1-1-2013


Elizabeth Weeks Leonard
University of Georgia School of Law, weeksleo@uga.edu

Nicole Huberfield
University of Kentucky

Kevin Outterson
Boston University

Repository Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Georgia Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Georgia Law. Please share how you have benefited from this access. For more information, please contact tstriepe@uga.edu.
ARTICLES

PLUNGING INTO ENDLESS DIFFICULTIES: MEDICAID AND COERCION IN NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS

NICOLE HUBERFELD,* ELIZABETH WEEKS LEONARD** & KEVIN OUTFITTERSON***

INTRODUCTION ................................................................................................... 2
I. MEDICAID EXPANSION UNDER THE ACA ................................................. 9
   A. The ACA’s Path to Expanding Coverage............................................. 10
   B. The Medicaid Program .................................................................. 13
      1. Medicaid and the “Deserving” Poor .......................................... 13
      2. The Scope of Medicaid Benefits and Coverage Prior to the ACA ................................................................. 17
   C. Previous Medicaid Expansions .................................................... 20
   D. The ACA Medicaid Expansion ..................................................... 25
II. NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS ........ 29
   A. Florida v. United States Department of Health and Human Services ................................................................. 31
   B. The States’ Merits Brief ................................................................ 32
   C. The United States’ Merits Brief ..................................................... 34
   D. The NFIB Opinions ................................................................... 36
      1. The Roberts Plurality ............................................................... 36

* Gallion & Baker Professor of Law, University of Kentucky College of Law.
** Associate Professor, University of Georgia School of Law.
*** Associate Professor, Boston University School of Law. The authors were the Counsel of Record and drafting authors of several amicus briefs filed before the Court in the Healthcare Cases, including a brief supporting the constitutionality of Medicaid filed on behalf of health law and policy scholars. We thank our co-counsel from those briefs for their many contributions: Sara Rosenbaum, Laura Hermer, Sidney Watson, Wendy Parmet, Lorianne Sainsbury-Wong, and Abigail Moncrieff. We also thank our colleagues for their willingness to read and comment on this Article: Tim Jost, Sam Bagenstos, Sara Rosenbaum, Scott Burris, Dan Coenen, Glenn Cohen, Rob Mikos, the Boston University School of Law Faculty Workshop, and the participants at the Loyola Chicago Constitutional Law Colloquium. Thanks to Shannon Leahy, Kathryn Swany, and Dennis Vann for diligent research assistance. We were assisted on the Medicaid brief by Boston University law students Amrit Gupta and Valerie Moore and Boston College law students Frederick Thide and Max Bauer.
INTRODUCTION

After a contentious partisan process, Democratic majorities in both houses of Congress succeeded in passing dramatic national reform, which became law upon the President’s signature. Opponents quickly filed suit, claiming, among other deficiencies, that the law exceeded congressional authority under the Spending Clause. In a divided opinion, the Supreme Court wrote: “The question is not what power the Federal Government ought to have but what powers in fact have been given by the people.” Otherwise, the Spending Clause “would become the instrument for total subversion of the governmental powers reserved to the individual states.” The case was United States v. Butler, and the law struck down was the Agricultural Adjustment Act of 1933.

Until the 2011 Term, no Supreme Court decision since the New Deal had struck down an act of Congress as exceeding the federal spending power. The

2 United States v. Butler, 297 U.S. 1, 63 (1936).
3 Id. at 75.
4 Id. at 78.
5 See Virginia Dep’t of Educ. v. Riley, 86 F.3d 1337, 1355 (4th Cir. 1996) (Luttig, J., dissenting) (“I recognize that the Court has not invalidated an Act of Congress under the Spending Clause since United States v. Butler, over half a century ago.” (citation omitted)),
question of unconstitutionally coercive conditions was also novel. Indeed, no federal court had ever found any legislation to be an unconstitutionally coercive exercise of the spending power until the Court decided *National Federation of Independent Business v. Sebelius* (*NFIB*) on June 28, 2012. The only two previous Supreme Court cases mentioning the spending power coercion doctrine found it inapplicable, upholding the federal laws in question: the unemployment-compensation provisions of the Social Security Act of 1935 in *Steward Machine Co. v. Davis* and the drinking-age condition on highway funds in *South Dakota v. Dole*. In each case, the Court recognized the theoretical possibility of a federal-spending program unconstitutionally coercing states, but found no coercion on the facts presented. Accordingly, until *NFIB*, coercion had been relegated to the realm of dicta and theory.

Most of the vast legal and political commentary on the *Healthcare Cases*, which challenged the Patient Protection and Affordable Care Act (the Affordable Care Act or ACA), centered on the individual health insurance

---

6 Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2630 (2012) (Ginsburg, J., concurring in part and dissenting in part) (“THE CHIEF JUSTICE therefore – for the first time ever – finds an exercise of Congress’ spending power unconstitutionally coercive.”). The panel decision in *Riley*, 86 F.3d at 1346-47, is not a counterexample as the majority denied Virginia’s coercion claim. The Fourth Circuit reversed en banc, adopting Judge Luttig’s panel dissent but ultimately deciding the case on grounds other than coercion. *Riley*, 106 F.3d at 561, 569 (“[I]nterpre[ting] section 1412(1) of IDEA so as not to impose upon the States the condition that they provide private tutors and other alternative educational services to handicapped students . . . [the court] need not resolve the Tenth Amendment issue that is presented upon the contrary reading of the statute.”).

7 *NFIB*, 132 S. Ct. at 2608 (plurality opinion). Notably, *NFIB* did not strike down any provision of the Affordable Care Act, but merely held that an existing statute, 42 U.S.C. § 1396c, constitutionally could not be applied to cut off existing Medicaid funds if states refused to implement the mandatory Medicaid expansion under the Affordable Care Act. *Id.* at 2607 (“In light of the Court’s holding, the Secretary cannot apply § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion. That fully remedies the constitutional violation we have identified.”).

8 301 U.S. 548, 585-93 (1937).


10 See infra Part III.

11 The litigation that culminated in the *NFIB* decision included dozens of cases and even more opinions in federal courts. We refer to this litigation collectively as the *Healthcare Cases*.

12 The law we commonly refer to as the “Affordable Care Act” was actually two separate Acts of Congress: the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124...
mandate’s prospects under the Commerce Clause. But a few of us, familiar with Medicaid, were focused on a much more fundamental challenge to federal power that threatened not only Medicaid but also a host of other federal spending programs. NFIB presented a prime opportunity for the Roberts

Stat. 119 (2010) (codified in scattered sections of 25, 26, 29 and 42 U.S.C.), and the Health Care and Education Reconciliation Act of 2010, Public Law 111-152, 124 Stat. 1029, which amended Public Law 111-148. Amendments related to Medicaid are found in three locations: Title II of Public Law 111-148 (the core provisions); Title X.B of Public Law 111-148 (a later amendment to Title II); and Title I.C of Public Law 111-152 (Medicaid amendments made in reconciliation).


Court to revive the Rehnquist Court’s “Federalism Revolution”15 in the context of the Tenth Amendment.

Justice Cardozo long ago warned that enforcing the coercion doctrine would “plunge the law into[16] endless difficulties.”17 Nevertheless, the Court held that the expansion of Medicaid to include a new category of beneficiaries17 was unconstitutionally coercive because the Secretary of the U.S. Department of Health and Human Services (HHS) could theoretically withdraw all (or part) of federal Medicaid funding in response to a state’s failure to comply with federal Medicaid laws.18

Seven Justices, including two liberal members of the Court, held the ACA’s Medicaid expansion to be an unconstitutionally coercive exercise of the spending power, the first such holding in the history of the Republic.19 While these Justices agreed on this result, however, they fractured into a three-vote plurality authored by Chief Justice Roberts (joined by Justices Breyer and Kagan) and a four-vote joint dissent signed by Justices Scalia, Kennedy, Thomas, and Alito. It was particularly surprising that Justice Kagan, President Obama’s appointee and former Solicitor General, thought the Medicaid expansion was unconstitutional.20

In the remedy phase, the Roberts plurality did not strike down any part of the Affordable Care Act. Instead, the Court held that an existing statute, on the books for almost eight decades, constitutionally could not be applied to

---

17 See infra Part I.
18 NFIB, 132 S. Ct. 2566, 2607 (2012) (plurality opinion) (“What Congress is not free to do is penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”).
19 See supra note 5 and accompanying text.
20 Politics aside, after the tough questions at oral arguments from Justices Kagan and Breyer, it is indeed surprising that they joined the Roberts plurality on the Medicaid coercion issue.
withhold states’ Medicaid funding for failing to implement the Medicaid expansion. 21 Effectively, the Court allowed states to opt in or out of the expansion 22 without jeopardizing their existing Medicaid programs. This severability holding, in which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined the Chief Justice, saved the Medicaid expansion from the joint dissent’s preferred disposition to declare the entire ACA unconstitutional. The Medicaid expansion thus remains in the U.S. Code but states that opt out cannot be penalized with a reduction in existing Medicaid funds. We will call this state of affairs the “Red State Option.” 23

The Court has now decisively determined that the Tenth Amendment operates as a limit on Congress’s power to spend for the general welfare when conditions are placed on states’ acceptance of that spending. NFIB invites a host of new coercion challenges to federal conditional spending programs, but the Court has crafted little guidance for lower courts, while complicating matters by misstating the facts upon which the decision relies. Accordingly, the resulting difficulties for lower courts attempting to decide coercion challenges, legislators drafting new conditional spending programs, and federal agencies administering existing Spending Clause programs are profound. For every federal spending program since the Great Society, this case signals the beginning of a new era of litigation challenges. 24

This Article proceeds as follows: Part I discusses the Affordable Care Act’s Medicaid expansion in the context of the history and purpose of the Medicaid Act, paying particular attention to facts about the Medicaid program the Court misunderstood. Part II summarizes the litigation from the lower courts up to the NFIB decision, and examines the Medicaid coercion opinions in NFIB in

---

21 NFIB, 132 S. Ct. at 2607 (plurality opinion) (referring to 42 U.S.C. § 1396c).

22 Id. (“[W]e determine, first, that § 1396c is unconstitutional when applied to withdraw existing Medicaid funds from States that decline to comply with the expansion.”). Chief Justice Roberts also wrote: “The Court today limits the financial pressure the Secretary may apply to induce States to accept the terms of the Medicaid expansion. As a practical matter, that means States may now choose to reject the expansion; that is the whole point.” Id. at 2608.

23 Kevin Outterson, The Scope of the Red State Option, INCIDENTAL ECONOMIST (July 20, 2012, 1:44 PM), http://theincidentaleconomist.com/wordpress/the-scope-of-the-red-state-option/. Of course, the option is available to any state, but in the current political climate only “red” states are likely to exercise it.

detail. Part III first considers NFIB in the context of the Federalism Revolution,25 and then discusses three weaknesses in the new coercion doctrine with an eye toward predicting difficulties of application.

These three weaknesses bear brief mention at the outset. First, although Florida and the other litigating states did not base their Medicaid challenge on any of the four Dole limits, the Court’s coercion analysis was heavily informed by two of the four spending principles set forth in Dole.26 Specifically, the Court considered whether Congress had given sufficiently clear notice of the condition and whether the condition was sufficiently related, or germane, to the federal program. With respect to clear notice for Medicaid expansion, Congress warned the states from the inception of the Medicaid program that it reserved the “right to alter, amend, or repeal any provision” of the Act.27 This provision of the statute has troublesome implications for the suggestion that conditional spending programs be treated as contracts between the federal government and the states. Congress did not need this language at all because subsequent Congresses always retain the power to amend legislation. Moreover, a document with an unlimited unilateral amendment provision is hardly a contract. The NFIB Court’s failure to give controlling effect to direct language disclaiming the applicability of contract principles bodes ill for the federal government’s ability to meet the clear notice standard in future cases.

On the question of relatedness, the germaneness test articulated by the Court in Dole, the Court determined that the Medicaid expansion was not adequately related to the pre-ACA Medicaid program. To reach that conclusion, the Roberts plurality artificially separated the existing Medicaid program from the ACA’s Medicaid expansion, treating them as two distinct federal programs. The expansion, per Chief Justice Roberts, was no longer limited to the “neediest among us” because single and childless adults with incomes below $15,415, 133% of the federal poverty level (FPL),28 would now qualify for

25 See infra Part III.A.

26 Formulating what was to become the standard for evaluating the constitutionality of conditions placed on federal funding, Chief Justice Rehnquist summarized prior caselaw to create an enumerated test. That four-part test was: (1) spending must be for the general welfare; (2) conditions must be unambiguous; (3) conditions must be related to federal goals; and (4) conditions cannot themselves be unconstitutional. See South Dakota v. Dole, 483 U.S. 203, 207-08 (1987). Aside from these four limits, the Court then noted, “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.’” Id. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).


28 The FPL for a single adult in the forty-eight contiguous states in 2012 was $11,170. After the 5% income disregard, which is allowed by the ACA provisions regarding calculation of income eligibility, the 133% standard effectively becomes 138%, which was used to calculate this number. For discussion of the income-disregard provisions of the
assistance. If relatedness becomes a meaningful element of a coercion claim, one can imagine a host of federal programs that would be vulnerable to similar challenges.29

Second, both the Roberts plurality and the joint dissent expressly declined to articulate any test or rubric for deciding whether a Spending Clause program crosses the coercion line. Instead, the Roberts plurality and the joint dissent offered slogans, suggesting that a federal condition is unconstitutionally coercive if it is a “gun to the head,” “conscripts states,” or is “economic dragooning.”30 Those formulations are conspicuously fact specific and provide little guidance to future courts and litigants. Moreover, the Court’s conclusion that the Medicaid expansion qualifies under all three formulations transforms what earlier Courts had called difficult political choices into unconstitutionally coercive conditions. So transformed, the Court effectively forbids certain arrangements between the federal government and states.31 When considering this weakness in depth, we also evaluate the various statistical indicia of coercion, the role of political accountability, and “coercion in fact.”32

Third, in the remedy phase, the Roberts plurality forbade the Secretary from using § 1396c of the Medicaid Act as codified33 to cut off existing Medicaid funding, effectively making the Medicaid expansion optional for states.34 It

ACA, see infra note 55.

29 See infra Part III.B.1.

30 See infra Part III.B.2.c.

31 By way of analogy, consider common law courts’ refusals to enforce certain contracts when parties are deemed to possess unequal bargaining power and the nature of the contract is particularly important for personal safety or the public interest, among other factors. See, e.g., Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441, 441-42 (Cal. 1963) (refusing to enforce a charity hospital’s exculpatory clause, signed by patient upon admission to the emergency room).

32 See infra Part III.B.2. Glenn Cohen analyzed NFIB’s coercion doctrine from the perspective of ethics, concluding that states had not been coerced. I. Glenn Cohen, Conscientious Objection, Coercion, the Affordable Care Act, and U.S. States, 20 ETHICAL PERSP. (forthcoming Mar. 2013) (manuscript at 16-17) (on file with authors) (describing the NFIB opinion as containing an unsophisticated philosophical analysis and constituting an example of “personification confusion,” improperly treating states like individual persons for the purposes of coercion analysis).


34 Another way to think about the remedy is that the Medicaid expansion has become an unenforceable mandate. See E-mail from Sara Rosenbaum, Professor of Health Law & Policy, George Washington Univ. Sch. of Pub. Health & Health Servs., to Nicole Huberfeld, Professor of Law, Univ. of Kentucky Coll. of Law (Aug. 16, 2012) (on file with authors). The characterization of mandatory-but-unenforceable versus optional, while not key to the constitutional analysis of the case, may be very important for understanding how HHS will approach implementation of the expansion. This is because “mandatory” and “optional” are terms of art for the Medicaid program, indicating certain degrees of flexibility and sometimes negotiating leeway for HHS.
remains to be seen whether future decisions will, under the guise of the Tenth Amendment, similarly invoke a narrow severance remedy to reformulate existing conditional spending programs into optional state programs. The remedy, although effective in terms of salvaging the ACA from being struck down in its entirety, presents a host of unanticipated challenges and future questions.\textsuperscript{35} If the Medicaid coercion was something of a sleeper issue, the question of coercion severability was almost entirely off the radar – barely raised and thinly briefed before the Court. Any attention the argument received was largely due to the political instincts of the Chief Justice and a key concession at the end of oral arguments by Mr. Clement, counsel for the States. But our analysis in Part III concludes that perhaps the Red State Option is exactly what sound principles of constitutional federalism require, a solution uniquely crafted for Tenth Amendment coercion cases.

Finally, in Part IV, we examine the post-	extit{NFIB} struggles to administer the Medicaid expansion, including challenges to the “maintenance-of-effort” requirements and the question of the legality of tax credits in federally created exchanges. This historic decision undoubtedly will continue to surprise.

I. \textsc{Medicaid Expansion Under the ACA}

To appreciate the congressional design underlying the Medicaid expansion and the Court’s factual missteps in \textit{NFIB}, background on the Medicaid program is necessary. The Medicaid Act is one part of the Social Security Act (SSA), a venerable and notoriously complex statute, which “is among the most intricate ever drafted by Congress. Its byzantine construction . . . makes the Act ‘almost unintelligible to the uninitiated.’”\textsuperscript{36} The SSA is both intricate and interconnected: “Medicare and Medicaid are enormously complicated programs. The system is a web; a tug at one strand pulls on every other.”\textsuperscript{37} Judicial confusion over government healthcare programs is notorious.\textsuperscript{38} Even the Supreme Court can fall victim to the challenge of fully grasping the intricacies of federal healthcare legislation. This Part will demonstrate how the Roberts plurality mischaracterized the Medicaid expansion and failed to appreciate several fundamental features of the program. To the ACA drafters, the Medicaid expansion was a philosophically significant but statutorily

\textsuperscript{35} See infra Part III.B.3.

\textsuperscript{36} Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981) (quoting Friedman v. Berger, 547 F.2d 724, 727 n.7 (2d Cir. 1976)); see also id. at 43 n.14 (“The District Court in [\textit{Friedman}] described the Medicaid statute as ‘an aggravated assault on the English language, resistant to attempts to understand it.’” (quoting Friedman v. Berger, 409 F. Supp. 1225, 1226 (S.D.N.Y. 1976))).

