561-63 (Powell, J., dissenting) (describing *Usery* as standard-like balancing test); *Usery*, 426 U.S. at 856 (Blackmun, J., concurring) (indicating that *Usery* employed "balancing approach").

Nine years later, in *Garcia v. San Antonio Metropolitan Transit Ass'n*, the Court was presented with another opportunity to reaffirm the AED-like decision rule from *Usery*. Instead, the Court explicitly overruled *Usery*.[73] The majority found that the *Usery* framework was not only unworkable, but it was inconsistent with the respective competencies of the legislative and judicial branches.[74] Without denying that Congress might attempt to push the bounds of its regulatory powers, the Court now indicated that the chief means of protecting the states lay in the structure and process of the federal political system, rather than in the courts. "[W]e are convinced," wrote Justice Blackmun for the Court, "that the fundamental limitation . . . on the Commerce Clause to protect the 'States as States' is one of process rather than one of result."[75]

B. Anti-Anti-Evasion in Individual Rights and Liberties Cases

1. The Establishment Clause

Minnesota allowed parents to deduct certain educational expenses on their state taxes. The deduction was available whether the children attended public or private schools. Because parents whose children attended private, sectarian schools benefitted disproportionately, the deduction was challenged as a violation of the Establishment Clause.[76] Central to the challenge was the argument that, despite the deduction's facial neutrality, the primary beneficiaries of the deduction were religious schools, because public education was provided free of charge.[77] Upholding the tax deduction,[78] then-Justice Rehnquist wrote that "[w]e need not consider [the establishment-in-effect argument] in detail."[79] He continued:

> We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated. More-

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73. *Garcia*, 469 U.S. at 557 (majority opinion).

74. *Id.* at 538-47.

75. *Id.* at 554.

76. Mueller v. Allen, 463 U.S. 388, 390-92 (1983).

77. *Id.* at 400-01. In *Committee for Public Education & Religious Liberty v. Nyquist*, the Court invalidated a similar New York law that provided tax relief to parents of parochial school students alone. 413 U.S. 756 (1973).

78. The Court concluded that the deduction had a secular purpose, did not impermissibly advance religion, and did not excessively entangle the state with religion. *Mueller*, 463 U.S. at 394-400 (applying the prongs of Lemon v. Kurtzman, 403 U.S. 602 (1971)).

79. *Id.* at 401.

> over, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.[80]

In a more recent case, *Arizona Christian School Tuition Organization v. Winn*,[81] the Court held that Arizona taxpayers lacked standing to challenge a state law permitting a tax deduction for contributions to private school tuition organizations that provided scholarships for students to attend secular and sectarian private schools in the state.[82] Under federal law, taxpayers generally don't have standing to challenge governmental action.[83] An exception was created in *Flast v. Cohen* for taxpayer challenges to government expenditures alleged to violate the Establishment Clause.[84] As the *Winn* Court explained, *Flast* requires the satisfaction of two conditions for such taxpayer standing. First, "there must be a 'logical link' between the plaintiff's taxpayer status 'and the type of legislative enactment attacked.' "[85] Second, "there must be 'a nexus' between the plaintiff's taxpayer status and 'the precise nature of the constitutional infringement alleged.' "[86] In *Flast*, the latter condition was satisfied by an "allegation that Government funds had been spent on an outlay for religion in contravention of the Establishment Clause."[87] *Flast*'s exception, however, has been narrowed nearly to the vanishing point, and the *Winn* Court was not inclined to reverse this narrowing.

Petitioners argued that the tax credit was akin to direct governmental spending and that they should be deemed to have standing to challenge the deduction.[88] "A dissenter whose tax dollars are 'extracted and spent,' " explained Justice Kennedy, "knows that he has in some small measure been made to contribute to an establishment in violation of conscience."[89] By contrast,

> [w]hen the government declines to impose a tax . . . there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. And awarding

80. *Id.*

81. 131 S. Ct. 1436 (2011).

82. *Id.* at 1440.

83. *See generally* 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.10 (3d ed. & Supp. 2008) (describing citizen suits).

84. 392 U.S. 83, 106 (1968).

85. *Winn*, 131 S. Ct. at 1445 (quoting *Flast*, 392 U.S. at 102).

86. *Id.* (quoting *Flast*, 392 U.S. at 102).

87. *Id.*

88. *Id.* at 1447.

89. *Id.*

> some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences.[90]

Justice Kennedy thus concluded that "[w]hen Arizona taxpayers choose to contribute to [student tuition organizations], they spend their own money, not money the State has collected from respondents or from other taxpayers."[91]

Justice Kagan wrote a dissent for herself and three other Justices criticizing the majority's position and arguing that it facilitated naked evasion of the taxpayer standing exception created in *Flast*.[92] The majority's "novel distinction . . . between appropriations and tax expenditures," she wrote,

> has as little basis in principle as it has in our precedent. Cash grants and targeted tax breaks are means of accomplishing the same government objective—to provide financial support to select individuals or organizations. Taxpayers who oppose state aid of religion have equal reason to protest whether that aid flows from the one form of subsidy or the other. Either way, the government has financed the religious activity. And so either way, taxpayers should be able to challenge the subsidy.[93]

2. Taxes as Takings

When Pittsburgh imposed a twenty percent gross receipts tax on owners of private parking lots, the owners of the lots sued, alleging that the tax destroyed their businesses and thus constituted an uncompensated taking in violation of the Fourteenth Amendment.[94] The Pennsylvania Supreme Court agreed, but the U.S. Supreme Court reversed.[95] First, the Court noted it "ha[d] consistently refused either to undertake the task of passing on the 'reasonableness' of a tax that otherwise is within the power . . . of state legislative authorities, or to hold that a tax is unconstitutional because it renders a business unprofitable."[96] Second, the Court identified problems with the state court's claim that the tax was so high that it amounted to an unlawful confiscation of property. Not only was such a conclusion reserved for "rare and special instances,"[97] but the Pennsylvania court itself

90. *Id.* (citation omitted).
91. *Id.*
92. *Id.* at 1450 (Kagan, J., dissenting).
93. *Id.*
94. City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 370-73 (1974).
95. *Id.* at 372-73.
96. *Id.* at 373.
97. *Id.* at 374.

had recognized that the tax was going to raise a significant amount of revenue.[98]

Similar problems existed with the lower court's "takings-in-effect" argument, which assumed that "a bona fide tax, if sufficiently burdensome, could be held invalid under the Fourteenth Amendment."[99] The Court found this at odds with "the oft-repeated principle that the judiciary should not infer a legislative attempt to exercise a forbidden power in the form of a seeming tax from the fact, alone, that the tax appears excessive or even so high as to threaten the existence of an occupation or business."[100] The Court found no more appealing the suggestion that "the ordinance loses its character as a tax . . . if the taxing authority, directly or through an instrumentality enjoying various forms of tax exemption, competes with the taxpayer in a manner thought to be unfair by the judiciary."[101] Institutional competence counseled against "the judiciary undertak[ing] to separate those taxes that are too burdensome from those that are not," as well as engaging in "judicial oversight of the terms and circumstances under which the government or its tax-exempt instrumentalities may undertake to compete with the private sector."[102]

The Court's earlier decision in *Leonard v. Earle*[103] provides an even more pointed example of the refusal to second-guess a taxing measure on the ground that it is pretext for, or has the same effect as, a taking. In *Leonard*, the Court considered a Maryland statute that required oyster packers to deliver to the state ten percent of the empty oyster shells left over after the shucking process. The state planned to place the empty shells back into the oyster beds to prevent their destruction and aid in their reproduction.[104] The empty shells, however, had commercial value to the packers, who could sell them for use in road-making, fertilizer manufacturing, and chicken feed.[105] Thus, the plaintiff packer refused to deliver the required shells and challenged the statute as effecting an uncompensated taking of its property.[106]

The Court unanimously rejected this challenge. Noting that the state undoubtedly could have taxed the packers for a cash equivalent to the value of the empty shells, the Court saw no meaningful difference in the state physically demanding the shells themselves. "[A]s

98. *Id.* at 375 ("It would have been difficult from any standpoint to have held that the ordinance was in no sense a revenue measure.").

