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Abstract

The aim of this paper is to compare the impact of the federal spending power in the United States and Canada, by identifying the factors that might account for a modus vivendi between horizontal equalisation and federal units’ autonomy. For each state, it will be analyzed the legal foundation of the federal spending power, such as the political implications.Through legal and political argumentations the following thesis will be supported: if the federal spending power is something which sould not flow into the rejection of cultural diversity, it has therefore to be circumscribed by the extension of more flexible block grants and the effective right to opt-out of conditional grants.

Key Words

Federal spending power, conditional grants, United States, Canada

From nation-building to "coercive federalism": the role of the federal spending power in the United States and Canada

Emanuele Pollio[*]

INTRODUCTION[1]

"There are philosophical ideas about federalism which are strained by the use of the federal spending power"

(David Yudin[2])

The federal spending power has been defined as "the power of a federal authority to make payments to people or institutions or governments for purposes on which it does or does not have the power to legislate[3]". This federal prerogative has been historically enforced through conditional grants and shared-cost programmes, which transformed the federal regimes of the United States and Canada in terms of centralisation and "coercive federalism[4]".

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[1] I would like to thank prof. Johanne Poirier for her comments and suggestions. Usual disclaimers apply.

[2] YUDIN David W.S., *The federal spending power in Canada, Australia and United States*, in National Journal of Constitutional Law, 13:3, 2002, p. 483.

[3] RICHER Karine, *The Federal Spending Power*, Library of Parliament, Ottawa, 13/11/2007, http://www.parl.gc.ca/information/library/PRBpubs/prb0736-e.htm. p. 1.

Following the dynamic theory of federalism, conceptualized by Carl Friedrich through the notion of "federalizing process[5]", the federal spending power constitutes one of the crucial factors that can influence the informal transformation of a federal system. As R. A. Musgrave has pointed out, the federal spending power could still be considered as "the most prominent factor of institutional change in federal regimes[6]". The emergence of welfare state, in part consequently to the Great Depression, has altered the traditional distribution of competences between the Federation and the federated units. Such a massive extension of the economic public intervention generated what Keith Banting described as a "mismatch between governments' fiscal resources and their constitutional responsabilities[7]". The increased legislative centralisation, set up to promote some important social policies with national standards, has nonetheless partially "corrupted" the federal principle. In fact, federal governments, by attaching mandatory conditions to the vertical financial transfers, indirectly affected the regulation in areas of federated States' jurisdiction.

Always considered as one of the most controversial issues in the relations between governmental levels, the federal spending power was seen, on the one hand, as a source of "nation building", equalisation and modernisation of federal systems in a "cooperative" model of territorial cohesion. According to Hamish Telford, "many of the social programmes established by the spending power, have become part of the "national" identity[8]". Conversely, detractors of the spending power doctrine refer "to the pervasive use of federal

[4] See POSNER Paul, *The Politics of Coercive Federalism in the Bush Era*, in "Publius:The Journal of Federalism", volume 37 number 3-2007, pp. 390-412.

[5] See FRIEDRICH Carl, *Trends of Federalism in Theory and Practice*, Pall Mall, London, 1968, p.8.

[6] MUSGRAVE R. cit. in ZORZI GIUSTINIANI Antonio, *Competenze legislative e federalismo fiscale in sei ordinamenti liberal-democratici*, in ZORZI GIUSTINIANI Antonio, *Stato Costituzionale ed espansione della democrazia*, 2002, Cedam, Padova, p. 356.

[7] BANTING Keith, *The Welfare State and Canadian Federalism,* 1987, Kingstone, McGill-Queen's University Press, p. 51.

[8] See H. TELFORD, *The federal spending power in Canada: Nation-Building or Nation-Destroying?*, in in "Publius: The Journal of Federalism", volume 33 number 1-2003, pp. 23-44.

spending as nothing less than the complete undermining of a federal state[9]".

The aim of this paper is to compare the impact of the federal spending power in the United States and Canada, by identifying the factors that might account for a *modus vivendi* between horizontal equalisation and federal units' autonomy. For each state, it will be analyzed the legal foundation of the federal spending power, such as the political implications. Because of their geographical proximity, the United States and Canada present strong cultural and historical links. Nevertheless, these two federations structurally differ in the constitutional foundation of the federal spending power[10]. What makes the approach of comparative law particularly useful to understand is the different judicial and political evolution the spending power has shown in those federal regimes.

Notwithstanding a dominant acceptance of the federal spending power, an increasingly widespread criticism characterizes the issue, particularly crucial in Quebec's dissatisfaction with the Canadian federation. Far from representing a highly technical exercise, the analyisis of the federal spending power is intimately connected with the nature of federalism, its implications concerning the respect of cultural diversity in a federal society.