\textsuperscript{37} Stephenson v. Shalala, 87 F.3d 350, 356 (9th Cir. 1996).

incrementalist amendment to the existing program. To the Roberts plurality, it was “a shift in kind, not merely degree,” transforming Medicaid into something that “is no longer a program to care for the neediest among us.” This suggested distinction matters greatly in the decision itself and the discussion of coercion in Part III. By providing history and context for both the ACA and Medicaid, this Article illuminates that the Medicaid expansion was not a dramatic “shift in kind” but instead fits comfortably into familiar patterns of prior amendments to Medicaid.

A. The ACA’s Path to Expanding Coverage

Due to public preferences and political realities, the ACA did not radically overhaul the U.S. healthcare system. Single-payer health care was never on the table, and the so-called “public option” received only nominal consideration. Instead, the ACA built upon the United States’ existing path-dependent, public-private healthcare system, which is premised on the assumption that at least some individuals should not be left to fend for themselves in the private market for health care. Resulting forms of government assistance and beneficiaries have evolved through often-contentious debate over many decades. The ACA’s expansion of Medicaid eligibility and other government subsidies, as well as its creation of premium-assistance tax credits and health insurance exchanges, are the latest iterations.

Before the ACA was enacted, roughly 16% of the U.S. population was uninsured. Close to half the country, 49%, was covered by employer-sponsored health insurance, and about one-third was covered by public-benefits programs, primarily Medicare (12%) and Medicaid (17%). Only 5% was insured in the private, non-group health insurance market. From that

---

40 Id. at 2606.
44 Id.
baseline, the ACA sought to close the gap by increasing each of the other pieces of the pie: employer-based health insurance; private, non-group health insurance; and public health insurance programs.

The biggest piece of the pie is employer-based health insurance. In a nod to behavioral economics, the ACA implements default-enrollment requirements for large employers, meaning that employees are automatically enrolled in an employer-based plan and must actively opt out. Large employers also are subject to limited penalties for failing to provide affordable health plans to employees. The ACA offers generous tax credits to small employers to encourage them to offer health insurance to employees and creates a new Small Business Health Options Program.

Strategies to expand coverage in the private, individual health insurance market include health insurance exchanges, the Minimum Coverage Provision (the individual mandate), and insurance-underwriting reforms. Lacking the advantages of large risk pools, individual health insurance plans have long been more difficult and expensive to obtain. The ACA addresses known dysfunctions in the individual health insurance market by prohibiting pre-existing condition exclusions and discriminatory pricing based on health status. The minimum essential coverage provision and the exchanges support those reforms by expanding risk pools and minimizing medical underwriting. Those provisions simultaneously create strong incentives for

---

45 Patient Protection and Affordable Care Act § 1511, 29 U.S.C. § 218a (Supp. IV 2011) (applying to employers with more than 200 full-time employees).

46 Id. § 1513(a) (codified as amended at I.R.C. § 4980(H)(c)(2)(A) (Supp. IV 2011)). These penalties are applicable to employers with fifty-one or more full-time equivalent employees. Id.

47 Id. § 1421 (codified at I.R.C. § 45R(g)). A small employer is defined as an employer with “no more than 25 full-time equivalent employees for the taxable year.” Id. (codified at I.R.C. § 45R(d)(1)).

48 Id. § 1311(b)(1)(B) (codified at 42 U.S.C. § 18031(b)(1)(B) (Supp. IV 2011)).


52 Patient Protection and Affordable Care Act § 1501(b) (codified at I.R.C. § 5000A (Supp. IV 2011)).

53 Id. § 1311 (codified at 42 U.S.C. § 18031).

54 See generally Tom Baker, Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act, 159 U. PA. L. REV. 1577 (2011); Mark A. Hall, The
individuals to purchase health insurance and prohibit insurers from refusing to cover or charging higher premiums to perceived high-risk individuals.

The ACA also expands public insurance, primarily through Medicaid. After the expansion, all citizens and legal residents earning below 133% FPL are now eligible for Medicaid. 56 This approach won out over other proposals, including raising Medicaid eligibility to 150% FPL, 57 offering a public option in the health insurance exchanges, 58 and providing tax subsidies for all low-income, uninsured individuals to purchase private health insurance. 59 The policy compromise was based on the idea that extremely low-income Americans should be provided public health insurance while slightly less impoverished individuals should be given federal tax credits to support private purchasing in the exchanges. 60

Three Types of Reinsurance Created by Federal Health Reform, 29 HEALTH AFF. 1168 (2010).

55 Patient Protection and Affordable Care Act § 2001(a)(1) (codified at 42 U.S.C § 1396a). The original language established an income threshold of 133%, but that was effectively increased to 138% through a 5% income disregard in section 1004(e) of the Health Care and Education Reconciliation Act of 2010. Health Care and Education Reconciliation Act of 2010 § 1004(e), 42 U.S.C. § 1396a(e)(14) (originally enacted as Patient Protection and Affordable Care Act § 2002(a)) (adding to the Social Security Act a provision requiring a 5% income disregard for certain qualified individuals); see also Medicaid Program; Eligibility Changes Under the Affordable Care Act of 2010, 77 Fed. Reg. 17,144, 17,146 (Mar. 23, 2012) (to be codified at 42 C.F.R. pts. 431, 435, 457); Sara Rosenbaum, A “Customary and Necessary” Program – Medicaid and Health Care Reform, 362 NEW ENG. J. MED. 1952, 1953 (2010) (citing Congressional Budget Office estimates that the new income-calculation methods will effectively raise the Medicaid eligibility threshold to 138% FPL). We use 133% because that is the language of the statute, even though the practical effect of the income disregard is to raise the standard to 138%.

56 This equates to an annual income of $31,809 for a family of four after the 5% income disregard. See Annual Update of the HHS Poverty Guidelines, 77 Fed. Reg. 4034, 4035 (Jan. 26, 2012) (stating that the 2012 poverty guidelines for the forty-eight contiguous states and the District of Columbia is $23,050 for a family of four).


59 See Sara Rosenbaum & Benjamin D. Sommers, Rethinking Medicaid in the New Normal, 5 ST. LOUIS U. J. HEALTH L. & POL’Y 127, 130 & n.18 (2011) (suggesting that a proposal to cover all low-income adults through the exchanges was rejected because the federal government would have assumed the full cost, as compared to Medicaid, under which states and the federal government share the cost); see also Leighton Ku & Matthew Broaddus, Public and Private Health Insurance: Stacking Up the Costs, 27 HEALTH AFF. w318, w318 (2008).

60 See Patient Protection and Affordable Care Act §§ 1401, 10105 (codified as amended at I.R.C. § 36B (Supp. IV 2011)) (providing premium assistance tax credits for the purchase
B. The Medicaid Program

1. Medicaid and the “Deserving” Poor

Medicaid has historically provided health insurance coverage to the “deserving” poor, including women (widows in particular) and their children, the blind, the disabled, and impoverished elderly. This normative classification, derived from the Elizabethan Poor Laws, was expressed in state welfare policies deeming the working poor and those considered “blameless” in their poverty to be deserving of assistance, while the non-working poor, or paupers, were not.

The SSA of 1935 provided the statutory basis for both Medicare and Medicaid. As part of President Roosevelt’s New Deal legislation, the SSA effectively codified the historical categories of deserving poor, deeming them eligible for government assistance through income-security payments. With


62 The very concept of the “deserving” poor is contested as racialized. See Khiara M. Bridges, Reproducing Race: An Ethnography of Pregnancy as a Site of Racialization 212-20 (2011). Despite criticism of the category, it is common in Medicaid.

63 See Stevens & Stevens, supra note 62, at 11 (describing the clear division between contributing work-related social insurance to workers and giving to the “poor”); Huberfeld, Federalizing Medicaid, supra note 14, at 439 (“Starting in the colonial period, states provided various forms of welfare assistance to so-called deserving poor based upon that state’s colonial policy as adopted from Elizabethan Poor Laws.”).

64 Huberfeld, Federalizing Medicaid, supra note 14, at 441; Elizabeth A. Weeks, Cooperative Federalism and Healthcare Reform: The Medicare Part D “Clawback” Example, 1 ST. LOUIS U. J. HEALTH L. & POL’Y 79, 83-84 (2007) (“Congress enacted Medicaid at the same time as Medicare, intending Medicaid to be a welfare program to provide healthcare to the needy, including individuals impoverished by staggeringly high medical expenses.”).

65 Huberfeld, Federalizing Medicaid, supra note 14, at 441 (“The SSA adopted and
the exception of limited, open-ended federal grants to states. However, Roosevelt put the goal of government health insurance aside due to political objections, including widespread fear of socialized medicine and fragile political support for other reforms built into the SSA. Health care was not added to the SSA until the 1960s.

After 1935 there were modest expansions of public assistance for health care, focused on hospital infrastructure, provider payments, and ensuring care for especially deserving groups, including the very elderly. During the 1950s the elderly poor exercised more political power and pushed for health insurance benefits mirroring the workers’ insurance program in the SSA. Those efforts resulted in the Kerr-Mills Act, a 1960 amendment to the SSA designed to assist the impoverished elderly by supporting existing state programs through a limited federal grant-in-aid program.

In 1965, Congress enacted comprehensive, fully federal health insurance for the elderly in the form of Medicare. Unlike Medicare, Medicaid was almost codified states’ categories of deserving poor into federal law by protecting the elderly, children, widows and widowers, blind, those otherwise disabled, and the unemployed through income security.

---


67 See Starr, supra note 66, at 266-69; Robert I. Field, Regulation, Reform and the Creation of Free Market Health Care, 32 Hamline J. Pub. L. & Pol’y 301, 308 (2011) (“When he proposed Social Security in 1935, Roosevelt chose to leave health insurance out because of its political sensitivity. . . . [The Roosevelt] saw a threat that charges of socialized medicine would be resurrected, which could paint the entire package as too radical for the public to accept.”).

68 See Starr, supra note 66, at 371.

69 Jost, supra note 62, at 80 (discussing the birth and growth of public assistance healthcare programs in the 1950s and 1960s); Starr, supra note 66, at 270-71 (describing limited government healthcare programs, including poor farmer subsidies); Huberfeld, Federalizing Medicaid, supra note 14, at 443; see also, e.g., Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (expanding the FDA’s regulatory role); Hospital Survey and Construction Act of 1946, Pub. L. No. 79-725, 60 Stat. 1040 (funding new hospital construction and expansion).

70 See Huberfeld, Federalizing Medicaid, supra note 14, at 443 (“While the elderly pushed for health insurance benefits that would mirror the SSA workers’ insurance program, a political willingness to assist impoverished (if not all) elderly emerged and became the program that immediately preceded Medicaid, referred to as Kerr-Mills.”).


73 See Weeks, supra note 64, at 83.
Medicaid is a paradigmatic cooperative-federalism program, which is one reason the NFIB decision is so troubling. Financial contributions by both the states and the federal government provide the “cornerstone of Medicaid.”

74 See Stevens & Stevens, supra note 62, at 47-51 (describing Medicaid as “ill-designed” compared to Medicare).

75 Id. at 51 (“[T]he section of the Senate report dealing with Title XIX was entitled, ‘Improvement and Extension of Kerr-Mills Medical Assistance Program.’”); Sara Rosenbaum, Medicaid at Forty: Revisiting Structure and Meaning in a Post-Deficit Reduction Act Era, 9 J. HEALTH CARE L. & POL’Y 5, 9-10 (2006) (“An outgrowth of the earlier Kerr Mills grant-in-aid program, which assisted states in meeting the health care costs of the elderly poor, Medicaid reflected Congress’s decision to ‘liberalize and extend’ this system of federal grants to states for specific health care purposes.”).

76 Starr, supra note 66, at 369 (describing how President Johnson signed three programs into law: first, “the Democratic plan for a compulsory hospital insurance program under Social Security” which is now Part A of Medicare; second, “the revised Republican program of government-subsidized voluntary insurance to cover physicians’ bills” which is now Part B of Medicare; and third, Medicaid, which “expanded assistance to the states for medical care for the poor”); see also Schweiker v. Gray Panthers, 453 U.S. 34, 36-37 (1981) (describing the enactment of the Medicaid program); Brogan v. Miller, 537 F. Supp. 139, 142 (N.D. Ill. 1982); Rosenbaum, Markus & Sonosky, supra note 61, at 7-8 (characterizing Medicaid as “an afterthought to Medicare, and a relegation to states of responsibility for insuring the poor” (internal quotation marks omitted)).

77 Efforts to metamorphose Medicaid into a capped block grant have failed. See, e.g., Jeanne M. Lambrew, Making Medicaid a Block Grant Program: An Analysis of the Implications of Past Proposals, 83 MILBANK Q. 41, 46-47 (2005) (outlining the efforts of Speaker of the House Newt Gingrich and President George W. Bush, among others, to make a capped block grant part of federal Medicaid funding).


79 Huberfeld, Federalizing Medicaid, supra note 14, at 445 n.69 (“Arizona and Alaska were holdouts, with Arizona joining Medicaid in 1982 and Alaska joining in 1972.”).

80 See NFIB, 132 S. Ct. 2566, 2629 (2012) (Ginsburg, J., concurring in part and dissenting in part) (“Medicaid is a prototypical example of federal-state cooperation in serving the Nation’s general welfare.”); Harris v. McRae, 448 U.S. 297, 308 (1980) (stating that Medicaid fosters cooperative federalism and describing the program); Huberfeld, Bizarre Love Triangle, supra note 14, at 419; Weeks, supra note 64, at 114.

81 Harris, 448 U.S. at 308 (“The cornerstone of Medicaid is financial contribution by
Through a federal offer of open-ended matching funds, states are incentivized to provide generous public benefits, receiving additional federal financial support for every state dollar spent.\(^{82}\) Medicaid is entirely voluntary for states.\(^{83}\) They do not have to participate and could refuse federal dollars, establish their own indigent healthcare programs, or elect not to provide any medical assistance for low-income individuals.\(^{84}\)

As originally enacted, Medicaid targeted the now-familiar categories of deserving poor.\(^{85}\) The groups originally entitled to Medicaid were elderly, blind, and otherwise disabled persons receiving welfare under federal cash-assistance programs, and dependent children and their caretaker relatives receiving assistance through Aid to Families with Dependent Children (AFDC).\(^{86}\) The goal expressed in 1965 was to provide a broad package of medical assistance to these categories of individuals whose incomes were “insufficient to meet the costs of necessary medical services.”\(^{87}\) Congress later replaced the cash-assistance programs for disabled adults and children and the impoverished elderly with Supplemental Security Income (SSI); but these groups continued to qualify for Medicaid on the basis of SSI eligibility.\(^{88}\) Congress also later replaced AFDC with Temporary Assistance for Needy Families (TANF) but retained the historical AFDC eligibility requirements for Medicaid.\(^{89}\) Prior to the enactment of the ACA, Medicaid covered seven discrete categories of individuals.\(^{90}\) The ACA added an eighth category: all

---


\(^{83}\) *Harris*, 448 U.S. at 301 ("Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of [the Medicaid Act].").


\(^{85}\) Huberfeld, *Federalizing Medicaid*, supra note 14, at 445-46 (explaining that the Medicaid Act originally covered medically indigent individuals who fell within a traditional “welfare category”).


\(^{88}\) Rosenbaum & Frankford, supra note 86, at 503.

\(^{89}\) Id. at 503 n.*.

citizens and legal residents with incomes up to 133% FPL who are not otherwise eligible through another mandatory Medicaid category.91

2. The Scope of Medicaid Benefits and Coverage Prior to the ACA

Beyond the broad statutory outlines, states have considerable discretion over Medicaid eligibility requirements and program benefits.92 States can expand beyond the mandatory groups and services93 and will receive unlimited federal matching dollars for those optional elements of their programs.94 To receive federal funding, states must submit to the Secretary of HHS a “State Plan,” which explains how the state will comply with the Medicaid Act.95 Once the State Plan is in place, states administer Medicaid with little federal oversight.96 If the Secretary determines, after reasonable notice and opportunity for hearing, that a State Plan has fallen out of compliance with federal requirements, the Secretary has discretion under § 1396c to withhold federal funding due to the noncompliance until the plan is corrected.97 Typically, the Secretary negotiates a correction plan. Not once in the nearly fifty-year history of the program has the federal government withdrawn all federal funding from a noncompliant state.98 Section 1396c, which figures prominently in the NFIB decision, has been present in the Medicaid Act since its inception.99


92 See Schweiker v. Gray Panthers, 453 U.S. 34, 37 (1981) (describing “categorically” and “medically” needy beneficiaries); Kinney, supra note 84, at 857 (“Because states have great flexibility . . . the Medicaid program is really 50 very different programs serving different populations and providing different benefits.”); Rosenbaum, supra note 75, at 12-13 (describing Medicaid eligibility and coverage); Weeks, supra note 64, at 84 (“As long as states comply with certain broad federal requirements, they receive federal matching dollars to support their state Medicaid programs.”).

93 42 U.S.C. § 1396a(a)(10)(A)(ii) (2006). Additional services also can qualify for matching funds. See id. § 1396d(a) (defining services that qualify as “medical assistance” and can therefore receive funding).

94 Id. §§ 1396b(a)(1), 1396d(b) (setting out a formula for calculating the amount of federal matching funds due to a state for medical-assistance expenditures without including a specific monetary cap or maximum expenditure).

95 Id. § 1396a(a) (defining compliance requirements necessary to create and run a State Plan); Huberfeld, Federalizing Medicaid, supra note 14, at 447 (discussing how State Plans are administered with little federal oversight, despite the federal government paying a large portion of the plans’ administrative costs).

96 Huberfeld, Federalizing Medicaid, supra note 14, at 447.

97 See 42 U.S.C. § 1396c (giving the HHS Secretary the ability, after appropriate notice and hearing procedures, to cease making payments to a state “until the Secretary is satisfied that there will no longer be any such failure to comply [with 1396a(a)’s requirements]”).

