COERCION, CONDITIONS, AND COMMANDEERING: A BRIEF NOTE ON THE MEDICAID HOLDING OF *NFIB V. SEBELIUS*

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"Cooperative" fiscal federalism programs cover a vast range of government services, from education to transportation to health care. Far and away the largest of these programs is Medicaid,[1] which constitutes close to forty-five percent of all federal transfer payments and something like twenty-four percent of the States' budgets.[2] The Patient Protection and Affordable Care Act[3] (PPACA) works a further, massive expansion of the program.

That expansion, as all but the comatose know, was challenged on constitutional grounds by the (state) petitioners in *National Federation of Independent Business v. Sebelius*[4] (*NFIB*). The challenge sounded a recurrent theme of conservative politics, advocacy, and scholarship for the better part of four decades: some federal funding programs are unduly "coercive." In *NFIB*, the Supreme Court—for the first time ever—agreed, up to a point. As construed by the government, Chief Justice Roberts wrote for three members of a 7-2 majority, the PPACA's Medicaid expansion was "a gun to the head."[5] The Court held

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1. NAT'L ASS'N OF STATE BUDGET OFFICERS, FISCAL SURVEY OF STATES ix (2013).

2. *See id.* at 53; *see also Standard & Poor's*, A LOOK AT U.S. STATE AND LOCAL GOVERNMENTS AS JOINT COMMITTEE DEADLINE NEARS, 5 (2011) http://static.owly/docs/alookatusstateandlocalgovernmentasjointcommitteedeadlinenears_Nov2011_pzq.pdf.

3. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

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

5. *Id*. at 2604 (plurality opinion).

that a state that declines to participate in Medicaid's expansion could be made to suffer the loss of federal funds that would pay for such an expansion but not the loss of *all* federal Medicaid funding, including funding for preexisting programs.[6]

Like many other observers, I view the Court's holding and rationale as incoherent.[7] The point of this brief essay, though, is broader. The *NFIB* holding is a this-day-and-train-only ticket: It is hard to think of any other federal funding program that would fail to pass muster under the Court's analysis, or of another federal funding statute whose operational content the Court might want to rewrite so as to avoid a direct constitutional holding. In contrast, the conservative "funding as coercion" critique is meant to cut a much wider swath, across a broad range of federal funding programs. But it, too, strikes me as incoherent. More fatefully, the critique misses—and fails to provide a remedy for—the truly destructive effects of cooperative federalism programs.

The problem with (some) conditional spending programs, supposedly, is "coercion." The term cannot be taken in its literal sense. An outright, affirmative federal order to any state ("do this or else") is called "commandeering"; and that, we know on good authority, is unconstitutional.[8] Even the authors of the PPACA, whose constitutional sensibilities are charitably described as attenuated, recognized the point: having provided that each state "shall" establish a health care exchange,[9] they provided an alternative—the establishment of a federal exchange—in non-compliant states.[10] "Coercion," then, must mean something more subtle and metaphorical—something more like duress.

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6. *See id.* at 2608.

7. *See, e.g.*, Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging Into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Business v. Sebelius, 93 B.U. L. REV. 1 (2013). For a circumspect, qualified defense of the holding see Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861 (2013). Professor Bagenstos's thoughtful article contains a discussion of the literature.

8. Printz v. United States, 521 U.S. 898, 919–22 (1997); New York v. United States, 505 U.S. 144, 149 (1992).

9. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311, 124 Stat. 119, 173 (2010).

10. *Id.* § 1321, 124 Stat. at 186. The constitutionality of this form of "conditional preemption" (more precisely, conditional commandeering) is to my mind open to doubt but beyond the scope of this Essay.

I can think of a constitutional "coercion" theory. It hangs on the distinction between a mere prohibition and an affirmative command, which the *NFIB* Court rightly recognized in its Commerce Clause holding and which, in the federalism context here at issue, translates into the distinction between preemption and commandeering.[11] I can *not* think of a coherent, constitutionally grounded theory of duress.[12] Even if one could articulate such a theory, however, it would miss the political economy of federal conditional funding programs.