1. THE RISE OF WELFARE STATE AND THE FEDERAL SPENDING POWER IN CANADA

1.1. The historical evolution of the Canadian fiscal federalism in parallel with the growing modern welfare state

[9] YUDIN David W.S., *The federal spending power in Canada, Australia and United States*, in National Journal of Constitutional Law, 13:3, 2002, pp.436-484, p. 439.
[10] P. HOGG, *Constitutional Law of Canada*, 2005, Carslaw, Toronto, pp. 171-173.

The emergence of the welfare state posed for the Canadian federal regime what Banting has defined a "major constitutional dilemma[11]". Conceived as a classical 19th century constitutional document, the British North America Act[12] (BNA Act) did not authoritatively staute which level of government had to respond to social problems, both by legislation and by finance resources. Under section 91 and 92 of the BNA Act, the federal government is allowed to raise revenues "by any mode or system of taxation (s. 91.3)", while Provincial governments are restricted to direct taxation "within the Province in order to the raising of a revenue for provincial purposes (s. 92.2)". Under the BNA Act distribution of legislative powers, amended by the 1982 Constitution Act, Provincial governments are granted the *exclusive* legislative responsibility "for delivering many of the key public services, including healthcare, education and social welfare[13]".

A vertical fiscal imbalance between the revenue available to the provincial level of government and its spending responsibilities emerged in the Canadian case since the interwar period, mainly beacause of the potential burden of the welfare expenditures. Two basic alternatives were faced by the Canadian federal authorities in order to solve the fiscal "constitutional dilemma": either implementing a centralised welfare state with a substantial Dominion's fiscal predominance, or building a welfare system based on fiscal decentralisation, accompanied by a mechanism of inter-regional transfer, functional to reduce any horizontal welfare gap. The increased pressures to preserve "national standards" of social protection accounted for the fiscal centralisation choice, empowered by the federal government during and after the World War II.

Through the 1957 Federal-Provincial Tax Sharing Arrangements Act and the successive Tax Rental Agreements[14], the Federation was

[11] BANTING Keith, op. cit. supra note 5, p. 47.
[12] Full text available at http://laws.justice.gc.ca/en/const/index.html.
[13] RICHER Karine, op. cit. supra note 1, p. 5.
[14] See BELANGER Claude, *Canadian federalism, the Tax Rental Agreements of the period of 1941-1962 and fiscal federalism from 1962 to 1977*, http://faculty.marianopolis.edu/c.belanger/QuebecHistory/htm.

allowed to collect personal income taxes in return of fixed percentages of the income tax revenues and corporate income tax revenues to Provinces. Such a centralised system imposed a unilateral redistributive ethic to Canadian federalism.

On the spending side, a constitutional balance between federal and provincial jurisdiction emerged since the 1940's. The Privy Council struck down as *ultra vires* Bennet's New Deal federal legislation about social insurance, while non-contributory programmes could remain a federal prerogative. Thus, the Parliament's power "to legislate for peace, order and good government of Canada[15] (BNA Act section 91)" remained the legal basis of the federal intervention in social policy domains.

Notwithstanding Quebec's government opposition[16], the federal government started in the 1940's a series of shared-cost programmes, proposed to the Provinces with a partial cover of the cost of the programme, usually 50%. Successive examples of shared-cost programmes can be considered the Post-Secondary Education Programmes, the Canada Assistance Plan (1966-67), the Hospital Insurance Program and the Medical Care Program.

Similar controversial sources of federal spending power have been conditional federal grants to Provinces, such as Canada Social Transfer and Canada Health Transfer, and direct spending. Conditional grants historically constitute the most relevant instrument of federal indirect regulation, as provinces are required to meet fixed federal standards in order to obtain the transfer. Both shared-cost programmes and conditional grants generated a divisive debate about the constitutional status of the federal spending power and its impact on the formal vertical balance of powers: is the Dominion allowed to indirectly accomplish that which can not be done directly?

[15] http://laws.justice.gc.ca/en/const/index.html

[16] See SECRÉTARIAT AUX AFFAIRES INTERGOUVERNEMENTALES CANADIENNES - Direction des politiques institutionnelles, *Position historique du Québec sur le pouvoir fédéral de dépenser 1944-98,* http://www.saic.gouv.qc.ca/publications/documents_inst_const.