98 For this reason, the Health Law Brief argued that the states’ question was not ripe, but
Each dollar a state spends on federally approved Medicaid programs, whether required or optional, is matched by federal funds. The basic federal match ranges from 50% to almost 75%, based on the amount of money the state spends on Medicaid and the state’s per capita income, with poorer states receiving a more generous match. In addition, states receive a federal match of at least 50% for administrative costs.

Prior to the ACA, State Plans were required to cover seven groups (collectively, the “categorically needy”) modeled on the traditional deserving poor who earn less than specified amounts. States could also extend benefits to “optional categorically needy” beneficiaries. States could further elect to cover the “medically needy,” meaning individuals who are categorically eligible (aged, disabled, blind, or families with dependent children) and who have high medical expenses despite enjoying incomes in excess of the financial eligibility levels. Thirty-three states and the District of Columbia currently cover these optional groups.

The Court did not accept that view. Health Law Brief, supra note 14, at 21 (“Petitioners’ fear of total funding loss . . . is not cognizable, as the Secretary has never exercised this power in forty-seven years of Medicaid administration.”).


100 See 42 U.S.C. § 1396b(a) (listing the percentage of state spending that the federal government will match, depending on the type of expenditure); Harris v. McRae, 448 U.S. 297, 308 (1980) (describing the “cooperative federalism” approach enacted in order “to provide federal financial assistance for all legitimate state expenditures under an approved Medicaid plan”).


103 Id. § 1396a(a)(10)(A).

104 Recipients considered “categorically needy” include certain children in foster or adoptive homes, pregnant women, and certain gainfully employed individuals with disabilities. 42 C.F.R. § 435.201 (2011) (covering pregnant women and blind, aged, or disabled persons); id. § 435.227 (covering adoptive and foster-care children). In 2000 Medicaid coverage was also extended to certain low-income women screened for breast and cervical cancer under a federal early detection program as an “optional categorically needy group.” Breast and Cervical Cancer Prevention Treatment Act of 2000 § 2, 42 U.S.C. §§ 1396(aa), 1396a(a)(10)(A)(ii)(XVIII); see also 42 C.F.R. §§ 410.34(b), 410.56(a).


Nationwide, children represent close to 50% of the total Medicaid enrollment. The elderly and disabled comprise 25%, and the remaining approximately 25% are non-elderly, non-disabled adults, usually caretakers of covered children. Before the ACA’s passage, the income eligibility tests varied among categories (based on federal requirements) and states (based on states’ optional coverage). For example, pregnant women were required to be covered up to 133% FPL, and states could opt to cover them at higher income levels. Federal law did not require states to cover non-pregnant caretakers or childless adults, but states could opt to do so, typically up to a much lower percentage of FPL. Children ages zero to five had to be covered up to 133% FPL, while children ages six to eighteen had to be covered only up to 100% FPL. States could opt to cover higher-income children, often in combination with the separate federal block grant Children’s Health Insurance Program. Medicaid coverage is also limited to citizens and qualified aliens (with a limited exception for emergencies).

Once a state decides which groups will be eligible, it must determine which services it will provide. The Medicaid Act mandates the provision of seven forms of medical services, including inpatient hospital, outpatient hospital, laboratory and x-ray, nursing-facility, physician, nurse-midwife, and nurse-

---


108 Id.

109 Id. (stating that adults constituted twenty-six percent of Medicaid enrollees in fiscal year 2009).

110 42 U.S.C. § 1396a(a)(10)(A)(i)(III)-(V), (l)(2)(A)(ii)-(iv) (requiring coverage for pregnant women at or below 133% FPL, but giving states discretion to fund coverage up to 185% FPL).


112 42 U.S.C. § 1396d(b), (u)(1) (allowing for the “optional use of state child health assistance funds” as part of an “enhanced Medicaid match” for low-income children); id. §§ 1397aa-jj (adding Title XXI to the SSA, thereby establishing the State Children’s Health Insurance Program (SCHIP)). See generally Rosenbaum, Markus & Sonosky, supra note 61 (discussing the similarities and differences between Medicaid and SCHIP as dual programs targeting the health care of low-income children).

113 42 U.S.C. § 1396b(v)(2)(A) (stating that payment will be made for care of aliens only for emergency services); see also Sana Loue, Access to Health Care and the Undocumented Alien, 13 J. LEGAL MED. 271, 288-89 (1992).
practitioner services. States may also elect to cover “optional” services, including such fundamental items as dental care and prescription drugs.

Moreover, the state may not deny services solely because of a beneficiary’s diagnosis, illness, or condition. Beneficiaries are entitled to relatively prompt services with no waiting periods. Healthcare providers are not required to participate in the Medicaid program, but states are required to provide reimbursement sufficient to ensure provider participation equal to non-Medicaid patients in the geographic area. This “equal access” provision was also at stake during the Court’s 2011 Term in Douglas v. Independent Living Center of Southern California, Inc., in which the Court declined to decide a Supremacy Clause challenge to a state Medicaid reimbursement methodology.

C. Previous Medicaid Expansions

Medicaid has never been a static program. Congress has repeatedly expanded Medicaid with both mandatory and optional features, often as part of other legislation.

115 Id. §§ 1396a(a)(10)(A)(i)-(ii), 1396d(a) (listing twenty-eight categories of medical assistance and mandating coverage for seven of those categories, while allowing states the option of covering some or all of the additional twenty-one).
116 42 C.F.R. § 440.230(c) (2011) (“The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.”).
117 42 U.S.C. § 1396a(a)(8) (requiring that State Plans provide “all individuals wishing to make application for medical assistance under the plan [the] opportunity to do so,” and ensure “such assistance shall be furnished with reasonable promptness to all eligible individuals”); Rosenbaum, supra note 75, at 12 (“Unlike private health insurance, Medicaid contains no pre-existing condition exclusions and no waiting periods.”).
118 42 U.S.C. § 1396a(a)(30)(A) (requiring states to adopt reimbursement procedures “sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area”).
119 See Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S. Ct. 1204, 1207-08 (2012); Huberfeld, Post-Reform Medicaid, supra note 14, at 515-27, 534 (discussing the Douglas decision and juxtaposing it with Florida v. Dep’t of Health & Human Servs.).
120 Sara Rosenbaum, Medicaid, 346 NEW ENG. J. MED. 635, 635 (2002) (“Over the years Medicaid has served as the legislative vehicle for an extraordinary range of reforms . . . .”); Sidney D. Watson, The View from the Bottom: Consumer-Directed Medicaid and Cost-Shifting to Patients, 51 ST. LOUIS U. L.J. 403, 405 (2007) (“Medicaid has grown to finance an astonishing range of safety net health insurance expansions, public health initiatives, and state health reform initiatives.”).
of broader policy initiatives.\textsuperscript{122} The \textit{NFIB} plurality fundamentally misunderstood this history, leading it to overemphasize discontinuities between the existing Medicaid program and the Medicaid expansion. The plurality artificially split Medicaid into two programs: old and new. It was then a short step to find that the condition linking those “two” programs was coercive. In addition, the \textit{NFIB} plurality minimized consideration of the previous mandatory amendments to Medicaid, leaving open the question of why mandatory amendments in 1967, 1972, 1988, and 2003 were not also coercive. In each case, all Medicaid funding for non-cooperating states was theoretically at risk under § 1396c.

Only two years after Medicaid was enacted, Congress expanded the program to address nationwide concerns regarding children’s health, including rampant poor health among preschool children and young draftees persistently failing Army physical exams.\textsuperscript{123} Congress enacted a suite of reforms\textsuperscript{124} that included a dramatic expansion of mandatory Medicaid coverage requirements, including Early and Periodic Screening Diagnosis and Treatment (EPSDT). EPSDT is a set of services and benefits for Medicaid beneficiaries under age twenty-one.\textsuperscript{125} EPSDT expanded coverage for children to a level unparalleled in public or private health insurance at the time.\textsuperscript{126} Since 1967 Congress has strengthened EPSDT several times, sometimes over states’ political objections.\textsuperscript{127} In keeping

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{122} Rosenbaum, \textit{supra} note 75, at 17-18 (explaining, for example, Congress’s use of Medicaid expansions to address healthcare access for displaced persons after Hurricane Katrina and to ensure the community integration aims of the Americans with Disabilities Act).
\item \textsuperscript{123} \textsc{Sara Rosenbaum et al., George Washington Univ., Sch. of Pub. Health & Health Servs., Dep’t of Health Pol’y, National Security and U.S. Child Health Policy: The Origins and Continuing Role of Medicaid and EPSDT 6-11 (2005), available at http://www.gwumc.edu/sphhs/departments/healthpolicy/chpr/downloads/mil_prep042605.pdf.}
\item \textsuperscript{125} 42 U.S.C. § 1396d(r) (requiring “early and periodic screening, diagnostic, and treatment services” for youth, including physicals and vision, dental, and hearing tests); \textit{see also} Frew v. Hawkins, 540 U.S. 431, 433-34 (2004) (describing the purpose of the EPSDT program).
\item \textsuperscript{126} Sara Rosenbaum & Paul H. Wise, \textit{Crossing the Medicaid-Private Insurance Divide: The Case of EPSDT}, 26 Health Aff. 382, 383-84 (2007) (describing the “importance, power, and breadth” of the EPSDT program in ensuring the availability of diagnostic, “developmental, and ameliorative services” for children).
\item \textsuperscript{127} \textit{See Omnibus Budget Reconciliation Act of 1989}, Pub. L. No. 101-239, § 6403(a), 103 Stat. 2106, 2262-63 (codified at 42 U.S.C. § 1396d(r)) (delineating further the scope of EPSDT benefits, including an express mandate that states cover “[s]uch other necessary health care, diagnostic services, treatment, and other measures . . . to correct or ameliorate
with general practice, continued Medicaid funding for states was conditioned on compliance with the new EPSDT requirements.

In 1972 Congress again amended Medicaid coverage requirements to reflect a change in traditional eligibility categories. With these amendments, Congress ended the federal-state cooperative welfare program for the aged, blind, and disabled, and replaced it with federal SSI.\(^{128}\) Accordingly, Congress revised Medicaid and required states to either extend Medicaid to all individuals eligible for SSI or, under the “209(b) option,” allow those with incomes above the prior program’s eligibility limits to qualify for Medicaid by deducting medical expenses from income.\(^{129}\) Although the 1972 Amendments gave states two options to comply with the new national policy, Congress did not afford states the option to forgo the Medicaid expansion entirely.\(^{130}\) By all appearances, the NFIB Court misunderstood this point. In oral arguments, when Mr. Clement, counsel for the States, incorrectly suggested the 1972 Amendments were “totally voluntary” and did not put existing funds at risk, neither the Court nor Solicitor General Verrilli corrected his error.\(^{131}\) In the Roberts plurality opinion, the 1972 Amendments are misleadingly described as “extending Medicaid eligibility, but partly conditioning only the new


\(^{129}\) Id. § 209(b) (allowing for the calculation of income-based eligibility after the subtraction of medical expenses); id. § 301, amended by Act of July 9, 1973, Pub. L. No. 93-66, § 212, 87 Stat. 152, 155-58 (defining mandatory SSI coverage); Brief for Respondents (Medicaid) at 5-6, Florida v. Dep’t of Health & Human Servs., 132 S. Ct. 2566 (2012) (No. 11-400) (explaining how previous Medicaid amendments mandated that states either expand SSI coverage or enact the “209(b) option”).

\(^{130}\) Brief of National Health Law Program et al. as Amici Curiae in Support of Respondents (Suggesting Affirmance on the Medicaid Issue) at 14-15, Florida v. HHS, 132 S. Ct. 2566 (No. 11-400) [hereinafter National Health Law Brief] (rejecting the argument that the 1972 SSA amendments gave the states a “take-it-if-you-want-it option” because even states choosing not to adopt the SSI expansion had to comply with section 209(b)).

\(^{131}\) Transcript of Oral Argument at 10, Florida v. HHS, 132 S. Ct. 2566 (No. 11-400).
funding.”132 The 1972 Amendments did not impose conditions only on “new funding”; both old and new funding were at risk. The only unique feature of the 1972 reform was that it gave states the additional option of complying through section 209(b).133

Further reforms came in 1988, when Congress completely delinked Medicaid eligibility for children and pregnant women from AFDC (later renamed TANF).134 Instead, Congress created uniform mandatory eligibility categories: up to 133% FPL for pregnant woman and children from birth to age five, and up to 100% FPL for children ages six to eighteen.135 These reforms greatly expanded the number of persons eligible for Medicaid. Again, Congress did not offer states a choice about whether to extend coverage; it became a condition of continued participation in the Medicaid program.

Congress added another significant mandatory requirement in 2003, as part of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA).136 The MMA created coverage for outpatient prescription drugs in the Medicare program, called Medicare Part D.137 The MMA was a response to the urgent need to extend affordable prescription-drug coverage to Medicare beneficiaries, including 8.9 million individuals covered by both Medicare and Medicaid (dual eligibles).138 At the time, all fifty states provided outpatient

---

132 NFIB, 132 S. Ct. 2566, 2605 (2012) (plurality opinion). This is not the only example of the Court getting it wrong when engaging in appellate-court factfinding. See Brianne J. Gorod, The Adversarial Myth: Appellate Court Extra-Record Factfinding, 61 DUKE L.J. 1, 25-37 (2011).

133 See Health Law Brief, supra note 14, at 4-6.


prescription-drug coverage to beneficiaries as an optional Medicaid service.¹³⁹ The MMA displaced states’ Medicaid prescription-drug-coverage programs for dual eligibles and required those beneficiaries to enroll in Part D.¹⁴⁰ To keep the new Part D within President George W. Bush’s promised $400 billion limit, Congress financed the program in part with compulsory state contributions toward the cost of Part D (known as the “clawback”).¹⁴¹ If states failed or refused to pay, the MMA authorized the federal government to extract the amount due through an automatic offset against federal Medicaid funds to which states were otherwise entitled.¹⁴² The Congressional Budget Office (CBO) estimated that states would pay $138 billion in clawback payments between 2006 and 2016.¹⁴³ Several states unsuccessfully challenged the clawback in an original-jurisdiction action in the Supreme Court, characterizing the new set of requirements as “an unprecedented intrusion into each State’s sovereignty.”¹⁴⁴ States have since adapted their Medicaid programs to comply with Part D’s requirements.

In summary, the Roberts plurality was historically inaccurate when it suggested that prior Medicaid amendments were voluntary or did not put already-existing program funds at risk. These changes have not been mere tinkering but significant expansions in both kind and degree.

¹³⁹ See Huberfeld, Clear Notice, supra note 14, at 445 (“[S]tates historically have covered drug expenses for dual eligibles through Medicaid . . . .”); William G. Weissert & Edward Alan Miller, Punishing the Pioneers: The Medicare Modernization Act and State Pharmacy Assistance Programs, 35 PUBLIUS 115, 118 (2005) (“Although it is an optional benefit, all states have elected to provide at least some level of pharmaceutical coverage under Medicaid.”); Richard Cauchi, State’s Rx for Medicare Gaps, ST. LEGISLATURES, Mar. 2006, at 28, 28 (describing states’ programs to fill the prescription-drug gap in the federal Medicare program).


¹⁴¹ Id. (defining state contribution requirements and allowing for the HHS Secretary to automatically withhold funds otherwise due to a state in response to a failure to pay); Weeks, supra note 64, at 103 (explaining the “clawback” provision).

¹⁴² 42 U.S.C. § 1396u-5(c)(1)(C) (“The amount so owed and applicable interest shall be immediately offset against amounts otherwise payable to the State . . . .”).


¹⁴⁴ Texas v. Leavitt, 547 U.S. 1204 (2006) (mem.) (denying review under the Supreme Court’s original jurisdiction); Brief of the States of Arizona et al. as Amici Curiae in Support of Plaintiffs at 1, Leavitt, 547 U.S. 1204 (No. 135). The United States was represented in this case by the then-Solicitor General, Paul Clement. See Brief for the Secretary of Health & Human Services in Opposition at 29, Leavitt, 547 U.S. 1204 (No. 135).
D. The ACA Medicaid Expansion

The ACA represents another instance of congressional use of the Medicaid program to address national healthcare needs. Most notably, Congress added a new category of individuals eligible for Medicaid, standardized income-eligibility thresholds, modified the mandatory-benefits package, and agreed to pay the lion’s share of the additional costs of covering the newly eligible individuals. Chief Justice Roberts pointed to these changes in support of his characterization of the ACA as creating a “new” Medicaid program. For their part, the states were required to maintain existing voluntary program expansions during the transition period – the “maintenance of effort” (MOE) requirement – and to contribute a small amount for the costs of the expansion population. Each of these changes will be explored briefly.

First, as with prior amendments, the ACA expands Medicaid – in particular, by extending coverage to all citizens and legal residents with incomes up to 133% FPL. Justice Roberts highlighted the additional adults covered by this provision in support of his argument that the ACA changed Medicaid “in kind, not merely degree,” because unlike pre-ACA Medicaid, the Medicaid expansion does not “care for the neediest among us.” In short, Chief Justice Roberts asserted that the eighth mandatory Medicaid category does not represent the deserving poor and enrobed this distinction with constitutional significance. Each of the pre-ACA categories were both impoverished and shared a common characteristic: poor and elderly, poor and disabled, poor and pregnant, and so forth. The only difference with the categories created by the new ACA provision was that the recipients were poor adults.

Second, the ACA standardizes the income-eligibility threshold across all categories, replacing Medicaid’s variable income-eligibility levels for different groups of categorically eligible beneficiaries. Under the ACA, income for purposes of Medicaid eligibility will be determined based on modified adjusted gross income, which uses a 5% income disregard, effectively raising the income threshold to 138% FPL. The expansion is especially significant for non-elderly, non-disabled, low-income single adults or couples without children, who previously were excluded from Medicaid because they did not qualify as “deserving” poor. Coverage is also extended to 133% FPL (or 138%, taking into account the 5% disregard) for all children, not just those under age six, instead of the previous 100% FPL requirement for children between the ages of six and eighteen. States were allowed to begin covering these newly eligible individuals as early as April 1, 2010 and must cover them

---

146 NFIB, 132 S. Ct. 2566, 2605-06 (2012) (plurality opinion).
147 For more discussion on the coverage of poor children under this particular expansion, see infra Part IV.A.
148 See supra note 55 and accompanying text.
by January 1, 2014. This set of changes is significant but apparently did not strike Chief Justice Roberts as fundamental enough to present constitutional problems – at least for now.