NFIB was argued and won on the theory that Congress had crossed the line that separates unattractive choices and "incentives" from a "gun to the head" (coercion, duress, call it what you will).[13] Presumably, the decision removed that mortal threat: What else was the point?

Not all states, however, viewed the PPACA offer as a threat.[14] Moreover, after the threat was gone, some of the petitioner-states in *NFIB* began to make a beeline for Medicaid expansion funds. [15] That altogether predictable result has to do not with coercion but with Medicaid's warped incentives.

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11. For elaboration see MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 67–68, 348–54 (2012).

12. Petitioners' argument and the Court's Medicaid holding in *NFIB* hang on the contention that the surrender of all Medicaid funding is not a viable option for any state, politically or economically. It is hard to see, however, how the line between "out of the question" (unconstitutional!) and "highly unattractive" (constitutional?) would lend itself to principled adjudication.

13. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2603–05 (2012) (plurality opinion).

14. *See* Brief of the States of Oregon et al. as Amici Curiae in Support of Respondents, Florida v. Dep't of Health and Human Servs, 132 S. Ct. 2566 (2012) (No. 11-400), 2012 WL 588460.

15. Republican governors endorsing Medicaid expansion under the ACA include: Rick Scott (FL), Jan Brewer (AZ), John Kasich (OH), Rick Snyder (MI), Jack Dalrymple (ND), Brian Sandoval (NV), Susana Martinez (NM), Terry Branstad (IA), and Chris Christie (NJ). *See* Ricardo Alonso-Zaldivar & Bob Christie, *Medicaid Expansion Pits Republicans Against Republicans*, HUFFINGTON POST, June 1, 2013, http://www.huffingtonpost.com/2013/06/01/medicaid-expansion_n_3371599.html (describing Governor Brewer's belief that expansion is a "prudent move that would return money to the state"); Julie Rovner, *Defying Expectations, GOP Governors Embrace Medicaid Expansion*, Nat'l Pub. Radio (Feb. 6, 2013, 5:05 PM), http://www.npr.org/blogs/health/2013/02/06/171312023/defying-expectations-gop-governors-embrace-medicaid-expansion (describing Governors Snyder and Kasich embracing Medicaid expansion so as not to leave money on the table); Daniel Trotta, *New Jersey's Christie vetoes Medicaid expansion bill*, REUTERS, June 28, 2013, http://www.reuters.com/article/2013/06/29/us-usa-newjersey-medicaid-idUSBRE95R16Q20130629 (reporting that Governor Christie endorsed temporary

At its inception in 1965, Medicaid was almost an afterthought—a modest addition to the much larger and highly popular Medicare program. However, Medicaid has grown by leaps and bounds over the decades, not so much because the federal government requires it but because states *demand* it. Medicaid covers "mandatory" services and populations that participating states must cover.[16] But it also covers states' "optional" services and populations: states decide to provide, and the federal government writes the checks. At least forty percent and by some estimates over sixty percent of all Medicaid spending is optional.[17] To that extent the program is all carrot and no stick, let alone a gun to the head. Medicaid's state-driven expansion casts grave doubt on conservative agitation over "coercion," in more than one way.

In the 1980s and 1990s, conservatives railed against "unfunded mandates." Federal funding programs, they said, were "coercive" because the federal government tossed a few dollars into the street and then refused to pay the full price for the implementation of the conditions that came along with the programs and the money.[18] The Unfunded Mandates Reform Act,[19] part of the GOP's 1994 "Contract With America," was a product of a broader attempt to make federal grant conditions more favorable to state and local recipients.