1.2. The uncertain legal foundation of the federal spending power in Canada

In spite of a widespread legal consensus around the notion of the federal spending prerogatives, no costitutional provision is considered to settle the constitutionality of the federal spending power. The absence of an explicit reference in the British North America Act has pressed the advocates of the federal spending to identify different legal sources. Section 91 (1A) gives the federal government jurisdiction over the Public Debt, Section 102 refers to "one consolidated revenue fund" and Section 106 refers to appropriate federal funds. Moreover, as Peter Hoggs has put it, with a reference to the royal *ex gratia payments*, it might be argued the possibility "to imply from the power of taxation that the government must have the ability to spend the money it raises in taxes[17]". However, none of the mentioned provisions authorises the federal government to make payments for objectives which are outside the federal legislative competence. It remains indeed as unquestionably granted that the federal spending power can, at best, only be inferred by the Canadian constitution. As Hemish Telford has pointed out, in a merely constitutional perspective, "the federal spending power thus sits in a *vacuum* of political and legal uncertainty[18]".

Although a form of implicit acceptance of the federal spending power constitutionality has never been directly challenged by the Canadian jurisprudence, a clear judicial consensus around this federal ability can still hardly be found. In *Canada vs. Ontario* (1935), where the Privy Council invalidated as *ultra vires* a federal unemployement insurance legislation because of the mandatory nature of employees

[17] HOGG Peter, *Constitutional Law of Canada*, 2005, Carswell, Toronto, in TELFORD Hemish, *The federal spending power in Canada: Nation-Building or Nation-Destroying?*, in in "Publius: The Journal of Federalism", volume 33 number 1-2003, p. 7.
[18] TELFORD Hamish, op. cit. supra, note 7, p. 3.

and employers' contribution[19], the federal spending power appears to be constrained by the distribution of competences:

> "Assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessairily within Dominion competences. It may still be legislation affecting the classes of subjects enumerated in section 92, and, if so, would be *ultra vires*. In other words, Dominion legislation, even though it deals with Dominion's property, may yet be so framed as to invade civil rights within the Province and [...] the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain[20]".

As David Yudin has pointed out, "the limitation on the spending is achieved precisley by characterising the legislation not in terms of spending but in terms of the *purpose of the expenditure*[21] [emphasis added]".

What is contradictory in the Privy Council decisions, is tha fact that the warning against federal authorities to indirectly legislate over areas of provincial jurisdiction is preceded by a well known implicit support of the federal spending power doctrine[22].

In contrast with the enigmatic character of the Privy Council's position, the federal spending power doctrine would seem to have been successively reinforced by two main argumentations.

Firstly, the difference between *spending* and *legislating* has been highlighted by the Supreme Court in dealing with the *Income Tax Act*. In *Winterhaven Stables Ltd. vs. Canada* the Court declines to characterise spending legislation which set welfare national standards as a substantial legislation in the provincial jurisdiction[23]. Thus, in

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[19] As a result of the constitutional balance of the interwar period, only *non-contributory* programmes could remain a federal legislation domain.

[20] *Reference re Employement and Social Insurance Act, 1935 (Canada)* (P. C.) n. 48 at 687.

[21] YUDIN David W.S., op. cit. supra note 6, p. 458.

[22] "That the Dominion may impose taxation [...] and apply that fund for making contributions in the public interest to individuals, corporations or public authorities could not as a general proposition be denied". *Reference re Employement and Social Insurance Act, 1935 (Canada)* (P. C.) n. 48 at 687

[23] See *Winterhaven Stables Ltd. vs. Canada* (AG) 1988.

Reference re Canada Assistance Plan[24], the Supreme Court "indirectly embraced the notion of conditional grants[25]". On the other hand, in *Finley*, a dissenting opinion by judge McLachlin argues that there might be some limits in the federal spending power[26], indirectly challenging the distinction between spending legislation and effective regulation[27].

Secondly, the federal government has tried to defend its spending power through the "gift-giving" doctrine, derived by Chief Justice Duff *Canada vs Ontario* dissenting opinion[28] and rethorically developed by Hogg and notably by F.R Scott[29]. Yet, the political reality has fundamentally denied the voluntariness argument of conditional grants, "it being for all intents and purposes impossible for a Province to refuse such a grant[30]". As conditional grants are partially raised from the taxes paid by the residents of the refusing province, it might be argued that with conditional grants the federal government is able to truly coerce the Provinces to meet federal standards.

For these kinds of reasons, in the lack of a clear constitutional status of the federal spending legislation, a political composition for the Canadian fiscal federalism has to be found aside legal argumentations.

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[24] The Court statued that any unilateral government reductions of payments for a shared cost program did not mean affecting legislative choices of the Provinces. *"The simple withholding of federal money which had prevoiusly been granted to fund matter within provincial jurisdiction does not amount to the regulation of that matter*". See *Reference re Canada Assistance Plan (British Columbia) 1991* at 567.