The third significant amendment to Medicaid under the ACA pertains to the mandatory-benefit packages. Again, for Chief Justice Roberts, this change marked a new form of Medicaid. But the amendment actually just extends flexibility that Congress had already allowed states since 2005. For the newly eligible population, states may provide the traditional Medicaid-defined benefit package or benchmark-equivalent coverage, as defined in a prior amendment to Medicaid. The Deficit Reduction Act of 2005 afforded states “unprecedented flexibility,” allowing them to modify their State Plans to provide “benchmark coverage” or “benchmark equivalent coverage” to a large portion of the Medicaid population, with some exceptions. Benchmark-equivalent coverage is less comprehensive than the traditional defined-benefits package. Instead of statutorily designed care and services, states can pay a private insurer who does not have to comply with the Medicaid Act. Benchmark coverage is a departure from Medicaid’s signature “defined benefits” package that is uniform across all beneficiaries within a state, instead permitting states to enroll some Medicaid beneficiaries in non-Medicaid managed-care plans. The ACA extends the DRA-benchmark and benchmark-equivalent-plan options to the Medicaid-expansion population.

The ACA also revises the Deficit Reduction Act of 2005 definitions in several important respects. First, benchmark and benchmark-equivalent

---

149 Patient Protection and Affordable Care Act § 2001(a)(1)(C) (codified at 42 U.S.C. 1396a(10)(A)(i)(VIII)).

150 Id. §§ 1302(a)(1), 2001(a)(2)(A), (c)(3) (codified at 42 U.S.C. §§ 1396a(k)(1), 1396u-7(b)(5), 18022(b)) (requiring that states cover this new population with benchmark or benchmark-equivalent coverage, providing at least the defined “essential benefits” package).

151 42 C.F.R. § 440.330 (2011) (defining benchmark coverage); id. § 440.335 (defining benchmark-equivalent coverage).


154 Id. (codified at 42 U.S.C. § 1396u-7(a)(1)-(2), (b)(2)).

155 42 U.S.C. § 1396u-7(a)(2) (listing categories of eligible beneficiaries); 42 C.F.R. § 440.315 (listing exemptions to mandatory benchmark-equivalent coverage).

156 42 U.S.C. § 1396u-7(b)(2)(A) (listing services mandatorily included in benchmark-equivalent coverage).

157 Id. § 1396u-7(b)(2).

158 Id. § 1396u-7(a)(1)(A) (allowing states to provide “alternative” benefits for eligible populations).

159 Id. § 1396u-7(b)(1) (listing managed-care provider plans that “shall be considered to be benchmark coverage”).
benefits must include at least the package of “essential health benefits” (EHB) that the ACA requires for private-individual and small-group insurance plans.160 The ACA broadly defined ten categories of services that must be included in EHB,161 and delegated rulemaking authority to HHS to further define the set of health services and items in EHB.162 The ACA further specifies that benchmark or benchmark-equivalent plans that provide medical and surgical benefits must comply with federal mental-health and substance-abuse parity laws.163 In addition, benchmark-equivalent packages now must cover prescription drugs and mental-health services,164 and both benchmark and benchmark-equivalent packages must cover family-planning services and supplies.165

Fourth, the federal government will provide most of the funding for the Medicaid expansion.166 For the first three years of Medicaid expansion, the federal government will pay 100% of the cost of covering newly eligible individuals in all states.167 Thereafter, the federal percentage phases down gradually, from 95% in 2017 to 90% in 2020 and thereafter.168 The more

---

161 Id. § 1302(b)(1) (codified at 42 U.S.C. § 18022(b)(1)) (listing “essential health benefits”).
162 Id. § 1302(b)(2), (4) (codified at 42 U.S.C § 18022(b)(2), (4)) (providing guidelines to the HHS for assessing and approving benchmark coverage).
163 Id. § 2001(c)(3) (codified at 42 U.S.C. § 1396u-7(b)(6)(A)) (requiring benchmark and benchmark-equivalent plans, excluding those offered by Medicaid managed-care organizations, to comply with federal mental health parity laws).
164 Id. § 2001(c)(2) (amending 42 U.S.C. § 1396u-7(b)(2)(A) (2006)) (increasing the categories of care mandatory under benchmark-equivalent coverage to include prescription drugs and mental-health services).
165 Id. § 2303(c) (codified at 42 U.S.C. § 1396u-7(b)(7) (Supp. IV 2011)) (mandating coverage of family-planning services).
166 See JOHN HOLAHAN & IRENE HEADEN, KAISER COMM’N ON MEDICAID & THE UNINSURED, MEDICAID COVERAGE AND SPENDING IN HEALTH REFORM: NATIONAL AND STATE-BY-STATE RESULTS FOR ADULTS AT OR BELOW 133% FPL 2 (2010), available at http://www.kff.org/healthreform/upload/Medicaid-Coverage-and-Spending-in-Health-Reform-National-and-State-By-State-Results-for-Adults-at-or-Below-133-FPL.pdf (estimating that 95% of new spending will be by the federal government).
168 Id. (decreasing the amount of the federal medical assistance percentage on a gradual basis from 100% in 2016 to 90% in 2020 and beyond); see MARTHA HEBERLEIN ET AL., KAISER FAMILY FOUND., FINANCING NEW MEDICAID COVERAGE UNDER HEALTH REFORM: THE ROLE OF THE FEDERAL GOVERNMENT AND STATES 2 (2010), available at http://www.kff.org/healthreform/upload/8072.pdf.
generous federal match applies only to the newly eligible population.\textsuperscript{169} States that previously expanded their Medicaid plans to cover any portion of the newly eligible population will also receive the enhanced match, meaning that some of those states may actually experience savings as a result of the Medicaid expansion.\textsuperscript{170} Overall, the federal government will fund 93\% of the expansion, according to the CBO.\textsuperscript{171} The 7\% state share represents less than a 3\% increase in state Medicaid spending.\textsuperscript{172}

Finally, Congress was concerned that states might reduce voluntary expansions before the Medicaid expansion phases in on January 1, 2014. For states that opted to cover a portion of the newly eligible Medicaid population under State Plans in effect before the ACA was enacted, the ACA requires them to maintain those current levels,\textsuperscript{173} pending implementation of the Medicaid expansion and establishment of health insurance exchanges, both in January 2014. Compliance with the MOE provision is “a condition for receiving any Federal payments” under the Medicaid Act for calendar quarters between March 23, 2010 and establishment of a health insurance exchange in the state.\textsuperscript{174} MOE provisions are typical of prior Medicaid expansions.\textsuperscript{175} In

\textsuperscript{169} Huberfeld, Federalizing Medicaid, supra note 14, at 451 (“The supermatch applies only to the newly covered population . . . .”).

\textsuperscript{170} See John Holahan et al., Kaiser Comm’n on Medicaid & the Uninsured, The Cost and Coverage Implications of the ACA Medicaid Expansion: National and State-by-State Analysis 3 (2012), available at http://www.kff.org/medicaid/upload/8384.pdf (stating that eight states are expected to experience savings under the Medicaid expansion); Holahan & Headen, supra note 166, at 4 (citing Massachusetts as a state that will experience savings).


\textsuperscript{172} See Holahan et al., supra note 170, at 3 & fig.ES-1; Orszag, supra note 171 (“The 7 percent state share would generate less than a 3 percent increase in total state Medicaid spending over that time . . . .”).


\textsuperscript{174} 42 U.S.C. § 1396a(gg)(1); see also id. § 18031 (assistance to states to establish American Health Benefits Exchanges); id. § 18041(c)(1) (providing that the federal government will establish exchanges in states that elect not to accept federal funding to establish their own).
fact, the ACA’s MOE provision is very similar to the MOE provision in the American Recovery and Reinvestment Act of 2009, to which states were subject before the ACA was passed.

States may receive waivers of the MOE through an administrative process: noncompliance is excused if “the State certifies to the Secretary that, with respect to the State fiscal year during which the certification is made, the State has a budget deficit, or with respect to the succeeding year, the State is projected to have a budget deficit.” Once states have fully operational exchanges, the MOE provision is largely waived, meaning that states can at that time vary their optional Medicaid coverage in accordance with their approved State Plan.

The Medicaid expansion was significant. But on closer examination, it was just another step in a regular process of incrementalist modification to the existing program, akin to prior amendments over the past half century. Each of the prior coverage expansions, redefinitions of eligibility, and funding adjustments have changed the terms of the cooperative arrangement between the federal government and participating states. The ACA’s Medicaid amendments were no more dramatic than these earlier changes. The Court’s claim that the expansion was an entirely new program does not square with the historical record.

II. NATIONAL FEDERATION OF INDEPENDENT BUSINESS v. SEBELIUS

The litigation surrounding the ACA is voluminous and ongoing. But the present concern is the Medicaid coercion issue that ignited before the Supreme Court.

---


177 See MOE Letter, supra note 173, at 1; see also Health Law Brief, supra note 14, at 34-36.


179 Patient Protection and Affordable Care Act § 2001(b)(2) (codified at 42 U.S.C. 1396a(gg)(3)); see also MOE Letter, supra note 173, at 5-6 (explaining how states may waive MOE requirements).

180 Patient Protection and Affordable Care Act § 2001(b)(2) (codified at 42 U.S.C. 1396a(gg)(1)) (defining MOE requirements applicable until the “Secretary determines that an Exchange established by the State . . . is fully operational”).

181 Professor Brad Joondeph maintains a useful website containing a comprehensive record of litigation concerning the ACA. ACA LITIGATION BLOG, http://acalitigationblog.blo
Officials representing twenty-six states, two private plaintiffs, and the National Federation of Independent Business challenged the Medicaid expansion on federalism grounds. In particular, the plaintiffs argued that the ACA’s requirement to expand Medicaid exceeded federal conditional spending power and amounted to unconstitutional coercion. The federal district court struck down the ACA in its entirety after holding the individual mandate unconstitutional, but rejected the States’ Medicaid challenge. The Eleventh Circuit affirmed the district court’s Medicaid ruling holding that because states continue to have a real choice whether to participate, the Medicaid expansion did not amount to coercion.

On this issue, the circuits were entirely in agreement. No lower court had declared the Medicaid expansion unconstitutional. Nevertheless, the Supreme Court reached out for the issue of coercion and granted the petition for certiorari on the Medicaid question. By almost all accounts, the Medicaid challenge was a sleeper issue. A few commentators, however, aptly noted that a decision striking down the Medicaid expansion would have a greater impact on constitutional law and health-reform implementation than a decision on the individual mandate. This Part briefly describes the Eleventh Circuit’s holding, the arguments presented before the Supreme Court, and the Court’s highly fractured Medicaid opinions.
A. Florida v. United States Department of Health and Human Services

The plaintiff states in *Florida v. United States Department of Health and Human Services* did not allege that Medicaid expansion violated any of the four limits on conditional spending power articulated in *South Dakota v. Dole*. Rather, their coercion challenge derived from the Tenth Amendment. The Eleventh Circuit noted that the Supreme Court had considered coercion in previous cases, namely *Dole* and *Stewart Machine Co. v. Davis*, but declined to strike down the laws in question because “the enactment of such laws remain[ed] the prerogative of the States *not merely in theory but in fact*.” Even though the choice might be politically difficult, when states “have a real choice, there can be no coercion.”

The Eleventh Circuit offered five reasons for finding that the Medicaid expansion was not unconstitutionally coercive. First, states were warned from the beginning of the Medicaid program that “Congress reserved the right to make changes to the program,” a right that Congress exercised several times in succeeding years. Second, except for “incidental administration costs,” the federal government will cover virtually all of the costs of expansion up to 2020, and thereafter never less than ninety percent. Third, states were given

---

190 648 F.3d 1235. In the Healthcare Cases, the Court granted certiorari on three cases, including *Florida v. Department of Health and Human Services*, which was docketed as No. 11-400. On the Medicaid issue, certiorari was granted only under this case. See *Florida v. Dep’t of Health & Human Servs.*, 132 S. Ct. 604 (2011) (mem.) (granting certiorari on the Medicaid question).

191 *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (listing the four limitations on federal government spending power: spending must be (1) “in pursuit of the general welfare”; (2) in a manner “reasonably related” to Congress’s policy goal; (3) in an “unambiguous” manner that allows states to “knowingly exercise their choice”; and (4) without requiring the states to act in violation of the Constitution).

192 *Florida v. HHS*, 648 F.3d at 1264 (reiterating the plaintiffs’ argument that the limitation on Congress’s spending power derives from the Tenth Amendment).


194 *Florida v. HHS*, 648 F.3d at 1265 (emphasis added) (quoting *Dole*, 483 U.S. at 211-12).

195 *Id.* at 1268.

196 *Id.* at 1267 (“The right to alter, amend, or repeal any provision of [the Medicaid Act] is hereby reserved to the Congress.”) (quoting 42 U.S.C. § 1304 (2006))). This provision was mentioned in the briefs and at oral arguments. See, e.g., Brief of State Petitioners on Medicaid at 41, *Florida v. Dep’t of Health and Human Servs.*, 132 S. Ct. 2566 (2012) (11-400); Brief for Respondents at 9, *supra* note 129; Transcript of Oral Argument, *supra* note 131, at 48. This point, however, was dismissed summarily by the plurality. See *infra* Part II.D.1.

197 *Florida v. HHS*, 648 F.3d at 1267-68 (citing 42 U.S.C. § 1396d(y)(1) (Supp. IV 2011)). The parties essentially did not dispute this fact, but they drew very different conclusions from the federal generosity. To the federal government, generosity was a virtue; to the states, a vice.
four years notice to determine whether to “deal with the expansion” or
“develop a replacement program.”\footnote{198} Fourth, the states’ independent power to
tax gives them the ability to fund healthcare programs of their own.\footnote{199} Fifth,
the states did not stand to lose all Medicaid funding even if they did not agree
to ACA’s eligibility expansion because HHS has “the discretion to withhold all
or merely a portion of funding from a noncompliant state,” which the court
likened to South Dakota’s potential loss of five percent of federal highway
funds in \textit{Dole}.\footnote{200}

The Eleventh Circuit’s conclusion was well supported by previous
challenges to Medicaid and similar conditional spending programs.\footnote{201} Even so,
and despite the absence of a circuit split, the Court agreed to hear the plaintiffs’
coercion challenge.\footnote{202}

\textbf{B. The States’ Merits Brief}

Language from the States’ brief shines through both the plurality and joint
dissent’s opinions in \textit{NFIB}.\footnote{203} The States acknowledged “[t]hat the line
between coercion and persuasion may not be bright”\footnote{204} but insisted that
judicially enforceable limits on the spending power are necessary because
Congress uses the Spending Clause to reach beyond its other enumerated

\footnote{198} Id. at 1268.
\footnote{199} Id.
\footnote{200} Id. (emphasis added) (citing South Dakota v. Dole, 483 U.S. 203, 211(1987)).
\footnote{201} See, \textit{e.g.}, Pennhurst State Sch. \& Hosp. v. Halderman, 451 U.S. 1, 22 (1980) (finding
that the Developmentally Disabled Assistance and Bill of Rights Act created shared
responsibilities between the federal and state governments); Helvering v. Davis, 301 U.S.
619, 640 (1937) (explaining the concept of conditional spending power); Steward Mach. Co. v. Davis, 301 U.S. 548, 593-95 (1937) (rejecting the claim that the Social Security Act’s tax
collection and unemployment benefits distribution infringed on state sovereignty); \textit{see also Florida v. HHS}, 648 F.3d at 1267 & n.66 (discussing the history of Medicaid Act
amendments); Padavan v. United States, 82 F.3d 23, 29 (2d Cir. 1996) (“Medicaid is a
voluntary program in which states are free to choose whether to participate.”); California v.
United States, 104 F.3d 1086, 1092 (9th Cir. 1998) (upholding an additional Medicaid
requirement to cover emergency medical care to illegal immigrants); Oklahoma v.
Schweiker, 655 F.2d 401, 416-17 (D.C. Cir. 1981) (holding that the pass-through provision
of the Social Security Act was a “conventional and appropriate” use of congressional power
under the Spending Clause). In \textit{Texas v. Leavitt}, the plaintiffs requested that the Supreme
Court assert original jurisdiction to review the Medicare Part D clawback which required
states to pay a portion of the new Medicare prescription-drug benefit. Plaintiffs’ Reply Brief
at 1, Texas v. Leavitt, 547 U.S. 1204 (2006) (No. 135). The Supreme Court was unwilling
even to hear the challenge, denying the states’ petition for original jurisdiction. \textit{Texas}, 547
U.S. 1204 (mem.); \textit{see supra} note 144.
\footnote{202} \textit{See Florida v. Dep’t of Health \& Human Servs.}, 132 S. Ct. 604 (2011) (mem.).
\footnote{203} The States were the petitioners in No. 11-400.
\footnote{204} Brief of State Petitioners on Medicaid, \textit{supra} note 196, at 30.
powers. According to the States, if this Medicaid expansion did not cross the line into coercion, “no Act of Congress ever will.”

In support of their coercion argument, the States contended that Congress never even considered the possibility of states opting out. By failing to provide an alternative method for those below the poverty line to comply with the individual mandate, other than Medicaid, and “threatening to withhold all funds from States that were unwilling or unable” to expand Medicaid, Congress crossed the line from pressure to unconstitutional coercion. In short, Congress failed to provide a safety net beneath the safety net.

One possible alternative to Medicaid expansion through the cooperative federal-state program would be for states to provide health care to the needy within their own borders, on their own terms. States undeniably have the independent power to tax and raise revenues from their citizens. But the States rejected that alternative because “[f]ederal funding is overwhelmingly composed of tax dollars collected from the States’ own residents.” Accordingly, the suggestion that states could “pay[] for medical care for the indigent through new [state] taxes” was an “illusory” choice that would effectively result in double taxation of state citizens.