99. *Id.* at 376.

100. *Id.*

101. *Id.*

102. *Id.*

103. 279 U.S. 392 (1929).

104. *Id.* at 393-94.

105. *Id.* at 393.

106. *Id.* at 396.

the packer lawfully could be required to pay that sum in money," wrote Justice McReynolds, "we think nothing in the Federal Constitution prevents the State from demanding that he give up the same per cent[age] of such shells."[107] This was so for two primary reasons. First, the Court viewed the form of the exaction—whether payable in cash or in kind—to be of no material difference to the packer: "From the packer's standpoint empty shells are but ordinary articles of commerce, desirable because convertible into money."[108] Additionally, the Court indicated that the method by which a tax is payable—including delivery of specific property—was a matter of legislative, not judicial, competence: "The extent to which it [the power to tax] shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power."[109]

3. Racial Discrimination

When its public swimming pools were held to discriminate against African Americans because they were white-only, the city of Jackson, Mississippi transferred ownership of one to the YMCA and closed four others.[110] The closure was challenged as an attempt to evade a lower court's finding and an attempt to evade the Equal Protection Clause. But the Court in *Palmer v. Thompson* concluded that there was no constitutional violation. Responding to the argument that it was the intent of the city, in closing the pools, to prevent their integration, the Court replied that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[111] While the Court conceded that there was "[s]ome evidence" in the record that the decision to close the pools was motivated by "ideological opposition to racial integration in swimming pools,"[112] there was also evidence that the city concluded that integrated pools could not be operated safely or economically.[113] Justice Black concluded:

> It is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its sup-

107. *Id.*
108. *Id.*
109. *Id.* at 397.
110. Palmer v. Thompson, 403 U.S. 217, 218-19 (1971).
111. *Id.* at 224.
112. *Id.* at 224-25.
113. *Id.* at 225.

> porters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.[114]

The Court distinguished cases like *Gomillion v. Lightfoot* on the grounds that the primary basis on which those laws were invalidated was their discriminatory *effects*.[115] Here the effects fell on black and white alike, according to the Court.[116]

Justice White, dissenting, responded that "[s]tate action predicated solely on opposition to a lawful court order to desegregate is a denial of equal protection of the laws."[117] He questioned the "substantial evidence" credited by the majority that the pools were closed because they could not be operated economically if integrated.[118] But for a court order to open the pools to all regardless of race, they would have remained open, he concluded; therefore, the decision to close them was motivated by opposition to integration and could not be squared with the Equal Protection Clause.[119]

Given *Palmer v. Thompson*'s emphasis on the need to prove *effects* and its skepticism about the ability or propriety of discerning the *purpose* or *intent* behind an official act, there is an irony in the Court's decision a few years later in *Washington v. Davis*.[120] Unsuccessful applicants for positions on the District of Columbia police force claimed that the use of a qualifying exam for police recruits violated the equal protection component of the Fifth Amendment[121] because it had a disproportionate impact on African-American applicants.[122] The court of appeals concluded that such a disparate impact was sufficient to state a claim for race discrimination under the Fifth Amendment, regardless of the lack of discriminatory intent.[123]

Justice White, for the Court, reversed. "[O]ur cases," he wrote, "have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory pur-

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114. *Id.*

115. *Id.*

116. *Id.* There was evidence, however, that the pool transferred to the YMCA continued to operate on a segregated basis. *Id.* at 252 (White, J., dissenting).

117. *Id.* at 265 (White, J., dissenting).

118. *Id.* at 259.

119. *Id.* at 270-71.

120. 426 U.S. 229 (1976).

121. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954) (holding that the Due Process Clause of the Fifth Amendment has an equal protection component that binds the federal government as the Equal Protection Clause does the states).

122. According to the Court, four times as many African-American applicants failed the test as did white applicants. *Davis*, 426 U.S. at 237.

123. *Id.*

pose, is unconstitutional *solely* because it has a racially disproportionate impact."[124] To the contrary, the Court's cases, he argued, clearly demonstrated the need to show that official action was motivated by an intent to discriminate,[125] either by reference to express language in a statute, or by inference from "the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[126] The Court explained away *Palmer v. Thompson*'s opposite claim—that invidious purpose could *never* form the basis for invalidating official acts—by explaining that in that case the Court

> [a]ccept[ed] the finding that the pools were closed to avoid violence and economic loss . . . [and] rejected the argument that the abandonment of this service was inconsistent with the outstanding desegregation decree and that the otherwise seemingly permissible ends served by the ordinance could be impeached by demonstrating that racially invidious motivations had prompted the city council's action.[127]

Were disparate impact sufficient to invalidate a law, the Court worried, such a holding "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[128] The Court concluded that nothing about the decision to use a screening test or its administration indicated an intent to discriminate against African-American applicants—indeed, it found that the District of Columbia had gone out of its way to encourage African Americans to apply for positions on the police force.[129]

The Court had occasion again to consider the requirement for discriminatory intent the next term in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[130] In that case, the Court considered a local zoning decision to prohibit a multi-family housing development, which the plaintiffs alleged had a racially disproportionate impact.[131] The majority reiterated that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[132] It then concluded that the evidence

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124. *Id.* at 239 (emphasis in original).
125. *Id.* at 239-42.
126. *Id.* at 242.
127. *Id.* at 242-43.
128. *Id.* at 248.
129. *Id.* at 245-47.
130. 429 U.S. 252 (1977).
131. *Id.* at 255-60.
132. *Id.* at 265.

showed that city officials, in denying the petition to rezone, "focused almost exclusively on the zoning aspects" of the planned housing project, rather than on the probable racial composition of the project's ultimate residents.[133] As such, the plaintiffs could not show that discriminatory purpose was a motivating factor in the city's decision, ending the constitutional inquiry and leaving the lower court's conclusion of discriminatory effect "without independent constitutional significance."[134]