Compare that posture to the *NFIB* case: The petitioners argued that the PPACA expansion is "coercive" because its terms are *too generous*. Participating states receive 100 cents on each dollar of

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Medicaid expansion in February 2013, but in June 2013 vetoed a bill attempting to make New Jersey's expansion permanent); *Our Opportunity. Our Iowa. Our Results.* OFFICE OF THE GOVERNOR OF IOWA, May 23, 2013, https://governor.iowa.gov/2013/05/our-opportunity-our-iowa-our-results/ (reporting that Governor Branstad endorsed Medicaid expansion, reasoning Iowa's current system required "modernization").

16. *See* 42 U.S.C. § 1396a(a)(10) (2006).

17. *See* Brigette Courtot, Emily Lawton & Samantha Artiga, *Medicaid Enrollment and Expenditures by Federal Core Requirements and State Options*, THE HENRY J. KAISER FAMILY FOUND., 1 (Jan. 2012), http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8239.pdf; *Medicaid Cost-Savings Opportunities*, DEP'T. OF HEALTH AND HUMAN SERVS., http://www.hhs.gov/news/press/2011pres/02/20110203tech.html, (last visited Nov. 25, 2013).

18. *See* THOMAS ATWOOD & CHRIS WEST, THE HERITAGE FOUND., HOME RULE: HOW STATES ARE FIGHTING UNFUNDED FEDERAL MANDATES 1 (1994); Editorial, *Too Little Money for Mandates*, N.Y. TIMES, Aug. 20, 1994, at 22, *available at* http://www.nytimes.com/1994/08/20/opinion/too-little-money-for-mandates.html?pagewanted=print&src=pm.

19. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48.

additional expenditure; and that, petitioners argued, is too good to refuse.[20] The natural question, asked of petitioners' counsel (Paul Clement) by one of the justices in *NFIB*, is whether a federal offer of 120 federal cents for each state dollar would be yet more coercive. Mr. Clement responded in the affirmative[21] as he had to, but his refusal to blink only highlights the problem at hand. An unfunded mandate, we are supposed to believe, is unconstitutionally coercive; but then so is a fully funded mandate, except maybe more so. Perhaps, conservatives can articulate some Goldilocks theory of federal spending—some level at which it's neither too skimpy nor too lavish but just right, for all states. Far more likely, however, at least one of the coercion-duress arguments—too little, too much—is wrong.

In my estimation, *both* arguments are constitutionally baseless and, more to my point here, misconceived as a matter of political economy. To repeat, the pathologies and the federalism costs of federal funding statutes have nothing to do with coercion. They have everything to do with bad incentives. Those incentives can be grouped under four headings: fiscal illusions, fiscal asymmetry, time inconsistency, and lock-in effects.

Fiscal illusions. Conditional funding programs systematically exploit voter ignorance for the purpose of making government services look much cheaper than they are and, in that fashion, increasing the demand for those programs. As noted, Medicaid consumes, on average, about twenty-four percent of state budgets.[22] The states' costs are expected to double again in less than a decade, with or without their participation in the PPACA expansion (which will add, in the aggregate, two or three percent to the Medicaid expenditures states will incur in any event).[23] Would any state spend at those levels and lock itself into that commitment if it had to pay the full price? Asked and answered. By reducing Medicaid's perceived cost, the federal grants spur the local demand for taxes and spending, as

20. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2657 (2012) (Scalia, Kennedy, and Alito, JJ., dissenting).

21. Transcript of Oral Argument at 3–4, 8, Nat'l Fed'n of Indep. Bus., 132 S. Ct. 2566 (No. 11-400).

22. NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 1, at 53.

23. JOHN HOLAHAN ET AL., THE HENRY J. KAISER FAMILY FOUND., THE COST AND COVERAGE IMPLICATIONS OF THE ACA MEDICAID EXPANSION: NATIONAL AND STATE-BY-STATE ANALYSIS 3 (Nov. 2012), http://kff.org/health-reform/report/the-cost-and-coverage-implications-of-the/.

that is the intended result of all federal transfer programs. At the same time, it seems very doubtful that the federal government would have allowed Medicaid to balloon to its current size if *it* had to pay the full price.