The States also argued that the sheer size of the Medicaid program supported their coercion claim. While acknowledging that Congress has discretion in setting conditions for new funds, the States asserted that creating new conditions for existing conditional spending programs constitutes coercion when Congress uses states’ “dependency on existing funding streams to coerce compliance with new conditions.” Congress’s statutory “right to alter, amend, or repeal” the Medicaid Act could not make the ACA constitutional because the states did not “cede to Congress the power to expand the program unilaterally and coercively” and because Congress does not have the power to “hold States hostage to Congress’ later demands.” Thus, the States argued that “[n]o amount of notice will render a coercive choice any less coercive.”

Recognizing that the Court had not previously struck down a federal spending program on coercion grounds, the States analogized the Medicaid expansion to other cases recognizing federalism-based limits on federal power.

---

205 Id. at 21.
206 Id. at 35 (“[A] State’s failure to participate in Medicaid was . . . inconceivable to the drafters of the ACA.”).
207 Id. at 37 (emphasis omitted).
208 Id. at 43.
209 Id. at 44. Note that Florida’s constitution prohibits personal state income tax. Fla. Const. § 5(a).
210 Brief of State Petitioners on Medicaid, supra note 196, at 40.
212 Brief of State Petitioners on Medicaid, supra note 196, at 41-42.
213 Id. at 45.
In particular, the States likened the Medicaid expansion to the federal law struck down as impermissible commandeering in *New York v. United States* because both required the state government to take regulatory action. 214 The ACA “effectively order[s]” states to comply with the Medicaid expansion or “assume full responsibility for all medical assistance to the needy themselves.” 215 The States distinguished *Dole* because the funds at stake with Medicaid expansion are “more than 1000 times” greater than the highway funds in dispute in *Dole*. 216

C. The United States’ Merits Brief

The United States’ brief began by noting that Congress traditionally has broad authority to exercise the spending power and to “‘fix the terms on which it shall disburse federal money to the states.’” 217 The brief acknowledged *Dole*’s limits on federal spending power 218 but urged that the Medicaid expansion was certainly constitutional and related to the goals of the federal program because the challenged conditions “define the Medicaid program, going to the very core of the offer of federal financial assistance that Congress has extended to the States.” 219 Invoking Justice Cardozo’s admonishment, the United States warned that applying the coercion doctrine would “‘plunge the law in[to] endless difficulties’” 220 and confuse “‘motive or temptation’” with coercion. 221

The United States highlighted the Medicaid program’s history and prior expansions, observing that the Medicaid Act “always has mandated coverage for various categories of individuals and benefits,” and that these categories have been expanded numerous times. 222 Applying the coercion doctrine to federal-state cooperative arrangements would require courts to “delv[e] into essentially political questions about States’ differing policy choices and budgetary priorities.” 223 Cooperative federalism programs have been criticized for obscuring political accountability; the federal government enacts the programs but leaves states bearing the brunt of any political opposition to program operations and costs. Turning the political accountability argument on

214 Id. at 52 (citing *New York v. United States*, 505 U.S. 144, 174-75 (1992)).

215 Id. Of course, the states already failed at this option in the early twentieth century, which is the reason that Medicaid exists today.

216 Id. at 53 (emphasis omitted).

217 Brief for Respondents, *supra* note 129, at 20 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1980)). The United States was the respondent in No. 11-400.

218 Id. at 21.

219 Id. at 24.


221 Id. at 32 (quoting *Dole*, 483 U.S. at 211).

222 Id. at 26.

223 Id. at 35.
its head, however, the United States suggested that the States sought to avoid the political accountability of rejecting the generous federal funding for Medicaid expansion by seeking judicial intervention.224

The United States challenged the logic of the States’ claim that coercion can be established based on the quantum of Medicaid money put on the table because that would mean “the Act’s Medicaid eligibility expansion would have been even more coercive [had] Congress chosen to fund indefinitely 100% of all its costs.”225 That suggestion cannot be squared with the Court’s contract analogy for federal-state cooperative arrangements because it essentially indicates that the federal program is unconstitutional because “the other party . . . is offering too much consideration.”226

In response to the States’ suggestion that the Medicaid expansion must be coercive because Congress failed to provide an alternative means of covering low-income adults, the United States noted that the States misinterpreted the structure of the ACA and the role of the Medicaid expansion. The Medicaid expansion population will not be “forced” to obtain minimum essential coverage because they could choose instead to pay the tax penalty.227 Moreover, many Medicaid-eligible individuals would be statutorily exempted from the individual mandate.228 It is not surprising that Congress did not include a “contingency plan” for Medicaid expansion because all fifty states have long participated in Medicaid and have complied, sooner or later, with every previous expansion.

Almost as an afterthought, the United States pointed out the “separability” clause in § 1303,229 providing that should any provision of the Act be declared invalid, the remainder should remain unaffected.230 Based on that provision, the United States suggested that the appropriate remedy, should the Court find the Medicaid expansion coercive, would be to “enjoin the ‘application’ of the [Medicaid expansion] to unconsenting States,”231 but otherwise enforce the ACA as written. The federal government urged the Court to recognize that

224 Id. at 36 (“[W]hat they seek is the ability to use the courts to tailor federal spending programs to their preferred specifications, and thereby avoid political accountability for the consequences that would follow from rejecting federal aid on the terms offered.”).
225 Id. at 41.
226 Id. at 42.
227 Id. at 49 (quoting Brief of State Petitioners on Medicaid, supra note 196, at 35).
228 Id. at 49-50 (citing I.R.C. § 5000A(e)(1)-(2), (5) (Supp. IV 2011)).
230 Id. (“If any provision [of the SSA], or the application thereof to any person or circumstance, is held invalid, the remainder of the [Act], and the application of such provision to other persons or circumstances shall not be affected thereby.”).
231 Brief for Respondents, supra note 129, at 53.
Congress would prefer a weaker Medicaid expansion to no Medicaid expansion, or no ACA, at all.\textsuperscript{232}

D. The NFIB Opinions

June 28, 2012 was full of surprises.\textsuperscript{233} First, a majority of the Court upheld the individual mandate as an exercise of the General Welfare Clause power to tax, even though no lower court had previously endorsed that theory.\textsuperscript{234} A majority also found the mandate unsustainable under the commerce power.\textsuperscript{235} This discussion was arguably dicta, though Chief Justice Roberts insisted it was necessary to the holding.\textsuperscript{236} Of particular importance for this Article, a plurality limited Congress’s power to expand Medicaid under the Spending Clause by judicially enforcing the Tenth Amendment. Though the Medicaid expansion itself was not struck down, expansion became optional for states, with no risk to their existing Medicaid funding.\textsuperscript{237} No one predicted these peculiar outcomes. The three principal Medicaid opinions\textsuperscript{238} are described in the following Sections; analysis of the opinions begins in Part III.

1. The Roberts Plurality

Chief Justice Roberts authored the controlling decision on Medicaid coercion, joined only by Justices Breyer and Kagan as to Part IV on Medicaid.\textsuperscript{239} This plurality opinion is controlling because it is the narrowest point of law; the joint dissent also found the Medicaid expansion to be unconstitutionally coercive, but refused to join the plurality and would have struck down the ACA in its entirety.\textsuperscript{240} Plurality opinions are notoriously difficult to interpret, and NFIB does not disappoint.\textsuperscript{241}

\begin{footnotes}
\item[232] Id. (“There is no basis to believe Congress would have preferred no Medicaid eligibility expansion at all to an eligibility extension that applies only to consenting States.”).
\item[233] For an account of the day’s events by a key observer, see Tom Goldstein, We’re Getting Wildly Differing Assessments, SCOTUSBLOG (Jul. 7, 2012, 10:04 PM), http://www.scotusblog.com/2012/07/were-getting-wildly-differing-assessments/.
\item[235] Id. at 2593 (Roberts, C.J., joined on this issue by Scalia, Kennedy, Thomas & Alito, JJ.)
\item[237] NFIB, 132 S. Ct. 2608 (Roberts, C.J., joined on this issue by Breyer & Kagan, JJ.).
\item[238] Justice Thomas also filed a brief opinion which this Article does not discuss.
\item[239] NFIB, 132 S. Ct. at 2577 (plurality opinion). Justice Ginsburg’s opinion concurred only in Part IV-B, the remedy. See infra Part II.D.2.
\item[240] Id. at 2643 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“The Act before us
Chief Justice Roberts began: “There is no doubt that the [ACA] dramatically increases state obligations under Medicaid.” He then noted that the ACA requires states “to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line” and to provide “a new ‘essential health benefits’ package” to Medicaid recipients. The opinion acknowledged that Congress may exercise its spending power to encourage states to regulate according to federal policy and to influence state policy. Chief Justice Roberts also invoked the familiar contract analogy for conditional spending power, noting that states must voluntarily and knowingly accept the terms of the federal offer.

Chief Justice Roberts’ limits on conditional spending power were grounded in the notion that “freedom is enhanced by the creation of two governments, not one.” To protect individual liberty, therefore, the Court must enforce limits on both direct commandeering and indirect coercion of states. The plurality observed that those concerns have twice led the Court to strike down federal legislation that “commandeers” states. The same federalism values should prohibit Congress from using the spending power “to exert a ‘power akin to undue influence.’” When congressional “pressure turns into here exceeds federal power . . . in denying nonconsenting States all Medicaid funding.”

See generally John F. Davis & William L. Reynolds, Juridical Cripples: Plurality Opinions in the Supreme Court, 1974 DUKE L.J. 59. Davis and Reynolds describe some of the problems that arise from plurality opinions:

First, the fact that an opinion is supported by only a plurality of the Court may compromise its professional and public acceptance. Second, within the Court itself, a no-clear-majority decision will carry less precedential weight. Third, a plurality opinion often fails to give definitive guidance as to the state of the law to lower courts – both state and federal – as well as to the legislative, administrative, and executive agencies charged with implementing the standards so ambivalently articulated by the Court. Thus, there results a collective confusion as to what has been held by the Court in the plurality case.

Id. at 62.

NFIB, 132 S. Ct. at 2601 (plurality opinion).

Id.

Id. (quoting 42 U.S.C. §§ 1396a(k)(1), 1396u-7(b)(5), 18022(b) (Supp. IV 2011)).

Id. at 2601-02 (citing New York v. United States, 505 U.S. 144, 166 (1992)).

Id. (citing Barnes v. Gorman, 536 U.S. 181, 186 (2002)); see also Brief of James F. Blumstein, as Amicus Curiae in Support of Petitioners (Medicaid Issue) at 7-12, 25-38, Florida v. Dep’t of Health & Human Servs., 132 S. Ct. 2566 (2012) (No. 11-400) [hereinafter Blumstein Brief] (developing further the contract analogy for the Medicaid coercion argument).


Id.

Id. (citing Printz v. United States, 521 U.S. 898, 933 (1997); New York, 505 U.S. at 174-75).

Id. (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).
compulsion,’”” the statute “runs contrary to our system of federalism.”251 Both federal commandeering and coercive spending “threaten the political accountability key to our federal system.”252 The constitutional design is clear that states do not have to “yield[]” to federal policy, but the ACA crossed the line to coercion by issuing an implicit threat “to withhold . . . States’ existing Medicaid funds” if they rejected the Medicaid expansion.253

The opinion provided two reasons why the threat of losing all Medicaid funding constituted impermissible coercion. First, rejecting the federal government’s argument that the Medicaid expansion was merely a modification to an existing federal program,254 it claimed that the ACA transformed Medicaid, such that the expansion was “a shift in kind, not merely degree.”255 Two programs were at issue: “old” and “new” Medicaid.256 Artificially slicing Medicaid in two allowed the plurality to determine that funds for “old” Medicaid are not related to the ACA’s “new” Medicaid expansion.257 In Chief Justice Roberts’ view, “new” Medicaid “is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.”258 He described “new” Medicaid as being characterized by (1) the new category of eligible individuals, (2) the more generous federal-funding provisions in the Medicaid expansion, and (3) the less-comprehensive minimum-benefits package that states may offer to newly eligible individuals.259

Second, the Chief Justice held the Medicaid expansion coercive because it operated as far more than “‘inducement’” or “‘relatively mild encouragement’” of states.260 Medicaid expansion, read along with § 1396c – which allowing the Secretary to withhold payment to states for noncompliance with Medicaid

---

251 Id. (quoting Steward Mach. Co., 301 U.S. at 590).
252 Id.
253 Id. at 2603 (internal quotation marks omitted).
254 Id. at 2605.
255 Id. at 2605-06 (distinguishing the ACA amendments from previous Medicaid expansions found to be non-coercive).
256 Id. at 2605 (“We cannot agree that existing Medicaid and the expansion dictated by the Affordable Care Act are all one program simply because ‘Congress styled’ them as such.” (quoting id. at 2635 (Ginsburg, J., dissenting))); id. at 2606 (characterizing the Medicaid expansion as “a new health care program”); id. at 2607 (“What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”).
257 Id. at 2605-06 (concluding that while “[p]revious amendments to Medicaid eligibility merely altered and expanded the boundaries,” the ACA so fundamentally changed the nature of Medicaid as to create a “new health care program”).
258 Id. at 2606.
259 Id.
260 Id. at 2604.
requirements – coerced state governments. With Medicaid spending representing twenty percent of the average state’s budget, “[t]he threatened loss of over 10 percent of a State’s overall budget” was deemed “economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.” The coercion holding was further supported by the fact that states have, over the decades of Medicaid’s existence, formed “intricate statutory and administrative regimes . . . to implement their objectives under existing Medicaid.” Because states face considerable practical difficulties walking away from the substantial funding and disentangling their existing Medicaid programs, the Medicaid expansion operated as a “gun to the head.”

Just as the Court in Steward Machine declined to “‘fix the outermost line’” where persuasion becomes coercion, the NFIB plurality opinion saw “no need to fix a line” to determine when Congress’s use of the spending power becomes coercive. Chief Justice Roberts simply stated, “wherever that line may be, this statute is surely beyond it.” Citing the Court’s anti-commandeering precedents, he observed that “Congress may not simply ‘conscript state [agencies] into the national bureaucratic army,’” and concluded that was precisely what Congress was attempting with Medicaid expansion. Thus, Roberts avoided creating any kind of rule, test, standard, method, or other framework for understanding coercion beyond the facts of NFIB.

Having concluded that the Medicaid expansion constituted coercion in violation of the Tenth Amendment’s limit on federal spending power, the Court next considered the remedy. One option, advanced by the joint dissent, would have been to strike down the entire ACA based on the unconstitutionality of one provision. The plurality, however, held the Medicaid expansion unconstitutional only to the extent that it “penalize[s] States that choose not to participate in [the] new program by taking away their existing Medicaid funding.” On this remedial issue, Justices Ginsburg and Sotomayor joined the plurality, thus creating a unique five-vote majority to preserve the ACA from being struck down in its entirety.

---

261 Id. at 2604-05 (“Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of those costs.”).

262 Id. at 2604.

263 Id.

264 Id. at 2606 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 591 (1937)).

265 Id.

266 Id. at 2606-07 (alteration in original) (quoting Fed. Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 775 (1982) (O’Connor, J., concurring in part and dissenting in part)).

267 Id. at 2667 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (calling invalidation of the entire ACA “[t]he most natural remedy”).

268 Id. at 2607 (plurality opinion).

269 Id. at 2642 (Ginsburg, J., concurring in part and dissenting in part) (“I agree with
SSA’s “separability” clause in 42 U.S.C. § 1303, the Court “follow[ed] Congress’s explicit textual instruction to leave unaffected ‘the remainder of the [Medicaid] chapter.’”270 Accordingly, the only modification necessary to render the Medicaid expansion constitutional was that “the Secretary [of HHS] [] not apply § 1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion.”271 The Medicaid expansion thus became optional for dissenting states, the aforementioned “Red State Option.”272

The plurality accepted the arguments from the United States and amici that § 1303 demands a narrow remedy.273 The Chief Justice concluded that Congress “would have wanted to preserve the rest of the Act” because some states desire the Medicaid expansion and because the rest of the statute will still function in the manner intended by Congress.274 Accordingly, all other reforms Congress enacted in the ACA remain “‘fully operative as a law.’”275

2. The Ginsburg Opinion

Justice Ginsburg, joined by Justice Sotomayor, dissented from the plurality’s coercion decision, except with respect to the prescribed remedy.276 Justice Ginsburg recognized that “there are federalism-based limits on the use of Congress’ conditional spending power” but pointed out that “[t]he Court in Dole mentioned, but did not adopt, a further limitation” centered on “the

[Chief Justice Roberts] that the Medicaid Act’s severability clause determines the appropriate remedy.”); see also infra Part I.D.2 (discussing the Ginsburg opinion).

270 NFIB, 132 S. Ct. at 2607 (plurality opinion) (quoting 42 U.S.C. § 1303 (2006)).

271 Id. (recognizing that the Secretary, pursuant to the existing, pre-ACA Medicaid Act was authorized to withhold federal funding to noncompliant states (citing 42 U.S.C. § 1396c)).

272 See supra note 23 and accompanying text.

273 NFIB, 132 S. Ct. at 2607 (plurality opinion) (citing 42 U.S.C. § 1303) (holding that severability “fully remedies the constitutional violation . . . identified,” and that § 1303 “confirm[s] that we need go no further”); see also Brief for Respondents, supra note 129, at 53; Health Law Brief, supra note 14, at 39.

274 NFIB, 132 S. Ct. at 2608 (plurality opinion) (opining that “States [] may voluntarily sign up, finding the idea of expanding Medicaid coverage attractive,” and that “[t]he other reforms Congress enacted . . . will still function in a way ‘consistent with Congress’ basic objectives in enacting the statute’” (quoting United States v. Booker, 543 U.S. 220, 259 (2005))).