4. Abortion Funding

Following *Roe v. Wade*,[135] in which the Court held that a woman's choice to terminate her pregnancy before the third trimester was a fundamental right guaranteed by the Fourteenth Amendment, states and the federal government restricted conditions under which abortions would be subsidized by the government. The Court upheld Connecticut's decision to cover only "medically necessary" abortions—while funding childbirth—under its Medicaid program in *Maher v. Roe*.[136] The respondents maintained that the refusal to subsidize abortion constituted a denial of the right. The Court disagreed. Justice Powell wrote that *Roe v. Wade* and subsequent cases in which regulations of abortion were invalidated "recognize a constitutionally protected interest 'in making certain kinds of important decisions' free from governmental compulsion."[137] By contrast,

> [t]he Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.[138]

The dissent accused the majority of "distressing insensitivity" to the plight of poor women who "will feel they have no choice but to carry their pregnancies to term because the State will pay for the associated medical services, even though they would have chosen to

133. *Id.* at 270.
134. *Id.* at 270-71.
135. 410 U.S. 113 (1973).
136. 432 U.S. 464 (1977).
137. *Id.* at 473.
138. *Id.* at 474.

have abortions if the State had also provided funds for that procedure."[139] The decision, the dissent alleged, "seriously erodes the principles that *Roe* . . . announced to guide the determination of what constitutes an unconstitutional infringement of the fundamental right . . . ."[140] Justice Brennan also argued that the decision was inconsistent with cases involving other fundamental rights, in which the Court had "found . . . infringements . . . not limited to outright denials of those rights,"[141] but also cases in which the government imposed "restraints that make exercise of those rights more difficult."[142]

At the federal level, the "Hyde Amendment" prohibited the use of federal funds to pay for abortions unless the life of the woman was in danger, or the pregnancy resulted from rape or incest.[143] This exclusion was challenged in *Harris v. McRae*; as in *Maher*, the Court upheld the exclusions, finding that failing to subsidize abortion did not deprive women of the right to an abortion. For the Court, Justice Potter Stewart wrote that the Hyde Amendment, like Connecticut's regulations, "place[d] no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest."[144] Indigency, which the government did not create, produced the inability to procure an abortion for poor women. If there were a right to subsidized abortion, then other rights recognized by the Court—the right to use contraceptives or send children to private schools—could likewise be read to require government subsidies to the poor to enable them meaningfully to enjoy those rights.[145] That result "would mark a drastic change in our understanding of the Constitution," wrote Stewart.[146]

IV. WHY THE COURT DECLINES TO CREATE ANTI-EVASION DOCTRINES

The cases described in Part III establish that the Court regularly declines invitations by parties to create AEDs in a substantial number of cases involving structures and powers as well as civil liberties. But simply establishing the fact does not answer the more important

139. *Id.* at 483 (Brennan, J., dissenting).

140. *Id.* at 484.

141. *Id.* at 487.

142. *Id.*

143. Harris v. McRae, 448 U.S. 297, 302 (1980).

144. *Id.* at 315.

145. *Id.* at 317-18.

146. *Id.* at 318. Justice Brennan dissented, rehearsing his earlier complaints about the majority's "failure to acknowledge that the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions." *Id.* at 334 (Brennan, J., dissenting).

question: Why does the Court create AEDs in some areas but not in others? Why will the Court treat discriminatory effects against interstate commerce as sufficient to invalidate state or local action, but not when official action has a disparate impact on one racial group?[147] Why did the Court create the regulatory takings doctrine that prevents de facto takings effected by legislation, while permitting Congress to evade the Copyright Clause's "limited Times" restriction by continuously extending the length of copyright?[148]

Because a primary function of AEDs is to optimize constitutional principles and to prevent officials from observing the form of doctrinal rules at the expense of substance, it is tempting to conclude that in the cases discussed above, the Court simply *isn't* interested in optimizing the particular constitutional principles at issue. It is also tempting to throw up one's hands and conclude that the Court will create AEDs when it creates them, and will not create them when it does not.

In this Part, however, we hope to avoid either cynicism or tautology in our examination of this question. A close reading of the Court's reasoning in cases rejecting calls for AEDs reveals that the Court engages in anti-anti-evasion for one or more related reasons: (1) concerns about institutional competence expressed as a felt need for deference to another branch to permit the allegedly evasive activity; (2) a perceived distinction between conduct proscribed by the Constitution and the official action alleged to evade that proscription; (3) a reluctance to frame AEDs based on impermissible purpose alone; and (4) concerns about the consequences of over-enforcement of a constitutional principle through the use of AEDs. We find these reasons incomplete, however, because similar claims could be made about cases in which the Court *does* create AEDs. In Part V, we hypothesize that cases in which the Court declines to create AEDs share common characteristics that, though not remarked upon by the Court, explain its decision to engage in anti-anti-evasion. Here, however, we address the Court's stated reasons for such a decision.

A. Institutional Competence and Deference

Perhaps the most common reason articulated by the Court for declining to create an AED is that doing so will upset traditional balance of power arrangements or otherwise extend the judicial function beyond its proper boundaries. In several of the cases described above, the Court expressed a sense that either it ought to defer to historic

147. *Compare* Denning & Kent, *supra* note 1, at 1789-90, *with supra* notes 110-34 and accompanying text.

148. *Compare* Denning & Kent, *supra* note 1, at 1792-93, *with supra* notes 25-34 and accompanying text.

practice permitting the alleged evasion or it lacked the institutional competence to design an appropriate AED. In *Eldred v. Ashcroft*, for example, the Court deferred both to historic practice retroactively extending the time for existing copyrights and to Congress's decision to do so in that case. Noting that the statute at issue "reflects judgments of a kind Congress typically makes,"[149] the majority "stressed . . . that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."[150]

The Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority* provides another example of this rationale. In overruling its prior decision that the FLSA could not apply to state and local government employers, the Court noted that applying that rule had required difficult line drawing concerning the nature of the federal system, as well as about what functions and services government was supposed to provide. Recognizing that it was "an open question how well equipped" judicial officers are to make these determinations, the Court explained its reluctance to interject the judiciary into matters of public policy: "Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[151] Overruling its prior decisions to the contrary was required, the Court went on, by the "[d]ue respect . . . [the Court owed to] the reach of congressional power within the federal system."[152]

Similar statements can be found throughout the Court's anti-anti-evasion opinions.[153] The refusal to consider a "taxes-as-takings" AED, for example, is grounded in an unwillingness or inability to engage in the line drawing necessary to distinguish "true" taxes from confiscatory taxes that really are takings.[154] In both *Mueller v. Allen* and

149. Eldred v. Ashcroft, 537 U.S. 186, 205 (2003).

150. *Id.* at 212.

151. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 545-46 (1985).

152. *Id.* at 557.

153. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 227 (1971) (Burger, C.J., concurring) ("Probably few persons, prior to this case, would have imagined that cities could be forced by five lifetime judges to construct or refurbish swimming pools which they chose not to operate for any reason, sound or unsound."); Henneford v. Silas Mason Co., 300 U.S. 577, 587-88 (1937) ("A legislature has a wide range of choice in classifying and limiting the subjects of taxation. . . . Such questions of fiscal policy will not be answered by a court.").

154. *See* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 376 (1974):

> This approach would demand not only that the judiciary undertake to separate those taxes that are too burdensome from those that are not, but also would require judicial oversight of the terms and circumstances under which the government or its tax-exempt instrumentalities may undertake to compete with the private sector. The clear teaching of prior cases is that this is not a task that the Due Process Clause demands of or permits to the judiciary. We are not now inclined to chart a different course.