[25] YUDIN David W.S., op. cit. supra note 6, p. 461.

[26] "*I have not considered the constitutional limits on the spending power. That issue should in my view be left for another day*". *Finlay* McLachlin J. dissenting at 1104.

[27] As Peter Hogg seems to admit: *"If federal funds are granted on condition that the programmes accord with federal stipulations, then those stipulations wil effecteively regulate the programmes even though it lies outside federal legislative authority"*. HOGG cit. in TELFORD, op. cit. supra note 7, p. 3.

[28] *"It is evident that the Dominion may grant sums of money to individuals or organizations and that the gift may be accompanied by such restrictions and conditions as Parliament may see fit to enact. It would then be open to the proposed recipient to decline the gift or accept it subject to such conditions". Reference re Employement and Social Insurance Act*, 1935 (Canada) (P. C.) Duff dissenting at 536.

[29] *"None of these gifts in an invasion of anybody's right in so far as constitutional law is concerned. Generosity in Canada is not unconstitutional*". SCOTT F.R., *The Constitutional Background of Taxation Agreements*, cit. in TELFORD, op. cit. supra note 7, p. 5.

[30] MAZIADE, "*Si une province decidait de rompre son entent avec Ottawa, les citoyens seraient au plan fiscal doblement penalisés. [...] En conséquence, il devient économiquement impensable de refuser l'aide financier du gouvernement fédéral* ». In YUDIN, op. cit. supra, note 6, p. 468.

1.3. Fiscal centralisation and cultural autonomy: why Québec objects to the federal spending power

In a merely political perspective, the Canadian federal spending power has found its major justification in the practical advantages of the social policies implemented by conditional grants and shared-cost programmes. As Hemish Telford has put it, "the spending power has undoubtedly contributed to the rise of the modern welfare state in Canada. Furthermore, many of the social programmes established by the spending power, especially Medicare, have become part of the 'national' identity of Canadians[31]".

Another major argument in favour of the federal spending power concerns its benefits in terms of territorial cohesion and horizontal redistribution. Although equalisation can be achieved through unconditional grants, like the equalisation payments[32], it has been argued that the federal spending power has helped break out the anachronistic dualist federal perspective, establishing a cooperative mechanism of intergovernmental relations.

Nonetheless, the emerging centralisation shaped by the cooperative federalism is profoundly linked to the growing political controversy in the context of Québec-Canada relations. According to the Séguin Commission conclusions[33] and to the Lajoie argumentations[34], the federal spending in the Provincial fields fundamentally undermines the Canadian federal principle, in forging a subordination relationship between constitionally equals and sovereign governmental levels.

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[31] TELFORD Hemish, op. cit. supra note 7, p. 1.

[32] See RUGGERI Joe, *Equalisation Reform in Canada Principles and Compromises*, in Fiscal Federalism and the Future of Canada, Selected Proceedings from the Conference, September 28-29/2006, in Institute of Intergovernmental Relations, http://www.queensu.ca/iigr/working/fiscalImb.html.

[33] See QUEBEC COMMISSION SUR LE DESEQUILIBRE FISCAL, *Le pouvoir fédéral de dépenser*, in http://www.parl.gc.ca/information/library/PRBpubs/bp272-f.htm.

[34] A. LAJOIE, *The federal spendine power and Meech Lake*, cit. in YUDIN, supra note 15, p. 466.

Such a unilateral form of the Canadian fiscal federalism, developed through the practice of federal conditional grants, has the undeniable practical effect to give the federal government the power to influence the nature of provincial legislation. This consequently tended to obscure political accountability of both provincial and federal levels of government.

The increasing federal involvement in the fields of education and the proliferation of conditional grants and shared-cost programmes have encoutered, it must be said, other Provinces' resistance. Nevertheless, one element of the new centralisation is particularly worrisome to Québec: indeed, the notion of "national standards" in the welfare policies implies the existence of only "one" Canadian nation, in so denying the speficity of the Québec's cultural identity.

As a reaction to the federal government's claim of a "broad national consensus" in favour of the federal spending power, the majority of Québecois has shown the tendency to identify the "national standards" in standards of the "English Canadian nation[35]". In other words, as Telford has put it, "the developement of so called national standards for social programmes in Canada has precipitated a clash of nationalisms[36]". The federal invasion of written Provincial competences has furthermore been perceived as an instrument of "cultural imperialism" against Québec's *Civil Law* tradition.