275 Id. (quoting Champlin Ref. Co. v. Corp. Comm’n of Okla., 286 U.S. 210, 234 (1932)).

276 Id. at 2642 (Ginsburg, J., concurring in part and dissenting in part) (finding no constitutional violation of the Spending Clause but, given the plurality’s holding, agreeing that “the ACA’s authorization of funds to finance the expansion remains intact, and the Secretary’s authority to withhold funds for reasons other than noncompliance with the expansion remains unaffected”).
indistinct line between temptation and coercion.”277 Justice Ginsburg observed that the concerns that caused the Court to consider the coercion doctrine in *Dole* were not present in this case.278 First, the condition of expanded eligibility “relates solely to the federally funded Medicaid program.”279 By contrast, in *Dole*, the minimum-drinking-age condition related only *indirectly* to highway construction.280 Second, Congress has clear authority to directly enact the same Medicaid policy, as Congress could simply make Medicaid a fully national program like Medicare. By contrast, in *Dole*, it was an “open question” whether Congress had power to enact a nationwide minimum drinking age.281 Thus, in *Dole*, it was plausible that the Spending Clause was being used to regulate activity beyond Congress’s enumerated powers. Similar factors suggestive of coercion were not present with the Medicaid expansion. Justice Ginsburg recognized the importance of Chief Justice Roberts’ claim that the ACA created a “new” Medicaid program. She stated that, like the original Medicaid Act, the expansion “enable[s] States to provide medical assistance to needy persons” and “leaves unchanged the vast majority” of provisions governing Medicaid.282 Characterizing Title II of the ACA as an entirely new program ignored the “large measure of respect” that the courts should give to Congress’s description of its own law and created an ill-defined question of “‘at what point does an extension become so large that it ‘transforms’ the basic law?’”283 She queried why the most recent Medicaid expansion constitutes “a shift in kind, not merely degree,” when prior statutory expansions did not284 and charged the plurality with rewriting the 1965 Medicaid Act “to countenance only the ‘right to alter somewhat,’ or ‘amend, but not too much.’”285 Justice Ginsburg directly challenged Chief Justice Roberts’ reliance on features of the Medicaid expansion that he used to characterize it as a “new” program. First, to the Chief Justice’s suggestion that “unlike pre-ACA Medicaid, [the Medicaid expansion] does not ‘care for the neediest among us,’”286 Justice Ginsburg responded: “What makes that so? Single adults earning no more than $14,856 per year – 133% of the current federal poverty

---

277 *Id.* at 2634.
278 *Id.*
279 *Id.*
280 *Id.* (“In *Dole*, the condition – set 21 as the minimum drinking age – did not tell the States how to use funds Congress provided for highway construction.”).
281 *Id.*
282 *Id.* at 2635 (internal quotation marks omitted).
283 *Id.* at 2636.
284 *Id.* at 2639 (“But why was Medicaid altered only in degree, not in kind, when Congress required States to cover millions of children and pregnant women?”).
285 *Id.* (referring to 42 U.S.C. § 1304 (2006)).
286 *Id.* at 2636 (quoting *id.* at 2606 (plurality opinion)).
level – surely rank among the Nation’s poor.”

She also rebutted the suggestion that the ACA’s package of Medicaid benefits for newly eligible beneficiaries is “new,” noting that the ACA did not create the definitions of “benchmark” and “benchmark equivalent coverage” but expressly incorporated these definitions from the Deficit Reduction Act of 2005. Regarding the Chief Justice’s suggestion that the ACA’s more generous federal match evidenced a “new” program, Justice Ginsburg questioned the constitutional significance of the increased funding. Tracking Solicitor General Verrilli’s argument, she asked, “is it not passing strange to suggest that the purported incursion on state sovereignty might have been averted, or at least mitigated, had Congress offered States less money to carry out the same obligations?”

Justice Ginsburg also observed that nothing would stop Congress from simply repealing the Medicaid Act and then replacing it with “Medicaid II, a new program combining the pre-2010 coverage with the expanded coverage required by the ACA.”

Regarding the contract analogy, Justice Ginsburg precedent that caselaw required only that “conditions on federal funds be unambiguously clear at the time a State receives and uses the money.” That moment would begin in 2014, giving states more than three years to understand what was required of them. But if clear notice is required at the very beginning of the program, then Medicaid surely qualified in 1965 as well because Congress explicitly retained the right to amend or alter the program from the beginning. Relying on Bowen v. Public Agencies Opposed to Social Security Entrapment, Justice Ginsburg argued that states have no lawful basis to complain about the expansion of Medicaid, even if it represents a significant change in the program. In Bowen, the State of California and its public agencies challenged congressional amendments to the SSA’s old age, survivors, and disability insurance-benefits program that restricted the ability of states to terminate their agreements with the federal government. The Court rejected

\[287\] Id.

\[288\] Id. at 2636 n.20 (citing 42 U.S.C. §§ 1396a(k), 1396u-7 (2006 & Supp. IV 2011)).

\[289\] Id. at 2636.

\[290\] Id.

\[291\] Id. at 2638.

\[292\] Id. at 2637 (“Section 2001 does not take effect until 2014. The ACA makes perfectly clear what will be required of States that accept Medicaid funding after that date.”).

\[293\] Id. at 2638 (citing 42 U.S.C. § 1304 (2006)).


\[296\] Bowen, 477 U.S. at 49-50 (“The State claimed that the federal defendants had . . . violated the Tenth Amendment by impairing the State’s ‘ability . . . to structure its relationships with its employees.’”).
the challenge, relying on § 1304 (Congress’s express reservation of the right to “alter, amend, or repeal any provision” of the Act).297

Justice Ginsburg also expressed serious concern about the Court’s failure to “fix the outermost line” at which “persuasion gives way to coercion.”298 She stated that the Court failed to answer a variety of questions, including whether courts measure coercion by the amount offered to the states by the federal government, the percentage of the state’s budget affected, what effects on what states should figure into the constitutional analysis, and the combined effect of all plaintiff states refusing the spending conditions.299 Echoing Solicitor General Verrilli’s argument once again, Justice Ginsburg worried that “political judgments that defy judicial calculation” will become the business of courts.300

Only Justice Sotomayor joined Justice Ginsburg in concluding that the Medicaid expansion was constitutional. The seven other Justices signed two opinions holding the Medicaid expansion to be unconstitutionally coercive. The remainder of the ACA was saved only on severability grounds. Justice Ginsburg agreed that § 1303 and judicial precedent required the Court to “conserve, not destroy” the statute’s purpose.301 Here, Congress’s “objective was to increase access to health care for the poor by increasing” state funding.302 That objective was best implemented not by jettisoning the ACA altogether, but by keeping in place as much of the law as possible.303 In the context of Medicaid, that meant allowing states the option to accept additional federal funds for Medicaid expansion without facing potential withdrawal of existing funds.

3. The Joint Dissent

The remaining four Justices filed a joint dissent signed in order of seniority.304 Justices Scalia, Kennedy, Thomas, and Alito joined no part of the Court’s opinion despite substantially agreeing with the coercion holding, if not the reasoning. The joint dissent would have held the Medicaid expansion unconstitutional on broader grounds and would have refused to sever the application of § 1396c.305 According to the joint dissent, the constitutional flaws in the Medicaid expansion required striking down the entire ACA.306

297 Id. at 51-52.
298 NFIB, 132 S. Ct. at 2640 (Ginsburg, J., concurring in part and dissenting in part) (quoting id. at 2606 (plurality opinion); Steward Mach. Co. v. Davis 301 U.S. 548, 591 (1937)).
299 Id. at 2640-41.
300 Id. at 2641.
301 Id. at 2642.
302 Id.
303 Id.
304 Id. at 2642 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).
305 Id. at 2667 (“We should not accept the Government’s invitation to attempt to solve a
The joint dissent observed that “[t]he power to make any expenditure that furthers ‘the general welfare’ is an extensive power given to the federal government that includes ‘attach[ing] conditions’ to funds disbursed to the states.”307 Left unchecked, however, such a power “would present a grave threat to [our] system of federalism”308 and would allow Congress “to tear down the barriers . . . and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.”309 The joint dissent shared the political accountability concern articulated in the States’ Brief regarding the ability of federal officials to “remain insulated from the electoral ramifications of their decision.”310 In order to protect the “unique role of the States in our system,”311 the dissent urged that the Court must enforce the coercion doctrine as a limit on Congress’s spending power.

Like the Roberts plurality, the joint dissent determined that unconstitutional coercion depends on whether the states can voluntarily accept or decline an offer. Both opinions resisted defining the line beyond which the spending power becomes coercive. The joint dissent suggested that freedom to accept or decline the Medicaid expansion “as a matter of law” was insufficient to render constitutional the use of the spending power, as it ignored the “practical matter” of whether states can effectively create an alternative.312

For the joint dissent, there was “no doubt” that the Medicaid expansion was unconstitutional.313 The states have independent power to tax and spend and could theoretically create a new healthcare program, but “the sheer size” of Medicaid means that states would have to contribute up to “an additional 33% of all [] state expenditures to fund an equivalent state program.”314 The dissent constitutional problem by rewriting the Medicaid Expansion so as to allow States that reject it to retain their pre-existing Medicaid funds.”); id. at 2671 (discussing the non-severability of the rest of the ACA from the individual mandate and Medicaid expansion).

306 Id. at 2668-69 (describing the severability inquiry as “whether the now truncated statute will operate in the manner Congress intended” and whether “Congress would have enacted [the remaining provisions] standing alone and without the unconstitutional portion”).

307 Id. at 2658.

308 Id. at 2659.

309 Id. (quoting South Dakota v. Dole, 483 U.S. 203, 217 (1987) (O’Connor, J., dissenting)).

310 Id. at 2660 (quoting New York v. United States, 505 U.S. 144, 169 (1992)).


312 Id. at 2661 (internal quotation marks omitted).

313 Id. at 2662 (“[T]here can be no doubt [that the legislation is unconstitutional]. In structuring the ACA, Congress unambiguously signaled its belief that every State would have no real choice.”).

314 Id. at 2663 (citing Arizona as an example, highlighting that the state “commits 12% of its state expenditures to Medicaid, and relies on the Federal Government to provide the rest: $5.6 billion, equaling roughly one-third of Arizona’s annual state expenditures of $17
also suggested that states that opt out of Medicaid could further face the loss of TANF funds because participation in that program is premised on participation in Medicaid.\textsuperscript{315} Meanwhile, local hospitals and healthcare providers would be forced to bear the unfunded requirement to treat patients under the federal Emergency Medical Treatment and Labor Act, without the assurance of Medicaid reimbursement.\textsuperscript{316}

Finally, the anticipated success of the inducement was a strike against it. The joint dissent agreed with the States’ argument that no one expected states to refuse the Medicaid expansion.\textsuperscript{317} Under the joint dissent’s reasoning, Congress’s failure to provide backup coverage for those below the poverty line, in contrast to other new ACA programs that provide alternatives to state participation, demonstrated that “Congress well understood that refusal was not a practical option.”\textsuperscript{318} To the joint dissent, the exceedingly generous federal match, which no state was expected to decline, was therefore further evidence of coercion.\textsuperscript{319}

On the question whether Medicaid expansion operates as unconstitutional coercion, seven Justices agreed. But the joint dissent and the Court parted ways primarily on the issue of remedy and severability for several reasons. First, the dissent maintained that “the ACA depends on States’ having no choice” as many individuals subject to the individual mandate cannot afford insurance outside of Medicaid.\textsuperscript{320} Put another way, the ACA was structurally dependent upon the Medicaid expansion. Second, if a state opted out, its citizens would still pay federal taxes to support the Medicaid expansion in other states that opted in.\textsuperscript{321} The joint dissent warned that the Court should not create this
“divisive dynamic” but should leave such a design to “conscious congressional choice.”

The joint dissent agreed with the Court that § 1303 required the unconstitutional application of § 1396c, authorizing the Secretary to withhold all Medicaid funding for states that did not implement Medicaid expansion, to be severed from the rest of the Act. But the joint dissent did not read § 1303 to authorize the Court to rewrite the statute to cure its unconstitutionality. By reading the ACA Medicaid expansion as optional, rather than voluntary, the Court made “a new law” rather than “enforc[ing] an old one.” Rather, the joint dissent, upon finding the Medicaid expansion unconstitutionally coercive, would have struck down the entire ACA.

III. COERCION AND CONSTITUTIONAL CONFUSION

The Court has now decisively determined, through a three-Justice plurality and a four-Justice joint dissent, that the anti-coercion principle operates as a limit on Congress’s power to spend for the general welfare when conditions are placed on states’ acceptance of that spending. The Court has previously recognized structural limits on other federal powers, but NFIB was the first clear articulation of a federalism-based limit on Congress’s spending power.

The courthouse doors have now been thrown open to challengers seeking to explore the contours of the coercion doctrine. This Part focuses attention on this new judicially enforceable limit. It begins by placing NFIB in context as a

322 Id.
323 Id. (“[T]hat clause tells us only that other provisions in Chapter 7 should not be invalidated if § 1396c, the authorization for the cut-off of all Medicaid funds, is unconstitutional.”).
324 Id. (asserting that the severability clause “does not tell us that § 1396c can be judicially revised to say what it does not say”).
325 Id. (quoting Trade-Mark Cases, 100 U.S. 82, 99 (1879)).
326 See, e.g., Printz v. United States, 521 U.S. 898, 921 (1997) (describing how separation between the federal government and the states protects state executive actors from federal overreaching); New York v. United States, 505 U.S. 144, 181-83 (1992) (applying the Tenth Amendment as a structural limit on Congress’s commerce power); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (extolling, in one of the first Rehnquist Court cases to consider the issue, the virtues of federalism as a structural limitation on federal power).
327 NFIB, 132 S. Ct. at 2606 (plurality opinion). The plurality wrote:

The Court in Steward Machine did not attempt to “fix the outermost line” where persuasion gives way to coercion. The Court found it “[e]nough for present purposes that wherever the line may be, this statute is within it.” We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it.

Id. (alteration in original) (citations omitted). At oral arguments, Justice Alito proffered a question about coercion in the context of federal education programs. Transcript of Oral Argument, supra note 131, at 45-47; see also Pasachoff, supra note 24.
continuation of the Rehnquist Court’s Federalism Revolution. Next, it explores
three key coercion issues. First, it evaluates the Court’s reliance on, and
potential modifications to, the *Dole* test, including the clear-notice and
relatedness restrictions set forth in that case. Second, it considers the nature of
coercion, including how coercion is quantified, how it relates to political
accountability, and what constitutes “coercion in fact.” Third, it investigates
the question of severability for future conditional spending challenges.

A. Continuing the Federalism Revolution

The Rehnquist Court’s Federalism Revolution, which otherwise recognized
a Tenth Amendment limit on various exercises of federal power, notably
excluded the spending power. Justices and commentators interested in
advancing the Federalism Revolution found the exclusion of the spending
power to be a fissure in the project, as demonstrated by the dissent in *Davis v.

328 The Rehnquist Natural Court struck down all or part of federal legislation by
judicially enforcing the Tenth Amendment in four cases tied, at least in part, to the
the Violence Against Women Act because Congress lacked the authority to enact its civil
remedy); *Printz*, 521 U.S. at 933 (holding the Brady Handgun Violence Prevention Act to
be an unconstitutional exercise of Congress’s power); *United States v. Lopez*, 514 U.S. 549,
commerce power); *New York*, 505 U.S. at 149 (“We conclude that while Congress has
substantial power under the Constitution to encourage the States to provide for the disposal
of the radioactive waste generated within their borders, the Constitution does not confer
upon Congress the ability simply to compel the States to do so.”).

(Kennedy, J., dissenting) (discussing the need for federalism-based limits on spending).
Even before *Davis*, Justice Kennedy seemed interested in limiting the spending power.
Professor Baker reported in 1998 that Justice Kennedy was concerned that “conditional
federal spending . . . is the major states’ rights issue facing the country today.” Lynn A.
& PUB. POL’Y 95, 102-03 (1998). It seems from her dissent in *Dole* that Justice O’Connor
would have taken the *Dole* test a step further by fortifying the germaneness element. See
is not entitled to insist as a condition of the use of highway funds that the State impose or
change regulations in other areas of the State’s social and economic life because of an
attenuated or tangential relationship to highway use or safety.”).

330 See generally Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM.
L. REV. 1911 (1995) (advocating for stronger federalism-based limits on the spending
power); Baker, *supra* note 329 (advocating a “revival of states’ rights” by strengthening
*Dole*’s conditional spending analysis); James F. Blumstein & Frank A. Sloan, *Health Care
Reform Through Medicaid Managed Care: Tennessee (TennCare) as a Case Study and a
in,” and accusing the federal government of passing mandatory Medicaid amendments once
states could not leave the program); Cohen & Blumstein, *supra* note 14 (suggesting the
Court should adopt a stronger coercion approach).
The Rehnquist Court bypassed several opportunities to recognize a Tenth Amendment limit in direct Spending Clause challenges such as *Dole* and *New York v. United States*, and in other cases such as *Pierce County v. Guillen*, a commerce power case that also presented a spending power issue in the lower court. Accordingly, the Roberts Court’s keenness to revisit federalism through the vehicle of Medicaid in *NFIB* was not surprising. As a former clerk of then-Justice Rehnquist, Chief Justice Roberts may well have been oriented to this issue by his mentor. Opinions penned by other members of the Roberts Court also suggested a desire to revive the Federalism Revolution. Those seeds sprung to life in the *NFIB* plurality and joint dissent.

Indeed, several members of the Roberts Court had recently hinted at a desire to revisit conditional spending doctrine as well as other federalism-based protections for the states. For example, Justice Kennedy’s concurrence in

---

331 *See Davis*, 526 U.S. at 654-86 (Kennedy, J., dissenting). Justice Kennedy’s dissent, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, began with the following observation:

“The Court has held that Congress’ power “to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.” As a consequence, Congress can use its Spending Clause power to pursue objectives outside of “Article I’s ‘enumerated legislative fields’” by attaching conditions to the grant of federal funds. So understood, the Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.”

*Id.* at 654-55 (emphasis added) (citations omitted) (quoting *Dole*, 482 U.S. at 207); see also Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 5 (2003) (observing that the power to spend was overlooked in the “Rehnquist Revolution”).

332 *Dole*, 483 U.S. at 210 (“We have also held that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants.” (citing Oklahoma v. Civil Serv. Comm’n, 330 U.S. 127 (1947))).

333 *New York*, 505 U.S. 144. The majority approved of federal spending as an appropriate method of influencing state policymaking. *Id.* at 166-67 (“Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests.”). Additionally, the Court held that grants to states for radioactive waste disposal were “well within the authority of Congress under the Commerce and Spending Clauses . . . [and thus] not inconsistent with the Tenth Amendment.” *Id.* at 173.