Washington v. Davis, the Court was equally wary of its ability to fashion rules inferring constitutional impermissibility from statistical evidence of actual benefit or burden, as well as the propriety of courts even engaging in that exercise.[155] And in the abortion funding cases, the Court emphasized that the legislature, and not the judiciary, was the proper forum for balancing the sensitive and competing policy interests that these cases typically involve.[156]

B. Constitutionally Significant Distinctions

Another common reason for declining to create an AED is that the complained-of action, to the Court, is not really evasion at all. The Court will point to something analytically distinctive about the action that renders it *not* merely an observance of form and disregard of the substance of a constitutional principle. Nowhere is this clearer than the Court's repeated refusal to treat tax expenditures as direct spending, either for purposes of the DCCD or, more recently, in its continued narrowing of the *Flast v. Cohen* exception to the bar on taxpayer standing. In DCCD cases, the Court repeatedly has suggested that "there is a constitutionally significant difference between subsidies and tax exemptions."[157] Likewise, in the context of taxpayer standing, the Court has emphasized a *constitutional* distinction between tax credits and direct expenditures, even though the *economic* consequences of the two devices may be similar.[158] These distinctions, for the Court, make a genuine difference that influences the ultimate make-up of constitutional doctrine.

In similar fashion, the Court has consistently regarded the decision *not* to subsidize a particular activity—abortion, for example—as being fundamentally different than a legislative decision to place a

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155. *See* Mueller v. Allen, 463 U.S. 388, 401 (1983) ("Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated."); Washington v. Davis, 426 U.S. 229, 247 (1976) (explaining that such a rule would involve "a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution").

156. *See* Harris v. McRae, 448 U.S. 297, 326 (1980) (explaining that public funding of abortion is a decision "entrusted under the Constitution to Congress, not the courts," and that "[i]t is not the mission of this Court or any other to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy"); Maher v. Roe, 432 U.S. 464, 479 (1977) ("The decision whether to expend state funds for nontherapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided. . . . [T]he appropriate forum for their resolution in a democracy is the legislature.").

157. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 590 (1997); *see also* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 (1994) (distinguishing a "pure subsidy," which "ordinarily imposes no burden on interstate commerce," from the offending tax expenditure under consideration); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988) ("Direct subsidization of domestic industry does not ordinarily run afoul of [the DCCD]; discriminatory taxation of out-of-state manufacturers does.").

158. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1447 (2011).

(non-financial) obstacle in the path of a woman who wishes to terminate her pregnancy.[159] The inability to secure an unsubsidized abortion is caused not by state action, but rather because of the poverty itself. Again, that distinction carries a real difference, according to the Court—the state presumably did not place the woman in a state of indigency and thus cannot be said to be imposing the restriction or proscription. Under these circumstances, the indigent woman is left "with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all."[160]

Consider also the different ways that the Court treats purpose tests. We will address this in more detail below, but here it suffices to note that the Court treats claims of improper motive as meaningfully different depending on the nature of the motive in question. Explaining its requirement for proof of racially discriminatory intent in the equal protection context, for example, the Court distinguished between racial animus and other legislative motivations:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration.[161]

Even though the Court often views allegations of improper motive with suspicion, *racial* motivation is sufficiently different that it warrants distinctive constitutional treatment.[162]

Finally, the Court's insistence in *Henneford v. Silas Mason Co.* that a tax on use is not the same as a tariff raising the costs of importation into a state,[163] and its differentiation in *Sabri v. United States* between federal spending as a trigger to punish individual conduct and federal spending as a means of overpowering state public policy choices,[164] provide yet more examples of the Court finding constitutionally significant distinctions that preclude the crafting of an AED.

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159. *See, e.g.*, *Harris*, 448 U.S. at 316; *Maher*, 432 U.S. at 474.

160. *Harris*, 448 U.S. at 317.

161. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (footnote omitted).

162. *See id.* at 265-66.

163. 300 U.S. 577, 586 (1937).

164. 541 U.S. 600, 608 (2004).

C. Skepticism About Purpose

As hinted at in the prior Part, the Court has displayed an ambivalent relationship with purpose tests throughout the years. On the one hand, it frequently uses purpose or intent tests to flush out unconstitutional actions that were somehow concealed.[165] But on the other, the Court is often wary of relying on impermissible purpose alone to invalidate official action, as *Palmer v. Thompson*, *Eldred*, and *Henneford* showed.[166] The Court's ambivalence stems from, as critics have argued, a reluctance to accuse another branch of legislating in bad faith, the difficulty in assigning motive or intent to a multimember body, the differences between the judicial and legislative functions, and the possibility that offending legislation will simply be reenacted after somehow purging itself of the effects of the malign purpose.[167]

It is interesting, then, that *Washington v. Davis required* a showing of discriminatory intent to prove a violation of the Equal Protection Clause. In addition to its conviction that racial motivation is significantly distinct from other types of intent,[168] the Court seemed concerned that holding discrimination-in-effect to be sufficient for invalidating official action would result in a flood of litigation calling into question innumerable federal and state policies.[169]

D. Consequentialism and the Failure to Create AEDs

Finally, the Court expresses a reluctance to create AEDs when it believes the consequences of adopting a particular AED will destabilize or dramatically alter constitutional doctrine. The Court worried in *Davis*, for example, that permitting disparate impact claims for race discrimination might end up permitting race to serve as a proxy for wealth, thus calling into question scores of laws that adversely affect minority groups whose members tend to be less wealthy.[170] Similar concerns—that to equate a refusal to subsidize a right was tantamount to infringing that same right—led the Court to reject the

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165. *See* Denning & Kent, *supra* note 1, at 1788-93 (describing purpose and effects tests as types of AEDs). *See generally* Caleb Nelson, *Judicial Review of Discriminatory Purpose*, 83 N.Y.U. L. REV. 1784 (2008) (discussing the evolution of the assessment of legislative purpose in the practice of judicial review).

166. *See* Eldred v. Ashcroft, 537 U.S. 186, 199-200 (2003); Palmer v. Thompson, 403 U.S. 217, 224 (1971); *Henneford*, 300 U.S. at 586.

167. *See, e.g.*, *Arlington Heights*, 429 U.S. at 265; *Palmer*, 403 U.S. at 225.

168. *See Arlington Heights*, 429 U.S. at 265-66; *supra* text accompanying note 161.

169. *See* Washington v. Davis, 426 U.S. 229, 239-43, 248 (1976); *supra* text accompanying notes 124-28.