What voters in each state tend to ignore is they are paying for the federal as well as the state expenditures. That is not as stupid as it sounds: from the voters' vantage, Medicaid is just another claim on a common pool, and the effects on the federal tax rate are untraceable. The end result is a level of spending that no jurisdiction would ever choose on its own. That is the point of configuring Medicaid as a "cooperative" fiscal program. The systematic production of fiscal illusions is cynical and ruinous, but it is not unconstitutional.

Fiscal asymmetry. The Republican governors who successfully challenged the PPACA Medicaid expansion and then agreed to participate in the program often argued that they could not afford to leave the money on the table. Their taxpayers would pay "their share" of the federal program either way; thus, they and their state can only opt out of the benefits but not the costs of the program. In "unconstitutional coercion" terms: The federal government is acting like a pickpocket who first steals your wallet and then promises to give it back on the condition that you cooperate in some scheme of his.

The argument—sketched in the states' briefs in the *NFIB* litigation[24]—seems to have some plausibility. However, the pickpocket analogy fails because under federal conditional funding programs, the money is not taken from the parties to whom it is returned ("or else"). As a rule, the federal government does not tax states. It taxes individuals, and states cannot interpose in that relationship.[25] The receipts, in turn, go not to the individuals but to the states. There is nothing constitutionally problematic about either leg of the tax-and-spend transaction. As a matter of political economy, the asymmetry is pernicious: It gives voters and politicians in each state a potent incentive to overgraze the fiscal commons. But again, the problem is incentives, not coercion.

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24. *See e.g.*, Brief of State Petitioners on Medicaid at 44, Florida v. Dep't. of Health and Human Servs., 132 S. Ct. 2566 (2012) (No. 11-400).

25. *See generally* Massachusetts v. Mellon, 262 U.S. 447 (1923).

*Time Inconsistency***.** State officials are well aware that even very generous federal conditional funding programs will require very substantial tax effort in the years ahead. Governors who have so far declined to participate in the PPACA's Medicaid expansion have stressed the ruinous long-term consequences of the program.[26] So why do so many state officials nonetheless agree to participate in such programs? The warped incentives mentioned earlier are reinforced by state officials' constricted time horizon. The officials usually look to the next election and no further; the wreckage down the road is somebody else's problem. To that considerable extent, the problem with conditional funding programs is not that state officials cannot say "no"; it is that they do not *want* to say "no."

State officials' limited time horizon actually is a constitutional problem—not in a formal sense, but from a political economy perspective. As Alexander Hamilton noted in the *Federalist No. 1*, state officials only look to "the power, emolument, and consequence" of their offices.[27] They lack any encompassing national or long-term interest. Hamilton concluded that you could not build a constitution with state officials; they would simply have to be beaten.[28] Somewhat curiously, many modern-day conservatives want to empower them.[29]

Lock-in Effects. When Florida Governor Rick Scott, a ringleader in the litigation against the PPACA, changed course and accepted a Medicaid expansion after all, he said that he would do so only so long as the federal government pays 100 percent of

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26. *Compare* Joshua Wolfson, *Wyoming governor expresses grave concerns over Medicaid expansion*, CASPER STAR-TRIB., July 20, 2012, http://trib.com/news/state-and-regional/wyoming-governor-expresses-grave-concerns-over-medicaid-expansion/article_6c567ad2-0094-549e-9a02-e2a46dbc51d0.html (referring to Governor Mead's "grave concerns" about Medicaid expansion's long-term financial impact on Wyoming), *with* Irina Zhorov, *Gov. Mead pushes for a WY Medicaid expansion plan pitch*, WYOMING PUB. MEDIA, Jan. 9, 2013, http://wyomingpublicmedia.org/post/gov-mead-pushes-wy-medicaid-expansion-plan-pitch (describing State of the State address in which Governor Mead encouraged legislators to consider a Medicaid expansion plan).