334 537 U.S. 129, 147-48 (2003) (holding that federal regulation of information about highway failures collected by states for federal funding purposes was a proper exercise of commerce authority).

335 Guillen v. Pierce Cnty., 31 P.3d 628, 651 (Wash. 2001) (holding that the federal regulation of state highway-safety regulation was not a valid federal interest and thus not a proper exercise of the spending power), *rev’d on other grounds*, 537 U.S. 129 (2003).
United States v. Comstock stated: “The limits upon the spending power have not been much discussed, but if the relevant standard is parallel to the Commerce Clause cases, then the limits and the analytic approach in those precedents should be respected.” Justice Kennedy was clearly asserting that the Tenth Amendment should drive judicially enforced limits on the spending power, as it has given rise to limits on the Commerce Clause in cases such as United States v. Lopez and United States v. Morrison. Moreover, Justice Kennedy articulated skepticism about the very source of the spending power in his Comstock concurrence, writing: “It should be remembered, moreover, that the spending power is not designated as such in the Constitution but rather is implied from the power to lay and collect taxes . . . .”

Likewise, the Court’s 2011 decision in Bond v. United States was rich with federalism observations that were harbingers of NFIB. Bond could have produced a brief decision to the effect that a criminal defendant can always defend herself based upon the constitutionality of the law under which she is charged, as demonstrated by Justice Ginsburg’s two-page concurrence. But because Ms. Bond defended herself by asserting a Tenth Amendment issue, Justice Kennedy wrote at length about the nature and value of federalism and the role of divided government in protecting individuals. Bond contains language the States echoed in their brief and was reiterated by the NFIB plurality.

337 514 U.S. 549, 568 (1995) (Kennedy, J., concurring) (discussing the proper balance that should be struck to respect the boundaries of federalism).
339 Comstock, 130 S. Ct. at 1967 (Kennedy, J., concurring).
341 Id. at 2367 (Ginsburg, J., concurring) (“Bond, like any other defendant, has a personal right not to be convicted under a constitutionally invalid law.”).
342 Id. at 2364-66 (majority opinion).
343 Brief of State Petitioners on Medicaid, supra note 196, at 24-25 (“That core limitation on Congress’ power is a necessary reflection of the fact that ‘the preservation of the States . . . are as much within the design and care of the Constitution as the preservation of the Union . . . .’” (quoting Texas v. White, 74 U.S. 700, 725 (1868))).
344 See, e.g., NFIB, 132 S. Ct. 2566, 2578 (2012) (plurality opinion) (“The independent power of the States also serves as a check on the power of the Federal Government: ‘By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.’” (quoting Bond, 131 S. Ct. at 2364)); id. at 2602 (“[F]reedom is enhanced by the creation of two governments, not one.”) (quoting Bond, 131 S. Ct. at 2364)).
In addition, Justice Alito crafted his 2006 opinion in Arlington Central School District Board of Education v. Murphy as a spending power decision rather than a statutory interpretation decision, producing a narrower clear-statement rule for the unambiguous-conditions element of the Dole test. Arlington was also indicative of things to come, as the clear-statement rule the Court introduced in that case proved to be a step toward the now-stronger judicial limits on congressional spending laid down in NFIB.

NFIB advances the Federalism Revolution as the first decision by any federal court to hold Spending Clause legislation to be unconstitutionally coercive. Proponents of broad federal power will no doubt claim that the decision is sui generis and limited to its particular facts. But both the result and the rhetoric in NFIB suggest that it is a launch, not a landing.

B. Unresolved Coercion Questions After NFIB

1. Stealth Application of Dole

The four-part test articulated in Dole has long been the definitive test for determining whether conditions placed on federal spending are constitutional. Justice Ginsburg summarized the test thus:

[C]onditions placed on federal grants to States must (a) promote the “general welfare,” (b) “unambiguously” inform States what is demanded of them, (c) be germane “to the federal interest in particular national projects or programs,” and (d) not “induce the States to engage in activities that would themselves be unconstitutional.”

Unfortunately, the manner in which the plurality addressed the four-part Dole test is both unclear and disorganized. The NFIB opinions relied

---

346 Huberfeld, Clear Notice, supra note 14, at 452-65 (tracing the concurrences and dissents that led to the stricter clear-notice standard in Arlington). Arlington involved the Individuals with Disabilities in Education Act, which provides for the recovery of attorneys’ fees by parents who successfully challenge inadequate education plans. Arlington, 548 U.S. at 293. At issue in the case was whether this reimbursement scheme also included reimbursing expert (non-attorney) fees. Id. The Court held that expert fees could not be reimbursed because the state did not have clear notice of this funding requirement. Id. at 298.
348 NFIB, 132 S. Ct. at 2634 (Ginsburg, J., concurring in part and dissenting in part) (quoting Dole, 483 U.S. at 207-08, 210).
349 Professor Samuel Bagenstos writes that this disjointed opinion should be read in the frame of an “anti-leveraging principle” and argues that the Roberts opinion requires that three factors exist for coercion to be found: that the conditions be “attached to large amounts of federal money, change the terms of participation in entrenched cooperative programs, or tie together separate programs into a package deal.” Samuel R. Bagenstos, The Anti-Leveraging Principle and the Spending Clause After NFIB, 101 Geo. L.J. (forthcoming Apr.
heavily, but indirectly, on the elements of the Dole test, even though those elements were not argued or relied on in the decisions below. District Judge Vinson cited the Dole test and noted that “[t]he plaintiffs do not appear to dispute that the Act meets these restrictions.” The Eleventh Circuit acknowledged the same concession, with a footnote clarifying that the plaintiffs’ claims were not based on the germaneness requirement of Dole.

At oral argument, Solicitor General Verrilli said the Medicaid expansion “complies with all of the limits set forth in this Court’s decision in Dole, and the States do not contend otherwise.” Justice Ginsburg noted the same point in her opinion.

Even so, elements of the Dole test feature prominently in the plurality opinion, though not identified as such. The Dole test was effectively waived below and not adequately briefed, but at least two parts of the test were reanimated, potentially modified, and ambiguously incorporated into the Court’s coercion analysis. With irony that the plurality surely did not intend, the first such part concerned “clear notice.”

a. Clear Notice

When exercising authority under the Spending Clause, Congress must clearly express any conditions it attaches to federal funds. The Court first articulated this legislative clear-statement rule in Pennhurst State School & Hospital v. Halderman, authored by then-Justice Rehnquist, who later

2013) (manuscript at 3).


352 Transcript of Oral Argument, supra note 131, at 40.

353 NFIB, 132 S. Ct. at 2634 n.18 (Ginsburg, J., concurring in part and dissenting in part) (“Although the plaintiffs, in the proceedings below, did not contest the ACA’s satisfaction of these criteria, [Chief Justice Roberts] appears to rely heavily on the second criterion.” (citation omitted)).

354 See id. at 2601-08 (plurality opinion). These issues were discussed during oral argument as well. Transcript of Oral Argument, supra note 131, at 41-42, 44 (discussing Dole’s conditions and their potential applicability to the Medicaid expansion in question).

355 Perhaps the NFIB coercion analysis could be considered entirely separate from the four-factor test in Dole, limited only to cases (like NFIB) where Dole was satisfied or waived. But if that were the Court’s intention, then the plurality opinion should have explained how clear notice and relatedness were satisfied for the Dole test, but not for purposes of the plurality’s coercion analysis. Instead, we have reanimation, potential modification, and ambiguous incorporation of the old test.

356 Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1981) (“Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds.”).

357 Id. at 25 (“The crucial inquiry, however, is not whether a State would knowingly
incorporated it into the Dole test as an “unambiguous conditions” requirement.\textsuperscript{358} This requirement was later given a tightened definition by Justice Alito’s majority opinion in Arlington, which announced that “clear notice” is required, not mere unambiguity or “adequate” notice.\textsuperscript{359} The Arlington Court stated that its task was to discern whether a state would have understood, at the outset of its decision to accept federal funding, all of the conditions attached to that funding.\textsuperscript{360}

The clear-notice requirement is closely linked to the Court’s view of conditional spending programs as “much in the nature of a contract.”\textsuperscript{361} The theory is that a state cannot understand the terms of the “contract” if they are not “clear.” Accordingly, the clear-notice requirement protects states from conditions that may be unanticipated. As Justice Rehnquist wrote in Pennhurst, the “crucial inquiry […] is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice.”\textsuperscript{362}

The connections between conditional spending power, clear notice, and federalism are direct. State autonomy is preserved by ensuring that states knowingly and voluntarily enter into cooperative arrangements with the federal government. But it now appears that clear notice and coercion are also linked because the Court’s coercion reasoning was based, in part, on what it deemed inadequate notice to the states of the new conditions on federal Medicaid dollars. Because the Court did not evaluate the Dole test systematically, it is unclear as to whether the Court intended this result. The plurality and the joint dissent both suggested that states in a program as longstanding as Medicaid cannot possibly have clear notice of a dramatic new condition on the funding

\textsuperscript{358} Huberfeld, Clear Notice, supra note 14, at 446-52 (describing the progression from Pennhurst to Dole).


\textsuperscript{360} Arlington, 548 U.S. at 296, 304.

\textsuperscript{361} Pennhurst, 451 U.S. at 17; see also Blumstein Brief, supra note 246 (developing further the contract analogy for the Medicaid coercion argument). The common law contractual defense of duress seems applicable here but was not discussed by the Court.

\textsuperscript{362} Pennhurst, 451 U.S. at 25.
for that program, despite Congress’s express reservation of the right to amend, revise, and thereby, implicitly, to impose new conditions on the program. \[363\]

That interpretation would seem to ossify federal programs. The resulting question is whether Congress could have avoided the Court’s coercion holding in \textit{NFIB} if it had given \textit{clearer} notice: for example, by stating expressly that it reserved the power to impose \textit{radically} new conditions on which all Medicaid funding could and would be conditioned. Whether the Court meant to endorse such a “clearer-statement” approach to congressional drafting we cannot know. \[364\]

Future Congresses could certainly repeal Medicaid entirely, as Justice Ginsburg observed, \[365\] with grudging agreement from Chief Justice Roberts on this specific point. \[366\]

The reasoning of the plurality and the joint dissent also suggest that timing matters for clear notice, but the Court addressed timing in a haphazard manner. For the contract analogy, the time that matters is the moment of contract formation. At that moment, states must clearly understand the conditions that attach to the federal funding. Only Justice Ginsburg explored the question of exactly when cooperative-federalism contracts are formed. To Justice Ginsburg, they are formed and reformed each and every fiscal year, as Congress offers money and states accept it. This is the true import of her statement that Congress could completely eliminate Medicaid and then re-enact it. \[367\]

According to this view, the relevant moment is March 23, 2010 (the date of the ACA’s enactment), and the question is whether states have a clear understanding of their obligations under Medicaid as of January 1, 2014 (the date of the Medicaid expansion’s applicability). This is a question that is easily answered in the affirmative. Unlike the concerns in \textit{Pennhurst} over retroactivity, the Medicaid expansion effectively provides six years of advance notice – four years until the expansion takes effect and two more years of

\[363\] See supra Part II.D.1., .3.


\[366\] \textit{Id.} at 2606 n.14 (plurality opinion). The hypothetical was suggested prior to \textit{NFIB} by Glenn Cohen and Jim Blumstein in the New England Journal of Medicine. Cohen & Blumstein, \textit{supra} note 14, at 104. While acknowledging this hypothetical was legally correct, Justice Roberts dismissed it as politically impractical. \textit{NFIB}, 132 S. Ct. at 2606 n.14 (plurality opinion); see also Cohen & Blumstein, \textit{supra} note 14, at 104 (discussing the political impracticability of the Medicaid unilateral amendment provision). It is not clear why this would be politically impracticable, as Congress could have just added a phrase to Title II of the Patient Protection and Affordable Care Act announcing repeal and re-enactment. Chief Justice Roberts does not describe why this would have changed a single vote in Congress or why we should require Congress to discern magic phrases that the Court will later require in legislation.

\[367\] \textit{NFIB}, 132 S. Ct. at 2636 (Ginsburg, J., concurring in part and dissenting in part).
100% federal funding. In *Pennhurst*, the Court cautioned: “Though Congress’ power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or ‘retroactive’ conditions.”\(^{368}\) The *Pennhurst* Court was concerned that states agreed to accept federal educational funds only to learn, through litigation several years later, that hortatory obligations were mandatory and had retroactive effect.\(^{369}\) Here, states have several years to decide whether to accept the conditions before agreeing to participate in the Medicaid expansion.

The lack of notice in *Arlington* is similarly distinguishable from the present case.\(^{370}\) In *NFIB*, the states fully understood the federal offer of the Medicaid expansion well in advance of the effective date. Indeed, the states’ immediate request for judicial relief from the Medicaid expansion indicates a very clear understanding of the law and ample time to challenge it. The notice was clear and prospective; some states just did not like the offer.

In the opinions and briefs in *NFIB*, much ink was spilled over whether Congress gave clear notice in 1965. But surely this is the wrong question. The original 1965 Medicaid statute included language originally enacted in the SSA of 1935: “The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress.”\(^{371}\) The plurality and the joint dissent simultaneously made too much and too little of this provision. Too much, because it goes without saying that Congress retains the right to amend federal laws, assuming the votes exist. The 89th Congress, which created the Medicaid Act in 1965, cannot and did not bind subsequent Congresses; nor did any Congress need this clause to authorize the right to amend Medicaid in the future. Too little, because, if anything, this provision disclaims the contractual analogy applied by the Court. An explicit provision permitting unilateral amendment, after all, is a stranger to contract law.\(^{372}\) Thus Congress included a provision that was substantively superfluous, but only served to emphasize that Medicaid was not a contract. The Court entirely neglected to discuss this point.


\(^{369}\) Id. at 22-25 (rejecting the argument that states were given ample notice that their receipt of funds attached conditions for the provision of mental health services and treatment).

\(^{370}\) *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (asserting that a state must have clear notice of conditions and not learn of them post hoc, through piecemeal litigation).


\(^{372}\) RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a (1981); see also Cohen, supra note 32, at 14-16 (discussing the doctrine of illusory promise in this precise context). For further scholarly discussion of the contract analogy, clear-notice requirement, and the relevant statutory “contract” dates animating the *NFIB* opinion, see generally Copeland, supra note 14.
When discussing the question of clear notice, it is important to remember that the Court did not declare any provision of the ACA to be unconstitutional. The only federal law affected by *NFIB* is § 1396c, which authorized the Secretary to limit federal funds for noncompliance. But § 1396c was not added by the ACA; it also has been part of the Medicaid Act since 1965 and analogous language has been part of the SSA since 1935. And surely Congress could cut off future funds to states through legislation repealing, no longer funding, or otherwise amending the Medicaid Act. The Tenth Amendment gives no textual hint of this clear-notice rule, nor does the Court elucidate any precedent or theory supporting this approach.

b. **Relatedness**

The linchpin of the plurality’s opinion is the artificial distinction it forges between “old” and “new” Medicaid. This factually incorrect and atheoretical assessment facilitated the conclusion that the Medicaid expansion was unconstitutionally coercive. It also may have modified the “germaneness” prong of the *Dole* test.\(^{373}\) Until now, the Court had not enforced relatedness in this context. But after *NFIB*, we will undoubtedly see many cases attempting to apply this new concept, especially to determine exactly how “related” the condition must be to the existing program.\(^{374}\)

A major error that facilitated this mischaracterization of “old” and “new” Medicaid was the plurality’s description of Medicaid eligibility, which portrayed historical coverage categories as if they had constitutional significance.\(^{375}\) This is far from the truth. As described in Part II, in 1965 Medicaid was limited to covering the “deserving” poor,\(^{376}\) but that is attributable to the historical precedent created by the Elizabethan Poor Laws.

\(^{373}\) South Dakota v. Dole, 483 U.S. 203, 207-09 (1987). The Court called this aspect of the limitations on conditional spending “relatedness” and “germaneness” interchangeably.

\(^{374}\) KENNETH R. THOMAS, CONG. RESEARCH SERV., R42367, THE CONSTITUTIONALITY OF FEDERAL GRANT CONDITIONS AFTER NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS 10 (2012) (“Justice Roberts’ decision in *NFIB* appears to contemplate that when a court evaluates a grant condition, it must determine the relationship between that grant condition and the underlying grant program.”). As the Congressional Research Service described it, this transformation created an entirely new category for constitutional-condition cases. *Id.* at 11 (“However, if the grant condition is for a new and independent program; the government threatens the funding of an existing program; and the withholding of federal funding represents a significant portion of a state’s budget, then the condition would be coercive under the Tenth Amendment.”).

\(^{375}\) *NFIB*, 132 S. Ct. 2566, 2636 (2012) (Ginsburg, J., concurring in part and dissenting in part) (discussing the plurality’s focus on past eligibility categories as determinative of future eligibility).

\(^{376}\) Huberfeld, *Federalizing Medicaid*, supra note 14, at 436-49 (providing a history of Medicaid to explain why the program has persistently limited eligibility to the deserving poor and focused on states’ autonomy).
The limited categories of Medicaid eligibility were not conceived of as a hard-wired, constitutional mechanism for protecting states from federal conditions.

Chief Justice Roberts suggested that individuals below 133% FPL but above the pre-expansion Medicaid eligibility levels are not “the neediest among us.”377 He was egregiously incorrect. As Justice Ginsburg described, the Medicaid expansion income levels under the ACA are quite modest, especially given the lack of protection from medical bankruptcy.378 The plurality failed to explain, for example, why a sixty-five-year-old person with income below $15,000 per year qualifies as the “neediest among us” but a sixty-four-year-old with the same income does not. The Medicaid expansion simply replaces the anachronistic categories of “deserving” poor with an across-the-board, nondiscriminatory income test. Nonetheless, Chief Justice Roberts attributed constitutional significance to the level of poverty and deployed the Tenth Amendment to protect states from any change in the historical coverage categories.