The will to preserve a multicultural foundation of the Canadian federal principle, especially in the education and social security fields, shaped Québec's historical opposition to the federal spending power. The Québec's governments objected in principle to the federal spending power during and after World War II[37]. However, the limitation of the federal spending power has gradually become the

[35] TELFORD Hemish, op. cit. supra note 7, p. 9.

[36] *Ibidem*, p. 10.

[37] See in particular, gov. Duplessis and Sauvé positions in SECRÉTARIAT AUX AFFAIRES INTERGOUVERNEMENTALES CANADIENNES - Direction des politiques institutionnelles, *Position historique du Québec sur le pouvoir fédéral de dépenser 1944-98,* http://www.saic.gouv.qc.ca/publications.

most challenging issue towards the unanimous acceptance of a consensual Canadian fiscal and institutional structure.

1.4 The search for a political composition between fiscal imbalances and Provinces' autonomy

After the 1987 constitutional reform, several intergovernmental negotiations have been set up to persuade Québec to endorse the Canada Act. In particular, both the Meech Lake and the Charlottetown Agreements recognised the specificity of Québec as a "distinct society", by giving it the power to veto any constitutional modification.

Nonetheless, in the research of a compromise between fiscal centralisation and federal units' autonomy, the "opt-out" question remains the most crucial factor. As André Tremblay has put it, "of all Québec's claims over the last 50 years, the right to opt out with compensation from federal programmes funded by the spending power is one of the most important and consistent[38]". In practice, any intergovernmental fiscal agreement should deal with the necessity of assuring an effective provincial right to reject conditional grants and divert their financial resources into other provincial expenditures.

In fact, the Meech Lake Agreements presented an "opting-out provision[39]" that, while granting the Provinces a greater degree of administrative and legislative control, do not yet resolve two structural deficiencies. Firstly, Provinces are still obliged to respect federal government fixed priorities over provincial expenditures, what does not let Provinces to divert and redistribute resources to other programmes. Secondly, the "opting-out" provisions only apply to

[38] TREMBLAY André, *The federal spending power*, in *The Canadian Social Union without Quebec: 8 Critical Analyses*, 2003, IRPP and the Quebec Studies Program of McGill University (eds.), p. 175.
[39] See the texts in http://www.solon.org/Constitutions/Canada/English/Proposals/MeechLake.html and http://www.solon.org/Constitutions/Canada/English/Proposals/CharlottetownLegalDraft.html.

future programmes, in so preserving all the unilateral rigidity over the past programmes.

In this controversial context, the Canada Social Union Framework Agreement (SUFA) seems to exarcebate the tensions, by constraining the right for a Province to reinvest a not required federal transfer through ever stricter conditions:

> "A provincial/territorial government which, because of its existing programming, does not require the total transfer to fulfill the agreed objectives would be able to reinvest any funds not required for those objectives *in the same priority area* or in *a related priority area*[40] [emphasis added]".

Moreover, the SUFA document endorses direct federal spending as an uncontroversial source of equal opportunity and "Canada-wide objectives", what continues to imply a uniform vision of social-policies typical of unitary regimes[41].

That's why, in view of its unclear constitutional status and the growing political conflict linked to it, the federal spending power has produced not only nation-building effects, but, more significantly, a nation-destroying tension between Québec and the rest of Canada. The inexistence of either an authoritative legal support by the Supreme Court or a practical political arrangment about the federal spending prerogatives has the deleterious effect to deepen the cultural cleavage between the "English Canadain nation" and the "Québec nation". Without unanimously accepted limitations, the federal spending power has gradually eroded the Canadian federal principle, transforming it from "cooperative" into "coercive" federalism.

[40] See the texts of the SUFA in http://socialunion.gc.ca/news/020499_e.html.
[41] TREMBLAY André, op. cit. supra note 36.

2. THE AMERICAN PRAGMATIC APPROACH TO THE FEDERAL SPENDING POWER: HOW THE US HAS DEALT WITH THE PROBLEM OF CENTRALISATION

2.1 The "general welfare clause" as a clear constitutional foundation of the federal spending power in the United States

In contrast with the uncertain constitutional status of the federal spending power in Canada, the legal foundation of this federal prerogative has never been seriously questioned in the United States. As unequivocal source of the federal spending power, Article I section 8 of the US Constitution[42] (better known as "general welfare clause"), explicitily authorises Congress to spend for the "general welfare".