27. THE FEDERALIST NO. 1, at 33–34 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

28. *See id.*

29. *See, e.g.*, Calvin Freiburger, *A Less Perfect Union: How Will Conservatives Restore States' Rights?*, REDSTATE (Aug. 8, 2011, 11:08 AM), http://www.redstate.com/calvinfreiburger/2011/08/08/a-less-perfect-union-how-will-conservatives-restore-states-rights/ (discussing efforts to restore States' rights by state constitutional amendments).

the expansion, and only for a period of three years.[30] Protestations of this sort, respectfully, are fatuous. Expansions of federally funded programs look relatively cheap, and every cutback looks absurdly expensive. To save a single dollar in state own-source revenues, a state would have to cut two, three, or four dollars' worth of Medicaid. That is very unlikely to happen. The high opportunity costs—foregone federal transfer payments—are compounded by a "flypaper effect":[31] Money sticks where it hits, with state governments and their clientele. Education funding does not fund education (except by sheer fortuity); it funds educators. Medicaid does not fund the poor (if we wanted to do that, we would give them the money); it funds health care providers, nurses' unions, and other constituencies. Under these circumstances, there can be no such thing as a temporary commitment to a federal funding program, least of all a generous program.

In the course of the *NFIB* litigation, Professor James Blumstein developed a potent argument that addresses the lock-in effects.[32] Conditional spending programs, the Supreme Court has said, are "much in the nature of a contract."[33] The PPACA expansion of Medicaid, Blumstein notes, is not a case of contract *formation*; it is case of contract *modification*, under conditions that allow one party (the federal government) to exploit its monopoly advantage. A ship owner may freely bargain with the crew before his ship sets sail; he may *not* extract concessions or impose additional conditions—at the threat of withholding bargained-for wages—while the ship is at sea. By judicially invited contract analogy, the federal government may not

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30. Press Release, Office of the Governor, Governor Rick Scott: We Must Protect the Uninsured and Florida Taxpayers with Limited Medicaid Expansion (Feb. 20, 2013) ("We will support a three-year expansion of our Medicaid program . . . , as long as the federal government meets their commitment to pay 100 percent of the cost . . . . This legislation would sunset after three years and need to be reauthorized.").

31. *See* Robert P. Inman, *flypaper effect*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS, (Steven N. Durlauf & Lawrence E. Blume eds., 2009), http://www.dictionaryofeconomics.com/article?id=pde2009_F000323&edition=current&q=flypaper%20effect&topicid=&result_number=1 (last visited Nov. 25, 2013) ("when a dollar of exogenous grants-in-aid leads to significantly greater public spending than an equivalent dollar of citizen income: money sticks where it hits.").

32. James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011-2012 CATO SUP. CT. REV. 67, 102 (2012).

33. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

leverage Medicaid's lock-in effects to press its advantage and to exact further concessions.[34]

I am fond of this argument (and of its author): It addresses one of Medicaid's crucial incentive problems in a manner that goes beyond loose "coercion" metaphors and instead gives operational and constitutional content to the notion. And yet, I despair of making the argument work. For one thing, the federal Medicaid statute unmistakably permits Congress to modify Medicaid grant conditions, and Congress has done so on countless occasions. Barring some independent reason that would render an arrangement of that sort unconstitutional, it is difficult to see why states should not be held to it. For another thing, federal funding programs always establish a regime of *bilateral* monopoly bargaining, with nasty incentives for strategic behavior on the states' as well as the federal side. (The ship owner may decide to exploit his bargaining power while at sea; but then so may the crew.) Any quasi-contractual constitutional theory of federal funding would have to account for both risks, across a vast range of federal conditional funding statutes of widely varying designs. I am skeptical that the contract analogy can do all that work.