170. *Davis*, 426 U.S. at 248 (explaining that such a rule "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes").

creation of an AED in the abortion funding cases. The Justices were concerned that so holding would constitutionalize vast swaths of the welfare state—at least those parts that impacted constitutional rights. That, in turn, would convert constitutional guarantees from "negative" liberties into positive ones, a move that was too radical for the Court.[171] " '[T]he Constitution,' " the Court explained in *Maher*, " 'does not provide judicial remedies for every social and economic ill.' "[172]

Considerations about disturbing existing constitutional frameworks also played a significant role in the Court's decision in *Garcia*. In overruling the AED previously created in *Usery*, the Court suggested that its prior rule ran the risk of upsetting the constitutional balance between federal and state authority. Noting that "the sovereignty of the States is limited by the Constitution itself,"[173] the majority explained that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[174]

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Implicit in the Court's decision not to create AEDs is its judgment that optimizing the enforcement of constitutional values—what we described as the main benefit of AEDs[175]—is not the Court's *raison d'être* in all constitutional cases. Other values—institutional competence, deference to past practice, separation of powers concerns—weigh on the Court's implementation of constitutional provisions. And yet, to us, the Court's articulated reasons for not creating AEDs don't tell the whole story. Many of the reasons discussed above are arguably present in cases in which the Court created or applied AEDs. Justices Scalia and Thomas, for example, have long complained that judicial enforcement of the DCCD—especially its balancing prong—is beyond the institutional competence of the judiciary.[176]

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171. *See* Harris v. McRae, 448 U.S. 297, 318 (1980) ("To hold otherwise would mark a drastic change in our understanding of the Constitution."); *cf. Palmer*, 403 U.S. at 228 (Burger, C.J., concurring) ("To find an equal protection issue in every closing of public swimming pools, tennis courts, or golf courses would distort beyond reason the meaning of [the Equal Protection Clause]" and would "constitutionally 'lock[] in' the public sponsor so that [the service or facility] may not be dropped . . . .").

172. Maher v. Roe, 432 U.S. 464, 479 (1977) (quoting Lindsey v. Normet, 405 U.S. 56, 74 (1972)).

173. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 548 (1985).

174. *Id.* at 552.

175. Denning & Kent, *supra* note 1, at 1797.

176. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 351 (2007) (Thomas, J., concurring) (complaining that the DCCD reflects only the policy preferences of majorities in particular cases, urging the doctrine's total abandonment); Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (complaining that balancing in DCCD cases requires comparing incommensurable values; requiring courts to "judg[e] whether a particular line is longer than a particular rock is heavy").

Academic and judicial critics of the Court's regulatory takings cases have complained that it ignores both historical precedent and salient differences between regulation and exercises of eminent domain.[177] And lamenting the consequences of over-enforcing constitutional principles through the use of AEDs is a familiar trope in dissenting opinions.[178] The question is still left hanging: What makes the Court less inclined to create AEDs in certain cases? Close inspection of the cases discussed above reveals a common thread that, we argue in Part V, explains the Court's reluctance to create AEDs.

V. AEDS AND ANTI-ANTI-EVASION: TOWARD A THEORY OF UNDER-ENFORCEMENT

As we recognized previously, AEDs tend to take the form of standards backstopping previously created rules to implement constitutional principles. Their function is prophylactic—they make it more difficult for officials to elevate form over substance, thereby frustrating covert violations of the Constitution. AEDs, then, over-enforce certain provisions. As we have pointed out in this Article, however, the Court doesn't always create AEDs. Why?

In reviewing the cases in which the Court has declined to create an AED, we are struck by a common thread: each deals to some extent either with governmental decisions to tax or spend or with the provision of subsidized goods or services. This characteristic is obvious in a number of the decisions discussed in Part III. *South Dakota v. Dole* and *Sabri v. United States*, for example, directly concern congressional spending authority. In similar fashion, the taxes-as-takings cases straightforwardly present issues about the government's power to tax. The DCCD cases involve either taxes or subsidies, as do the Establishment Clause and abortion funding cases.

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177. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1036-61 (1992) (Blackmun, J., dissenting); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000).

178. *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 314 (2001) (Thomas, J., dissenting). Criticizing the majority's extension of the state action doctrine, Justice Thomas complained that

> if the majority's new entwinement test develops in future years, it could affect many organizations that foster activities, enforce rules, and sponsor extracurricular competition among high schools—not just in athletics, but in such diverse areas as agriculture, mathematics, music, marching bands, forensics, and cheerleading. Indeed, this entwinement test may extend to other organizations that are composed of, or controlled by, public officials or public entities, such as firefighters, policemen, teachers, cities, or counties.

Id. at 314-15; *see also Lucas*, 505 U.S. at 1036 (Blackmun, J., dissenting) (expressing concern that "the Court's new [takings] policies will spread beyond the narrow confines of the present case").

Skeptical readers, however, might wonder about our characterization of the other cases. What about *Eldred*? *Washington v. Davis*? *Arlington Heights*? *Palmer v. Thompson*? What do race discrimination cases and a case about the Copyright Clause have to do with taxing and spending decisions? First, consider that "[a] copyright enables its owner to exclude competition from copiers, and so if there are no good substitutes for his work he will obtain a monopoly profit . . . by being able to charge a price in excess of his marginal cost (the cost of making an additional copy)."[179] This monopoly is granted by the government and results in a subsidy—in the form of the monopoly profits—from consumers of copyrighted works to their producers. The decision whether and to what extent to grant such privileges to a select group strikes us as consistent with other, more straightforward decisions to tax or spend or subsidize certain goods and services.

Washington v. Davis is a little different. On the surface, there is no connection between a disparate impact race discrimination claim and taxing and spending decisions. But in the opinion, the Court very quickly tumbled to the fact that race was often a proxy for wealth, and that claims of race discrimination could be lodged against laws that really discriminate on the basis of wealth. That result, the Court pointed out, "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[180] The zoning regulations at issue in *Arlington Heights* seem to fall squarely within the ambit of this concern, and scholars have noted that such regulations often have the economic effect of subsidizing some portion of the population at the expense of others.[181] Invalidating these regulations without evidence of an invidious purpose, the Court seemed to suggest, would be tantamount to deciding if and how land use subsidies should be meted out, a decision better left to the political branches. Similarly, the *Palmer* majority worried about "five lifetime judges" forcing cities "to construct or refurbish swimming pools which they choose not to operate for any reason, sound or unsound."[182]

More important than *what* subjects the cases involve, though, is *why* these subjects seem to matter. What makes the Court more likely to reject anti-evasion arguments in these types of cases as opposed to others? Though our conclusions here are tentative, our working

179. Richard A. Posner, *The Constitutionality of the Copyright Term Extension Act: Economics, Politics, Law, and Judicial Technique in* Eldred v Ashcroft, 2003 SUP. CT. REV. 143, 146.

180. Washington v. Davis, 426 U.S. 229, 248 (1976).

181. *See, e.g.*, Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 31-32 (1996).

182. Palmer v. Thompson, 403 U.S. 217, 227 (1971).

hypothesis is that the Court—at least implicitly, though sometimes explicitly—believes that there are robust political protections in these cases that sufficiently police the constitutional boundaries and prevent governmental overreaching. We stress that the Court's judgment here is a comparative one. It is evident that sometimes the political process does not monitor the boundaries effectively. The point is that, in the Court's judgment, it does so most of the time better than a court would be able to do. Or, put differently, the costs of optimization through the use of AEDs (which would probably result in some over-enforcement of constitutional norms) are greater than the risk of under-enforcement occasioned by the lack of an available AED.