During the XIX century, the historical dualist structure of the American fiscal federalism had posed no serious challenges to the fiscal balance between the Federation and the federal units, both on the revenue and on the speding side of the equation. However, since the approval of the XVI amendment in 1913, favoured by a progressive coalition's dominance in both levels of governments, the federal authorities started to centralise the collection of income taxes. The XVI amendment substantially changed the nature of the American fiscal federalism[43]. Thanks to a reinforced federal fiscal capacity, the US model gradually moved from dual to cooperative federalism in the 1930's. Conditional grants and and open-ended disbursements became the main instruments of the rooseveltian *New Deal*, where the federal government, legally covered by the "general welfare clause", legitimately regulated in States' jurisdiction domains.

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[42] "*The Congress shall have Power To lay and collect Taxes, Duties, Impots, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States*". Full text available at http://www.usconstitution.net/xconst_A1Sec8.html.

[43] See ZORZI GIUSTINIANI Antonio, *Competenze legislative e federalismo fiscale in sei ordinamenti liberal-democratici*, in ZORZI GIUSTINIANI Antonio, *Stato Costituzionale ed espansione della democrazia*, 2002, Cedam, Padova.

Thus, the US fiscal centralisation trends, synthesized by Grodzins "marble cake" metaphor[44], are profoundly linked to the systematic use of the federal spending power.

The ability of Congress to spend for the "general welfare" has never been directly put into discussion. The question did only arise "as to whether this power to spend was otherwise constrained by the division of powers in the constitution or whether the power to spend was limited merely by the requirements that it be for the general welfare[45]".

The madisonian interpretation of the "general welfare clause" as a simple introduction to the enumerated powers significantly constraints the federal spending power by the constitutional distribution of competences. Quite the opposite, the Supreme Court jurisprudence, closer to Alexader Hamilton's view, consistently endorsed an extensive interpretation of the federal spending power, only bounded by the notion of "general welfare". In *US vs. Butler* the Court stated the Congress expenditures were not subjected by the direct attribution of legislative powers, but adding:

> "Congress has no power to enforce its commands [...] to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance[46]".

In 1940's, the Court authoritatively confirmed the hamiltonian vision, in so favouring a multiplication of the federal spending instruments. By highlighting that social welfare was not a policy domain the States could adequately deal with, the US Supreme Court enumerated, in *South Dakota vs. Dole*, the only potential limits to the federal spending power:

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[44] See GRODZINS M., *Centralisation and decentralisation in the American federal system*, in R. GOLDWIN, *A Nation of States*, Chicago, McNeally, 1961, cit. in PIERINI Andrea, *Federalismo e welfare state nell'esperienza giuridica degli Stati Uniti. Evoluzione e tensioni di un modello neo-liberale di assistenza sociale*, 2003, Giappichelli, Torino, p. 414.

[45] YUDIN David W.S., op. cit. supra note 6, p. 443.

[46] U.S. Supreme Court. U.S. v. BUTLER, 297 U.S. 1 (1936)

"The spending power is of course not unlmited, but is instead subject to several general restrictions [...]. The first of these limitations is derived from the language of the Constitution itself: the exercice of the spending power must be in pursuit of the general welfare [...]. Second, if Congress desires to condition States' receipt of federal funds, it must do so unambiguously enabling States to exercise their choice [...]. Third, conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects [...]. Finally, other constitutional provisions may provide an independent bar to the conditional grants of federal funds[47]".

In a merely legal perspective, those Court's strong affirmations definitively allowed Congress to spend in areas of States' jurisdiction. Furthermore, concerning the possible coercive nature of conditional grants, that Court has considered the States' right to abstain as a satisfactory pledge of constitutionality of the federal spending power, as long as it relates to a "general welfare" purpose.

2.2 The evolution of the American spending power through judicial interpretations and political adjustments.

In the absence of a specific source of horizontal equalisation (on the model of Canadian "Equalisation Payments"), the proliferation of conditional grants during the *Great Society* era (1960's and 1970's), set up a nationwide homogeneous welfare state. However, in spite of the judicial and constitutional consensus around the notion of federal spending power, the centralisation trends had to face a political adjustment after the *stagflation* crisis at the end 1970's.

In accordance with the original constitutional design, given by the combination of art. 1 section 8 of the US Constitution (enumerated powers) and the X Amendment (residual powers), the reaganite *new federalism* doctrine started to question the efficiency of both federal

[47] U.S. Supreme Court. South Dakota v. Dole, 483 U.S. 203 (1987), cit. in YUDIN, op. cit. supra note 6, p. 444.

over-regulation and intergovernmental relations. A competitive vision of federalism, based on the *rational choice* theoretical framework, significantly limited the impact of the federal spending power on the overall American constitutional balance.