To restate my initial point: I cannot think of a credible "coercion" argument that would address the perverse incentives that drive federal conditional funding programs. The key problem, it seems to me, is that the Constitution permits the federal government to give states money that they have not raised—and that the states may very freely accept that money. In combination, these constitutional entitlements allow state and federal government actors to collude for the purpose of overexploiting the tax base. The painful reality is that at the end of the day, the Supreme Court cannot do much about that problem.[35] Any solution would have to be political.

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34. *See* Blumstein, *supra* note 32, at 104. In a similar vein, Samuel Bagenstos offers a cautious defense of the Supreme Court's *NFIB* decision as establishing an "anti-leveraging" principle. *See* Bagenstos, *supra* note 7, at 865.

35. The Court has held, time and again, that funding conditions must be clearly stated in the language of the statute. *See, e.g.*, Barnes v. Gorman, 536 U.S. 181, 186 (2002) (citing *Pennhurst*, 451 U.S. at 17). And it has come close to holding that grant conditions are unenforceable by private parties (either under 42 U.S.C. § 1983 or under a theory of implied private rights of action) unless the statute in question unmistakably creates such an entitlement. Gonzaga Univ. v. Doe, 536 U.S. 273, 276 (2002); Blessing v. Freestone, 520 U.S. 329, 341–44 (1997). I believe these constitution-

Unfortunately, the political agenda has also been affected by the coercion virus. The usual prescription is to "block-grant" funding programs so as to make them more palatable—less "coercive"—for states.[36] That is a bad idea: More freedom for the states means more freedom to dissipate federal funds to local constituencies, especially unionized constituencies. Letting states spend someone else's money is *always* a bad idea, regardless of the conditions that attach to the arrangement.

What reforms would promise redress (assuming, as I do, that Medicaid will continue to exist)? The program could be nationalized and funded directly and exclusively by Washington. The idea is to give money to people, not to places or to politicians. That might not be very effective, but at least the program would no longer grow on autopilot.

Alternatively, we could try to realign states' and taxpayers' incentives. In 2012, Medicaid amounted to about seven percent of all federal spending.[37] Congress could provide as follows: If a state declines to participate in Medicaid, the state's individual taxpayers—*not state governments*—receive a proportional refund on their federal income tax payments. That arrangement would not curb all the pernicious incentives that drive Medicaid and for that matter all federal funding programs. Still, it would invite a more honest political debate at the state level, and it might wring some of the cross-subsidies out of the system.

Reforms of that sort would be very hard to accomplish. But then, that is true of any meaningful reform of Medicaid, and of our federalism. Inchoate complaints about "coercion" make the task no easier. They are a distraction.

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ally grounded theories to be correct. *See* GREVE, *supra* note 11, at 83–85, 351–53. However, those theories do not remedy the appalling incentives of federal funding programs; they merely preclude the federal judiciary from exacerbating them.

36. Prominently, Congressman Paul Ryan's "Roadmap" proposes capped Medicaid block grants. *See* PAUL D. RYAN, A ROADMAP FOR AMERICA'S FUTURE VERSION 2.0 50, 73 (2010), *available at* http://roadmap.republicans.budget.house.gov/issues/issue/?IssueID=8520). *See also* MARGY WALLER, BROOKINGS INST., BLOCK GRANTS: FLEXIBILITY VS. STABILITY IN SOCIAL SERVICES, 3–4 (2005), *available at* http://www.brookings.edu/es/research/projects/wrb/publications/pb/pb34.pdf (describing states' preference for flexibility in block grants).

37. *Compare* OFFICE OF MGMT. AND BUDGET, TABLE 1.1—SUMMARY OF RECEIPTS, OUTLAYS, AND SURPLUSES OR DEFICITS (-): 1789-2018 (2013), http://www.whitehouse.gov/omb/budget/historicals, *with* OFFICE OF MGMT. AND BUDGET, TABLE 8.5—OUTLAYS FOR MANDATORY AND RELATED PROGRAMS: 1962-2018 (2013), http://www.whitehouse.gov/omb/budget/historicals.