Consider again the repeated references in the Court's opinions to the limits of its own institutional competence. These statements not only suggest that the Court perceives questions regarding optimal levels of taxing and spending to be outside its purview, but they also carry the additional message that the policing of those limits lies with other bodies that can discharge that function better than the judiciary. By ceding the enforcement role to these other institutions, moreover, the Court signals its confidence that the protections provided by the political processes are sufficient to prevent grave abuses.[183]

Sometimes, as in *Garcia*, the Court makes this point explicitly: "[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated."[184] More typically, the Court implies it, as it did in *Eldred*'s recounting of the various interests that participated in the passage of the Copyright Term Extension Act,[185] followed by its conclusion that the retroactive application of the term extension was a "rational enactment" reflecting "congressional determinations and policy judgments" that the Court refused to second-guess.[186] The majority chided Justice Breyer for his suggestion that a new three-part test be applied to the Act, commenting that " 'it is not our role to alter the delicate balance Congress has la-

183. *Cf.* Nordlinger v. Hahn, 505 U.S. 1, 17-18 (1992) (noting, in a tax case, that "the Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted" (citation and internal quotation marks omitted)).

184. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985); *see also id.* at 552-53 (discussing "[t]he effectiveness of the federal political process in preserving . . . States' interests"); *id.* at 554 ("[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result.").

185. Eldred v. Ashcroft, 537 U.S. 186, 205-06 & nn.11-13, 207 nn.14-15 (2003).

186. *Id.* at 208.

bored to achieve.' "[187] One hears a similar admonition in the Court's refusal to allow the taxpayers standing to sue over the tax expenditures in *Winn*. "Few exercises of the judicial power," the Court concluded, "are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them."[188] There is a forum for disputes such as these, the Court seems to say; it isn't a judicial one, but is one that can be counted upon to do a passable job preventing abuses. "We should not forget," the Court cautioned in *Maher v. Roe*, "that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' "[189]

By contrast, cases in which the Court has created AEDs feature clues that the Court is worried that the process protections to monitor official abuse either do not exist or could be expected to severely underperform relative to judicial enforcement. For example, regulatory takings opinions, an area in which the Court routinely employs AEDs,[190] often express doubt that process protections are robust enough to uphold the constitutional principle enshrined in the Takings Clause. In *Pennsylvania Coal Co. v. Mahon*,[191] which many consider to be the genesis of the Court's regulatory takings doctrine, Justice Holmes directly called into question the efficacy of political safeguards when it comes to protecting private property from public encroachment. Noting that the Takings Clause presupposes the existence of a public purpose, he pointed out that it nevertheless requires the payment of just compensation to the property owner, regardless of how important the public purpose may be.[192] "When this seemingly absolute protection is found to be qualified by the police power," he continued, "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."[193] More recently, the Court has made clear that its regulatory takings jurisprudence is grounded in the idea of proper burden distribution, "bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be

187. *Id.* at 205 n.10 (quoting Stewart v. Abend, 495 U.S. 207, 230 (1990)).

188. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1449 (2011).

189. Maher v. Roe, 432 U.S. 464, 479-80 (1977) (quoting Mo., Kan., & Tex. Ry. Co. v. May, 194 U.S. 267, 270 (1904)).

190. *See* Denning & Kent, supra note 1, at 1792-93 (discussing regulatory takings doctrine as example of AED); *see also id.* at 1795 (noting that "the Court's entire regulatory takings jurisprudence serves as an elaborate body of AEDs").

191. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

192. *Id.* at 415.

193. *Id.*

borne by the public as a whole."[194] Implicit in this justification is the notion that the political process cannot be trusted fairly to apportion public burdens where "other people's" property is involved. As one state court has noted in applying the Supreme Court's takings decisions, it is "entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others."[195]

The Court's dormant Commerce Clause opinions frequently sound a similar theme. In explaining why the federal government was empowered to regulate interstate commerce, Justice Cardozo famously referred to the Confederation Era experience of "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation" that suppressed competition among the states.[196] The reason for the involvement of the Court in invalidating state laws that give in to the temptation to discriminate (as opposed to leaving matters for congressional regulation) is the sense that the offending state and local laws "are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters."[197] For the Court to stay its hand, Justice Robert Jackson later concluded, "would allow the states to establish the restraints and let commerce struggle for Congressional action to make it free."[198]

The decision in *West Lynn Creamery, Inc. v. Healy* further illustrates the point.[199] Even though the tax in that case was facially neutral, applying to in-state and out-of-state producers alike, the reve-

194. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

195. Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004). The link between the Takings Clause and the Court's takings decisions, on the one hand, and political process failure, on the other, has been noted by several scholars. *See, e.g.*, Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings*, 51 WM. & MARY L. REV. 1833, 1863-65 (2010) (discussing process failure in context of land use exactions); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 855 (1995) (positing that remedying process failure was original purpose of the Takings Clause); *see also* Pennell v. City of San Jose, 485 U.S. 1, 21-23 (1988) (Scalia, J., dissenting) (relating takings protections to notions of political transparency and accountability).

196. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935) (internal quotation marks omitted).

197. Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring).

198. *Id.* at 401.

199. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), which struck down a state taxing scheme under the DCCD, likewise illustrates that there is nothing inherently magical about taxing and spending decisions in and of themselves. Rather, it is the Court's assessment that these cases generally provide sufficient political protections that is the driving factor. In cases where that assessment is shown to be false, even with regard to tax and spend measures, the Court will intervene.

nues raised from the tax were distributed only to in-state businesses.[200] This feature caused the constitutional infirmity, and for the Court, the problem was rooted directly in the lack of political safeguards:

> Nondiscriminatory measures, like the evenhanded tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because "[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse." However, when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy.[201]

The Court thus saw in the tax-plus-subsidy scheme a potential process failure similar to the one articulated above in the context of regulatory takings. Given the incentives for in-state producers to "gang up" on their out-of-state counterparts, the political process would be unlikely to provide adequate protections, making judicial intervention more necessary.[202]

Thus, it appears to us that the Court largely views the political process as typically better-equipped to safeguard constitutional principles in cases that involve taxing and spending decisions than in cases involving other types of regulation. Concomitantly, because of the existence of these process protections, the Court is more likely to decline the invitation to create an AED in the former cases as opposed to the latter. But where political safeguards are inadequate, even taxing and spending measures will come under heightened scrutiny.

A final piece of evidence in support of these conclusions is provided by the Court's recent decision in *NFIB v. Sebelius*, which was handed down as we were finishing this Article. Chief Justice Roberts's opinion for the Court upholding the individual mandate did so not on Commerce Clause grounds, but on the ground that the payment incurred by individuals for not purchasing insurance was a

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200. *Id.* at 188.

201. *Id.* at 200 (alteration in original) (footnote and citations omitted) (quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 473 n.17 (1981)).