Often described as the simple "extension of the market economy to the organization of the political structure[48]", competitive federalism has represented the US political answer to the pervasive influence of the federal government in the States' jurisdiction. In continuity with the traditional dualist approach, it aims to constitute an antidote to the centripetal forces linked to the federal spending power. Even by acknowledging the necessity of a minimal intergovernmental cooperation for the implementation of general welfare actions, the 1980's fiscal reforms strongly reduced the instruments of public intervention in the US economic system. As a consequences, federated States were granted a large discretionality in the implementation of social programmes.

Criticized for the risk of a geographical fragmentation of the welfare standards[49], the competitive federalism view inspired the 1996 Clinton Administration Welfare Reform, the Republican Party enjoying a solid majority in both Chambers of Congress. The devolution to States' governments of the power to unilaterally fix the entitlements and the fiscal levels of social programmes was accompanied by a substantial revision of the federal spending legislation.

Conditional grants and open-ended matching grants have been gradually transformed into more flexible block grants. In contrast with the different typologies of categorical grants, block grants are set up with extremely general and wide objectives, linked to the supply of a

[48] See BUCHANAN cit. in PIERINI, supra note 45, p. 420.

[49] Some recent contributions underlined the tendency to a race to the bottom in the social protection systems; see PETERSON, *The Price of Federalism,* cit. in PIERINI, supra note 7, p. 427, and BOLLEYER Nicole, *Federal Dynamics in Canada, the United States, and Switzerland: How Substates' Internal Organization Affects Intergovernmental Relations*, in "Publius: The Journal of Federalism", volume 36 number 4, pp.471-502.

fixed budget[50]. This reduced the potential impact of the federal spending power in terms of centralisation.

Such a pragmatic centrifugal mechanism, characterizing both the Reaganite view of the federal spending and the 1996 Wefare Reform, had the double effect to keep the federal budgetary policies under control and bring the fiscal responsibility of social protection back to federated States. This functional revision of the relationship between Washington D.C. and the federated units does constitute a significant turning point in the American fiscal federalism. States' governments carry now on both the responsibility of setting up the conditions of block grants regulation, and namely the financial risks of deliberatively extending the social protection entitlements.

In part influenced by the conservative vogue of the recent decentralising processes, the US Supreme Court jurisprudence concerning the fedeal spending power has lately seen a resurgence in the protection of States' sovereignty. In *New York vs. United States* and *United States vs. Lopez* the Court seemed to recognise the emergence of a more mixed pattern of relationship between governmental levels, implicitly limiting the role of conditional spending power as a form of *de facto* regulation. As David Walker has pointed out, "in terms of behavioral intergovernmental patterns, the present one appears to include the full range of possible attitudes that the history and practice of fedeal-state-local relations has generated, from independent, collaborative and collegial[51]".

As the generalization of fiscal devolution and block grants has not yet consolidated a horizontal competitive dynamic, an American model of "limited" federal spending power is still far to be established. Moreover, the fragmentation of social protection in terms of "race to the bottom" has consistently undermined the social rights

[50] For a detailed classification of the American system of grants-in-aid see KALAS J. W. *The Grant System*, cit. in. PIERINI Andrea, *New federalism e protezione sociale nella welfare reform degli Stati Uniti* (*New federalism and social protection in the US Welfare Reform*), in Diritto Pubblico Comparato ed Europeo, n. 4 anno 2001.

[51] D. WALKER, in PIERINI Andrea, op. cit. supra, p. 1735.

constitutionally recongnized by the Supreme Court after the *New Deal* era. However, the trade-off logic between fiscal decentralisation and welfare equalisation seems not to be confirmed in reality. The price of a flexible and not-invasive federal spending power has not been, in the American case, the geographical distorsion of social protection standards.

Conclusion

The transformation of the federal spending power: an inevitable move towards coercive federalism?

As the the constitutional evolution in the American and Canadian federations shows, the federal tendency to use its spending power in areas of federal units' jurisdiction has produced a significant impact both in terms of centralisation and equalisation.

From a legal point of view, a wide consensus over the constitutionality of the federal spending power has characterised the transition from dualist to cooperative federalism, profoundly linked to the emergence of the welfare state. Nevertheless, in the US context, the existence of a clear legal source of the federal spending power (the "general welfare clause") as well as an extensive judicial interpretation, increased the centralisation trends, notably under the Johnson Administration. On the other hand, the uncertain constitutional status of the federal spending power in Canada has encouraged Québec, and to a lesser extent Ontario, to claim a strict application of the federal principle, in order to limit the imposition of national standards in Provincial spheres. Without an unconditional right to opt-out, the federal spending power has fundamentally affected the nature of the Canadian federal structure, "allowing the federal government to enter areas of provincial jurisdiction with virtual impunity[52]".