202. This, of course, raises the question why direct subsidies to in-state interests are constitutionally permissible when similar tax expenditures are not. Although full treatment of that issue is beyond our scope, we note that several commentators have explained the difference on just the same terms we emphasize here—i.e., tax expenditures are less transparent than direct subsidies and, therefore, are less likely to be effectively monitored through the political process. *See, e.g.*, Coenen, *supra* note 37, at 984-86; J. Clifton Fleming, Jr. & Robert J. Peroni, *Reinvigorating Tax Expenditure Analysis and Its International Dimension*, 27 VA. TAX. REV. 437, 481-83 (2008); Ruth Mason, *Federalism and the Taxing Power*, 99 CAL. L. REV. 975, 1016-17 (2011). *But see* Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379 (1998) (arguing that the two devices should be treated as constitutionally equivalent in many cases).

permissible exercise of Congress's taxing power.[203] Opponents of the mandate argued—and most courts agreed—that the "shared responsibility payment" was in truth an unconstitutional "penalty," not a valid use of Congress's taxing power.[204] The Court rejected this argument, suggesting that the mandated payment was *not* a pretextual imposition of an impermissible penalty, but a real tax.[205]

Throughout this portion of the opinion, Chief Justice Roberts emphasized the protections built in to prevent abuses. He noted that, in addition to persons exempted from payment, the amount itself is capped: "for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more."[206] Moreover, Congress "bar[red] the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies."[207] He also stressed that the Act need not be read to make the failure to purchase insurance unlawful: "Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS."[208] Because an estimated four million people per year are expected to forgo insurance and make the payment, and because "Congress apparently regards such extensive failure to comply with the mandate as tolerable," that "suggests that Congress did not think it was creating four million outlaws."[209] In short, for the majority, the political process that produced the mandate incorporated safeguards against its abuse, and these legislative protections adequately policed the constitutional boundary demarcating a permissible tax from a pretextual one. As such, the Court apparently saw little reason for further, judicially created precautions.

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203. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2600 (2012) ("The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax."). This portion of the Chief Justice's opinion, Part III.C, was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, and thus constituted the opinion of the Court.

204. Though we did not discuss the taxing power in our earlier article, the tax/penalty distinction is suggestive of a pretext AED. *See* Bailey v. Drexel Furniture Co. (*Child Labor Tax Case*), 259 U.S. 20, 36-37 (1922) (holding that Congress may not expand its power by labeling a severe penalty a "tax"); Denning & Kent, *supra* note 1, at 1780-84 (discussing pretext AEDs).

205. *NFIB*, 132 S. Ct. at 2595 (suggesting indicia of a tax is a functional inquiry; emphasizing "practical characteristics" of a tax: (1) whether it raised revenue without imposing an excessive burden on the payer; (2) the presence or absence of a scienter requirement; and (3) which government agency possessed responsibility for collection); *see also supra* notes 157-64 and accompanying text (discussing refusal to create or apply AEDs because of the Court's perception of constitutionally significant distinctions).

206. *Id.* at 2595-96.

207. *Id.* at 2580; *see also id.* at 2596 (noting that "the payment is collected solely by the IRS through the normal means of taxation—except that the Service is *not* allowed to use those means most suggestive of a punitive sanction" (emphasis in original)).

208. *Id.* at 2597.

209. *Id.*

More support comes from Roberts's discussion of the Medicaid expansion. Under the Act, Medicaid was dramatically expanded from requiring states "to cover only certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the disabled" to forcing them "to cover *all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line" by 2014.[210] The coverage, moreover, had to meet federally mandated minimum standards to enable individuals to comply with the mandate's requirements. States that refused to comply with the mandated expansion lost *all* federal Medicaid funds.[211] Seven Justices thought that this "gun to the head,"[212] in the Chief Justice's phrase, was unconstitutionally "coercive" and went beyond Congress's power to attach conditions to money that it offers to states.[213]

At first blush, the Court's deployment of an "anti-coercion" AED in a spending matter would seem to create problems for our thesis.[214] A close reading of the various opinions, however, tends to confirm our working hypothesis. The seven members of the Court who voted to invalidate the penalty for refusing to embrace Medicaid's expansion on the grounds that it was unconstitutionally coercive were employing an AED previously suggested by the *Dole* Court, but one that had remained dormant. Consistent with our hypothesis, the Court abandoned its usual anti-anti-evasion position—even though this case involved spending—because it perceived the typical political safeguards as absent or having been severely compromised. The Court thought that the dramatic expansion of Medicaid represented a change in the nature of the program, not merely a change in degree. When coupled with the threatened loss of all existing Medicaid funds, states could not realistically escape the federal yoke by simply declining the funds; they were presented with an all-or-nothing proposition.

Roberts's opinion began by linking the anti-coercion rule for conditional spending with the constitutional principle underlying the anti-commandeering principle[215]: political accountability. "Permitting the

210. *Id.* at 2601.

211. *Id.* at 2603.

212. *Id.* at 2604 ("[T]he financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head.").

213. *Id.* at 2608 (opinion of Roberts, C.J., Breyer & Kagan, JJ.); *id.* at 2662 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("If the anticoercion rule does not apply in this case, then there is no such rule.").

214. *See supra* notes 16-24 and accompanying text (describing the Court's lack of interest in articulating criteria for "coercive" spending conditions as an example of anti-anti-evasion); *see also* Denning & Kent, *supra* note 1, at 1783-84 (discussing *Dole*'s suggestion that spending conditions could be so onerous as to be coercive and, thus, unconstitutional, as a possible—if inchoate—AED).

215. The anti-commandeering principle prohibits the federal government from forcing state legislatures or executive branch officials to implement a federal program. Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system," Roberts wrote.[216] He explained that accountability is not threatened when "a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer."[217] Without that choice, however, "the Federal Government can achieve its objectives without accountability"—indeed, the danger to the federal system is greater because "Congress can use [the spending] power to implement federal policy it could not impose directly under its enumerated powers."[218]

When the process works as it should, it provides ample safeguards for state interests, and no judicial intervention is called for. "In the typical case," the Chief Justice wrote, "we look to the States to defend their prerogatives by adopting 'the simple expedient of not yielding' to federal blandishments when they do not want to embrace the federal policies as their own."[219] He added wryly that "[t]he States are separate and independent sovereigns. Sometimes they have to act like it."[220]

Two features of the Medicaid expansion, however, suggested that Congress had deliberately short-circuited these safeguards, warranting application of the anti-coercion AED. First, the Act dramatically expanded the scope of Medicaid both in terms of eligible persons as well as the menu of services states were required to offer.[221] Second, a state's refusal to participate in the expansion would not merely render it ineligible for new federal money, but would also forfeit all *existing* Medicaid funding.[222] This "gun to the head" went far beyond *South Dakota v. Dole*'s[223] withholding of five percent of highway funds.[224] Because of the overall loss to a state's budget, Chief Justice Roberts concluded, states had no real choice but to accept the expansion of the program and the money that came with it, which was likely the reason Congress designed the program as it did.[225]

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216. *NFIB*, 132 S. Ct. at 2602.

217. *Id.* at 2602-03.

218. *Id.* at 2603.

219. *Id.* (quoting Massachusetts v. Mellon, 262 U.S. 447, 482 (1923)).

220. *Id.*

221. *Id.* at 2605-06.

222. *Id.* at 2603.

223. 483 U.S. 203 (1987).

224. *NFIB*, 132 S. Ct. at 2604.