[52] TELFORD Hemish, supra, note 6, p. 15.

The impact of the federal spending power in terms of vertical and horizontal equalisation has often justified the changing balance of power between levels of government[53], supported, especially in Canada, by the establishment of informal intergovernmental relations. As Peter Hogg has pointed out[54], the Canadian fiscal federalism presents a clear distinction between equalisation payments and centralised conditional grants. Quite the opposite, the US has seen the incoherent construction of several congressional-driven social programmes, that undermined the long term financial efficiency of the US welfare state.

Furthermore, confronted with similar centralisation trends, the US and Canada have tried to develop two competing models of a "limited" federal spending. On the one hand, Québec insists to attack the constitutionality of the federal spending power, asking for intergovernmental-negotiated limits, which should generate a dynamic towards asymmetrical federalism. On the other hand, the US has built a competitive mechanism between federated States, in order to reduce, through block grants and fiscal devolution, the impact of the federal indirect regulation in States' areas of jurisdiction.

The search for a political *modus vivendi* between decentralisation and territorial cohesion is similarly compelling on the other side of the Atlantic, where the European Union is called to build a long term stable model of economic governance. Given the *sui generis* nature of the European polity, it is not surprising to note that the spending power of the EU still represents an irrelevant part of the total European GDP (1,25% compared to the 19,4% in the US and 24% in Canada[55]). Moreover, the legal foundation of the EU spending power does not reside in an independent constitutional competence, but in

[53] See LANDON Stuart and BRAFDORD G. Reid, *The impact of the centralisation of revenues and expenditures on growth, regional inequality and inequality*, Working Paper 2005(4) 2005 IIGR, Queen's University, http://www.queensu.ca/iigr/working/archive/pubwork2005.html.
[54] See HOGG Peter, *Constitutional Law of Canada*, 2005, Carswell, Toronto.
[55] See ZORZI GIUSTINIANI Antonio, op. cit. supra note 4, p. 360.

the Member States' consensual mandate, formalised in the Council's budgetary agreement. Aside the Common Agricultural Policy, the most relevant section of the EU structural funds does not aim to become a permanent and structural equalisation fund, which will definitely remove the risks of centralisation that the US and Canada have experienced.

However, as Lehn Morris has pointed out[56], as far as the EU fiscal capacity in the light of Member States' national sovereignty is concerned, the European Union should overcome some fundamental obstacles. The first is connected with the need to provide funds for the EU itself. If the EU wants to assure an internal territorial cohesion independently from its Member States, it must have its own tax revenues. "Any subject of international law without taxing powers has no real freedom to act independently. In other words, it is not a sovereign subject[57]"**.** The second challenge is linked to the risk of a competitive dynamic in the European internal market on the American model. If the EU Member States find themselves competing on many levels, including taxes, with each other, the European model of governance should be revised in a neo-liberal perspective, that historically contradicts the social "ethos" of the EU economic model. Thirdly, the pressure on Member States to raise government revenues could be easier controlled if the EU starts to share the burdens of social expenditures, that would strongly contribute to the European "nation-building" process. Nonetheless, a federal taxation can only be imposed by a legislative act. In this sense, the exclusion in the Treaty of Lisbon of the term "European laws" represents the clear symptom of a persistent reluctance in the introduction of the federal spending power in a European polity, still constituted by a *demos* united around the notion of "constitutional tolerance[58]".

[56] See LEHNER Moris, *Limitation of the national power of taxation by the fundamental freedoms and non-discrimination clauses of the EC Treaty***,** (2000) 9 *EC Tax Review* pp. 5-15.
[57] *Ibidem*, p. 3.
[58] See WEILER Jospeh H. H., *Federalism and Constitutionalism: Europe's Sonderweg*, in KALYPSO Nicolaidis and HOWSE Robert(eds.), *The Federal Vision: Legitimacy and Levels of Governance in the*

In a political perspective, both the Canadian and the briefly recalled EU contexts underline the necessity of a homogeneous cultural background to enforce the federal spending power. In the lack of a sense of common identity, partially present in the US, the unilateral imposition of national standards in areas of federal units' jurisdiction has triggered, namely in the Canadian case, a consistent move towards "coercive federalism". If the federal spending power is something which sould not flow into the rejection of cultural diversity, it has therefore to be circumscribed by the extension of more flexible block grants and the effective right to opt-out of conditional grants. Following Hemish Telford[59], neither "unity without diversity" nor "diversity without unity" can be considered as acceptable outcomes of the federal principle.

US and the EU, Oxford: Oxford University Press, 2001

[59] TELFORD Hemish, supra, note 6, p. 15.