225. *Id.* at 2606 ("[T]he manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program."); *id.* at 2665 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("If Congress had thought that States might actually refuse to go along with the expansion of Medicaid, Congress would surely have

This conclusion was echoed by the four Justices who authored the joint dissent. These Justices noted that while states may be theoretically free to refuse to embrace the expansion and forgo the money,

> [w]hen a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative. . . . [W]ithdrawal would likely force the State to impose a huge tax increase on its residents, and this new state tax would come on top of the federal taxes already paid by residents to support subsidies to participating States.[226]

For the dissenters, putting states to such a Hobson's Choice "would permit Congress to dictate policy in areas traditionally governed primarily at the state or local level,"[227] thus ending any semblance of state sovereignty in the federal system.[228] Still, they cautioned that "courts should not conclude that legislation is unconstitutional [under the anticoercion principle] unless the coercive nature of an offer is unmistakably clear."[229]

What is striking about the discussion of both the mandate and the Medicaid expansion is the degree to which the Justices explicitly focused on the safeguards protecting individuals or states from congressional abuse or overreaching.[230] That the Court upheld the mandate as a permissible tax, while finding the spending conditions impermissibly coercive, moreover, confirms our theory that what matters is not necessarily subject area, but the Court's perception about the viability of robust political safeguards relative to judicially enforced ones.[231]

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devised a backup scheme so that the most vulnerable groups in our society, those previously eligible for Medicaid, would not be left out in the cold.").

226. *Id.* at 2661-62 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

227. *Id.* at 2662.

228. *Id.* at 2661.

229. *Id.* at 2662.

230. In similar fashion, Justice Ginsburg grounded her dissent from the Court's ruling on the Medicaid expansion, at least in part, on the presence of adequate political safeguards. First, she rejected the notion that the Medicaid expansion threatened political accountability by muddying the waters as to which level of government—federal or state—was ultimately responsible for Medicaid policy: "no such confusion is apparent in this case," she wrote, "[because] Medicaid's status as a federally funded, state-administered program is hardly hidden from view." *Id.* at 2633 n.17 (Ginsburg, J., dissenting). Additionally, she thought that the coercion analysis depended too heavily on the resolution of issues that must, and would, be resolved through the political process itself. *See id.* at 2641 ("The coercion inquiry . . . appears to involve political judgments that defy judicial calculation."). Finally, Justice Ginsburg pointed to the political pressures that could be brought to bear on federal officials tasked with distributing money to the states, which would make those officials "all the more reluctant to cut off funds Congress has appropriated for a State's needy citizens." *Id.* at 2641 n.27.

231. We acknowledge at this point that our theory raises other questions. For example, assuming that our thesis is correct, is the Court's approach normatively defensible? Should

VI. CONCLUSION

Despite the utility and ubiquity of AEDs in constitutional adjudication, there are notable examples where the Court declines to create or implement them. The Court's own reasons for this decision include concerns about institutional competence and a need to defer to other branches, constitutionally significant distinctions between proscribed conduct and the actions alleged to be evasive, reluctance to ground AEDs in allegations of impermissible purpose, and concerns about the consequences that an AED might have on constitutional doctrine. While these reasons no doubt influence the Court's decision whether or not to employ an AED, we think that they only tell part of the story. The common thread in the anti-anti-evasion cases is that they typically, in one measure or another, involve taxing or spending decisions or the provision of government-subsidized goods and services. Underlying this commonality, and of much greater significance, is the Court's perception that these cases normally present a context where there are sturdy political safeguards that adequately monitor and enforce the relevant constitutional principle better than would a judicially crafted decision rule. Indeed, that the Court sometimes employs AEDs even in taxing and spending cases suggests that the driving factor is not the subject matter of the litigation but, rather, the Court's evaluation of the strength of applicable process protections.

In this way, the actions of the Court when it employs anti-anti-evasion confirm our earlier observation that when the Court chooses among decision rules, it is engaging in a form of risk regulation.[232] Just as AEDs suggest that the Court's doctrinal formation is a type of risk assessment that seeks to achieve optimal (rather than maximal) precautions,[233] the decision *not* to create an AED suggests that the Court believes adequate (even if incomplete) protections already exist without the need for additional decision rules. Moreover, the Court's evaluation in anti-anti-evasion cases seems to be that extra judicial

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the existence of political safeguards be as influential to the development of constitutional doctrine as we suggest it is as a practical matter? Additionally, there are questions about what baselines the Court uses in determining whether political protections are sufficiently robust to avoid the creation of an AED, as well as whether those baselines are themselves justifiable. These are important questions, and we hope to take them up in future work. For now, however, we have decided to leave them unanswered—even at the risk of seeming dodgy or indolent. As we explain below, we hope that our work here provides a hypothesis that can be tested against future cases. Before delving into these more difficult questions, we would like further evidence that our hypothesis actually holds up.

232. Denning & Kent, *supra* note 1, at 1813-15 (discussing risk regulation). We return to our doctrine-as-risk-regulation argument in a work currently in progress. Brannon P. Denning & Michael B. Kent, Jr., Judicial Doctrine as Risk Regulation (unpublished work in progress) (drafts on file with authors).

233. Denning & Kent, *supra* note 1, at 1814.

protections ultimately would prove riskier than leaving the issue to the political safeguards that are already operating.

Assuming there is something to our hypothesis, what are its implications? For us, it answers a question that had bothered us since the first article—why does the Court sometimes refuse to create AEDs? Beyond simply satisfying our own academic curiosity, we think that our articles, taken together, have broader implications as well. First, AEDs and the phenomenon of anti-anti-evasion drill down into possible reasons the Court has for adopting a set of decision rules or for choosing one set of decision rules over others that are available. Earlier work (usefully) described factors bearing on the Court's choices in rather abstract terms.[234] Here we have described a concrete choice often presented to the Court and offered a theory as to why it accepts or declines the opportunity to make one choice or another. This, we hope, contributes to the ongoing attempt to describe accurately what courts, in fact, do when they decide cases. At the very least, we have furnished a hypothesis that can be tested against future cases and their outcomes.

But we hope it is not too presumptuous of us to suggest that our thesis might be of value to judges and lawyers, not just academics. Our hypothesis suggests an additional reason, other than the ones given by the Court, driving its decisions whether or not to create AEDs. By identifying a factor that seems to be influencing the Justices' decisions—a factor that may have escaped the full awareness of the Justices themselves—we hope to encourage the Justices to be more intentional in selecting among available decision rules, and perhaps more transparent in the reasoning behind the adoption of one set over others.

If our hypothesis holds up, moreover, practicing lawyers might obviously benefit. If an advocate is asking the Court to create or adopt an AED, then she will know in advance the necessity of carefully crafting arguments that stress the inadequacy of existing political safeguards and the need for an AED as a result.[235] Conversely, those defending against claims that the Court should adopt or apply an AED might stress not only the presence of one or more of the factors to which the Court regularly avers when it engages in anti-anti-evasion, but might also stress any political safeguards that render an AED unnecessary, if not pernicious.

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234. *See, e.g.*, Berman, *supra* note 2, at 92-96; *see also* KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM 26-32 (2006).

235. In like fashion, our hypothetical advocate will, we hope, also know what arguments not to make. *See supra* notes 165-69 and accompanying text (noting the Court's reluctance to create AEDs solely on the basis of alleged improper governmental purpose).