Here the actual history of Medicaid presses for attention. Since 1965, the federal government has expanded Medicaid mandatory coverage many times. Contrary to the plurality’s assertion that this expansion was a “shift in kind, not merely degree,” extending eligibility by eliminating the categorical characterizations of poverty was entirely consistent with federal control of a program that exists to mainstream the poor into the healthcare system.381 The plurality rejected the idea that Congress could “style” the “new” expansion as part of “old” Medicaid simply by calling it such.382 But the Medicaid expansion is not merely an issue of style. It is a modernization of the Medicaid program compatible with prior expansions.383

---

377 NFIB, 132 S. Ct. at 2606 (plurality opinion).
378 Id. at 2636 (Ginsburg, J., concurring in part and dissenting in part) (“Single adults earning no more than $14,856 per year – 133% of the current federal poverty level – surely rank among the Nation’s poor.”).
380 NFIB, 132 S. Ct. at 2605 (plurality opinion).
381 Id. at 2639 (Ginsburg, J., concurring in part and dissenting in part) (discussing the purpose and history of Medicaid, including its expansions).
382 Id. at 2605-06 (plurality opinion) (“Indeed, the 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.”). But see at 2635 (Ginsburg, J., concurring in part and dissenting in part) (“Congress styled and clearly viewed the Medicaid expansion as an amendment to the Medicaid Act, not as a ‘new’ healthcare program.”).
The characterization of “new Medicaid” is dangerous because it denies deference to Congress when it sets the parameters for both new and amended conditional spending programs. The federal government has always established the baselines of Medicaid, one of which is eligibility. The federal requirements operate as a floor, according states flexibility to increase coverage but not decrease it. The plurality failed to appreciate that eligibility for a federal program is a key element of “preserv[ing] control over the use of federal funds.” If eligibility for federal funding is beyond the federal government’s control, then NFIB truly opens the floodgates for litigation.

Putting aside this Article’s critiques of relatedness, on this issue the views of the joint dissent and the Roberts plurality merge, suggesting a line of argument likely to garner the support of a majority of Justices in future cases. They appear willing to carefully scrutinize the relatedness of conditions on federal programs, regardless of the way in which Congress structures those programs or describes their germaneness. Thus, it appears that Justice O’Connor’s Dole dissent, which similarly would have given prominence to germaneness under the Dole test, will now surely operate in future coercion analyses.

Based on its assessment of the Medicaid expansion as a “new” program, the plurality wrote:

benefits” to certain populations). For further description of the Deficit Reduction Act of 2005 and ACA amendments incorporating the EHB package as defined by ACA section 2001(c)(3), see supra notes 150-66 and accompanying text. It is ironic that the states now point to this option as coercion, when it was originally written to benefit them and provide them more flexibility.

384 NFIB, 132 S. Ct. at 2603 (plurality opinion).

Justice O’Connor wrote:

There is a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants. It is the line identified in the Brief for the National Conference of State Legislatures et al. as Amici Curiae:

“Congress has the power to spend for the general welfare, it has the power to legislate only for delegated purposes . . . .

“The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress’ intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress’ delegated regulatory powers.”

This approach harks back to United States v. Butler, the last case in which this Court struck down an Act of Congress as beyond the authority granted by the Spending Clause.

Id. at 215-16 (citations omitted) (quoting Brief of the National Conference of State Legislatures et al. as Amici Curiae in Support of Petitioner at 19-20, Dole, 483 U.S. 203 (No. 86-260)).
Conditions that do not here govern the use of the funds [] cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.\textsuperscript{386}

For the plurality, “old” Medicaid was a “significant independent grant” which could not be conditioned on states agreeing to accept “new” Medicaid conditions. The suggested line of attack for future challenges, therefore, is that conditions unrelated to the program for which funding is offered should be deemed non-germane, and therefore coercive, depending on the amount and percentage of funding at stake.\textsuperscript{387}

Both the plurality and the joint dissent were opaque in their application of the four \textit{Dole} factors, purporting instead to base their opinions on the analytically distinct coercion dicta. But the opinions’ inspection of the “relatedness” of the condition to the purpose of the program suggests a new judicial approach to Medicaid and other Spending Clause cases.\textsuperscript{388} \textit{NFIB} plows new ground: first, by giving teeth to \textit{Dole}’s germaneness limit, and, second, by injecting two \textit{Dole} factors, relatedness and clear notice, into the coercion analysis. Federal modifications of established conditional spending programs that impose new requirements on states will now be vulnerable to constitutional challenges for violating one or both of these limits. Moreover, federal conditions that were previously found not to be coercive may be exposed to new challenges after \textit{NFIB}. Two examples follow.

First, in \textit{Kansas v. United States} Kansas challenged conditions imposed on states that accepted federal funds under TANF and related programs after the 1996 welfare reform.\textsuperscript{389} The challenged federal law called on states to adopt

\textsuperscript{386} \textit{NFIB}, 132 S. Ct. at 2604 (plurality opinion) (emphasis added).

\textsuperscript{387} Because the majority in \textit{Dole} had found the conditions sufficiently related to spending for the general welfare, the opinion dispensed with consideration of the third prong. \textit{Dole}, 483 U.S. at 211 (“When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact.”).

\textsuperscript{388} Justice Ginsburg acknowledged “federalism-based limits” on Congress’s power to spend. \textit{NFIB}, 132 S. Ct. at 2634 (Ginsburg, J., concurring in part and dissenting in part). She rejected, however, the plurality’s assessment that it was constitutionally significant that the states lacked notice concerning the Medicaid expansion. \textit{Id.} at 2630. Further, in a clear reference to the plurality’s focus on Justice O’Connor’s dissent in \textit{Dole} (which she did not cite), Justice Ginsburg distinguished the germaneness concerns in \textit{Dole} from the expansion of funding in \textit{NFIB}. Justice Ginsburg noted that the condition on the spending is for the program, Medicaid, and not for anything else; therefore, the \textit{Dole} coercion concerns were not viable. \textit{Id.} at 2634.

\textsuperscript{389} \textit{Kansas v. United States}, 214 F.3d 1196, 1197 (10th Cir. 2000). President Clinton promised to “end welfare as we know it” during his 1992 campaign and fulfilled that promise with “workfare” in 1996. \textit{See}, e.g., Douglas J. Besharov, Op-Ed, \textit{End Welfare Lite
uniform national child-support laws and procedures, including the Uniform Interstate Family Support Act (UIFSA). More specifically, Congress required all fifty states to adopt this precise legal text or else suffer loss of all TANF funds. States were also subjected to an MOE provision akin to that found in many amendments to the SSA. Although not articulating "relatedness" as a constitutional test, the Tenth Circuit had little trouble finding an acceptable relationship between TANF funding and the UIFSA condition. The two were "clearly related," based on the program’s goals, legislative history, and the "interrelationship" between welfare and child support. Arguably, TANF, a program designed to help needy families achieve self-sufficiency through job preparation, work, and marriage, and the UIFSA, a model act regarding enforcement of child-support obligations, are less related than "old" and "new" Medicaid, which involve the same program of health insurance benefits for individuals in financial need. Conceivably, the Roberts plurality may invite a renewed coercion challenge to these programs. The Kansas court buttressed its relatedness analysis with statutory construction, noting that both programs were codified in the same chapter of the SSA. This, however, is precisely the type of evidence Chief Justice Roberts slighted in his NFIB opinion.

Second, in Oklahoma v. Schweiker eleven states challenged the 1976 SSA amendments on coercion grounds. These amendments conditioned the receipt of all Medicaid funds upon a new requirement: agreeing to pass through to SSI recipients all of the annual federal cost-of-living adjustments. as We Know It, N.Y. TIMES, Aug. 15, 2006, at A19 (describing the many changes attributed to the workfare law, and highlighting the impact of a strong economy on reducing welfare rolls).

390 See Kansas, 214 F.3d at 1198.
391 Id. ("If a state’s child support enforcement program fails to conform . . . the state risks the denial of . . . its TANF funding.").
392 Id. at 1197 ("A state that elects to receive the federal block grant under the TANF program, however, must operate a child support enforcement program that meets [the litigated program’s] requirements.").
393 Id. at 1200 (citing S. Rep. No. 93-1356, at 49-50 (1974)).
394 Id. ("It is no coincidence that the AFDC/TANF and the child support programs are both set forth in the same subchapter of the Social Security Act, which bears the heading ‘Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services.’").
395 NFIB, 132 S. Ct. 2566, 2605 n.13 (2012) (plurality opinion) ("Nor, of course, can the number of pages the amendment occupies, or the extent to which the change preserves and works within the existing program, be dispositive.").
396 Oklahoma v. Schweiker, 655 F.2d 401, 402 & n.1 (D.C. Cir. 1981) (listing the appellants as eleven states and noting that two additional states, Colorado and Michigan, were parties before the district court but did not join the appeal).
397 Id. at 408 ("In order to induce the states to pass cost-of-living increases on to aid recipients, Congress deemed it necessary to attach the pass-through condition to the
The D.C. Circuit Court found this threat – the loss of all Medicaid funds – permissible because it was sufficiently related to SSI:

Indeed, SSI and Medicaid are two interrelated components of the comprehensive federal effort to aid the aged, the blind, and the disabled. Both programs are aimed at the same target population – in fact, eligibility for SSI payments automatically entitles one to Medicaid benefits in most states – but each focuses on satisfying a particular need.\footnote{Id. at 409 (footnote omitted).}

\textit{NFIB}'s relatedness-infused coercion analysis now suggests a potentially different outcome in \textit{Oklahoma v. Schweiker}. First, the Court might find SSI and Medicaid not sufficiently related as they seem even more clearly different programs than “old” and “new” Medicaid.\footnote{See id. at 410 (“The legislative history of the Social Security Act and of its amendments therefore refutes appellants’ suggestion that the requirement that states pass through SSI cost-of-living increases is unrelated to the purposes of the Medicaid program. On the contrary, the relevant committee reports, the evolution of the Act’s structure, and other conditions set by Congress all indicate that Medicaid funds and SSI benefits are two elements of one scheme with a single aim. We find nothing impermissible in Congress’ conditioning a state’s receipt of Medicaid funds on its compliance with section 1618’s mandate regarding the use of SSI funds.”).} Then, it might find that conditioning states’ Medicaid funds on their agreement to apply the cost-of-living adjustments to SSI recipients would be unconstitutionally coercive. Additional examples abound and are likely to arise in the near future. Indeed, at oral arguments Mr. Clement discussed CHIP and Medicaid as if they were sufficiently unrelated to be vulnerable to a coercion claim.\footnote{Transcript of Oral Argument, supra note 131, at 16-17.}

Thus, it appears germaneness is no longer a silent element of the \textit{Dole} test, though the manner in which the concept was incorporated into the plurality’s coercion analysis differs from Justice O’Connor’s conception of relatedness, as expressed by her dissent in \textit{Dole}.\footnote{Justice O’Connor perceived a plain germaneness problem in \textit{Dole}; the federal highway funding was not rationally related to liquor regulation. South Dakota v. Dole, 483 U.S. 203, 212-18 (1987) (O’Connor, J., dissenting).} While it seems correct that Congress cannot condition federal funding on participation in unrelated programs, the deep problem with the plurality’s analysis is that Medicaid is just one program, thus germaneness/relatedness is inapposite. Nevertheless, the Court has now created precedent that connects germaneness to coercion, which arguably expands the reach of the coercion doctrine invented by \textit{NFIB}. 

Medicaid provisions of the Act, under which funds are disbursed to the states.”).
2. Failure to Define Coercion

In the absence of caselaw defining and applying the coercion doctrine, the States instead asked the Court to “fashion” a coercion doctrine. And “fashion” the Court did, though the rules for unconstitutional coercion in exercises of spending power have pointedly not been supplied. Nevertheless, at least three possible coercion rubrics can be gleaned from NFIB: a quantitative analysis focused on financial figures, the more qualitative concept of political accountability, and the joint dissent’s concept of “coercion in fact.”

a. Quantitative Coercion

Dole’s coercion analysis was open-ended and could have been interpreted to mean either that Congress offered states too much money or that Congress threatened to take too much money away. NFIB settled on the latter. The plurality in NFIB expressly affirmed that the amount of money being offered was not an issue, writing: “Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care . . . .” The conclusion then must be that the coercion question does not hinge, at least directly, on the amount being offered to the states but rather on the money that can be taken away for failure to comply with conditions on spending. But the amount offered seems relevant inasmuch as the overall size of a federal program, whether measured by total federal spending on the program or the size of the federal grants to states, was central to the Court’s coercion analysis of the Medicaid expansion.

In reviewing the size of the “threat,” the Court was attuned to both the raw dollar amount and the percentage of funding that the federal government could take away. Chief Justice Roberts’ opinion echoed a point he made during

---

402 Brief of State Petitioners on Medicaid, supra note 196, at 28-29 (“[I]t is incumbent on this Court to fashion judicially enforceable outer limits on the [spending] power that will ensure preservation of the federal balance and the Constitution’s broad reservation of powers to the States.” (citing U.S. Const. amend. X)).

403 Though the plurality used words like “transform” to describe the effect of the Medicaid expansion, finding it coercive and dividing it from the existing Medicaid program based on this perceived extent of change, it is hard to extrapolate a rule from the Court’s characterization of the expansion other than perhaps to look for characteristics of a new program. It also seems fairly clear that not every amendment is transformative.

404 Dole, 483 U.S. at 211 (acknowledging the possibility that conditions imposed on federal funds could acquire a “coercive nature,” but finding that on the facts presented “the argument as to coercion is shown to be more rhetoric than fact”).

405 NFIB, 132 S. Ct. 2566, 2607 (2012) (plurality opinion). The plurality continued this thought: “What Congress is not free to do is to penalize States that choose not to participate in the new [Medicaid] program by taking away their existing Medicaid funding.”

406 The plurality wrote as if this were clear from Dole, but the interpretation is clearer than its source. Id. at 2604 (“By ‘financial inducement’ the Court meant the threat of losing five percent of highway funds; no new money was offered to the States to raise their
oral arguments.\textsuperscript{407} “[The] financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’ – it is a gun to the head. . . . A State that opts out of the Affordable Care Act’s expansion . . . stands to lose not merely ‘a relatively small percentage’ of its existing Medicaid funding, but all of it.”\textsuperscript{408}

The Court’s quantitative analysis was not limited to the portion or overall amount of Medicaid funding at issue, in the abstract, but in relation to several other financial measures: the percentage of states’ budgets dedicated to Medicaid, the federal government’s expenditures on Medicaid, and the legislative and executive actions (especially funding) taken by states in pursuance of the federal program over the years. These factors in their totality supported the plurality’s determination that states are effectively “locked in” to Medicaid.\textsuperscript{409} But the conflation of financial and other considerations muddles the coercion analysis; the Court failed to indicate which of these factors is decisive for a law’s constitutional status.\textsuperscript{410}

\textit{NFIB}’s coercion analysis suggests that some subset of federal laws may now be unconstitutionally coercive, but the quantitative analysis was heavily fact dependent.\textsuperscript{411} According at least to the Roberts plurality, we know that offering a large sum of money is a permissible exercise of the spending power.\textsuperscript{412} But threatening to take away an equally large sum or a large percentage of already allotted money is potentially a prohibited exercise of the spending power. We do not know how much is too much or what lies between the permitted large offer and prohibited large withdrawal alternatives. \textit{NFIB} did not provide examples of offers that would be prohibited, but simply declared that if the drinking ages.”).

\textsuperscript{407} Transcript of Oral Argument, \textit{supra} note 131, at 54 (describing the threat of losing federal funds as “the gun to your head”).

\textsuperscript{408} \textit{NFIB}, 132 S. Ct. at 2604 (plurality opinion) (quoting \textit{Dole}, 483 U.S. at 211).

\textsuperscript{409} See Blumstein Brief, \textit{supra} note 246, at 26 (describing the political problem of state lock-in).

\textsuperscript{410} But see Bagenstos, \textit{supra} note 349 (manuscript at 7-12) (discerning a three-part test from the plurality’s opinion).

\textsuperscript{411} Justice Ginsburg found the concept of coercion too ethereal to be judicially administrable. Though not using the words “political question,” she invoked \textit{Baker v. Carr} to emphasize that courts cannot determine when states “have no choice” but to accept federal funds. \textit{NFIB}, 132 S. Ct. at 2641 (Ginsburg, J., concurring in part and dissenting in part) (“The coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation.” (citing \textit{Baker v. Carr}, 369 U.S. 186, 217 (1962))). Nevertheless, because she agreed that the penalty for non-compliance was severable, Justice Ginsburg (and Justice Sotomayor) joined the Roberts plurality to uphold the Medicaid expansion but to limit the remedy available to the Secretary for noncompliance.

\textsuperscript{412} Justice Ginsburg confirmed this reading of the plurality opinion. \textit{See Id.} at 2630-31 (differentiating between the constitutionally permissible making of federal grants to states and the constitutionally problematic withholding of federal funding from states).
states have “no real choice” then Congress has acted impermissibly. This “choice” language comes dangerously close to Justice Stewart’s “I know it when I see it” test, and it does nothing to define the spectrum of coercive funding conditions.

Even so, it is tempting to divine a rule from the figures and percentages that the Court referenced. For instance, the plurality’s reasoning suggests that if the federal funding constitutes more than 10% of a state’s budget (that is, 50% federal funding of a typical state’s 20% budget for Medicaid), it must be coercive. By way of contrast, the plurality noted that the federal funds being offered in Dole “constituted less than half of one percent of South Dakota’s budget at that time.” Another way of thinking about state expenditures on Medicaid, however, is based on the CBO’s estimate that compliance with the Medicaid expansion would increase state spending less than 3% over the amount states would spend absent the expansion. Thus, any rule for evaluating coercion based on quantitative figures is highly malleable, depending on which figures are presented as well as the ways in which states can manipulate their own contributions to such spending programs. As previously noted, a large percentage of the cost of Medicaid is due to states choosing to exercise their options within Medicaid. Moreover, even the CBO’s 3% figure was likely overstated when offset against other expected state and local savings in healthcare spending for the uninsured under the ACA. And states could inflate the impact of the loss of federal funds by, for example, eliminating state income tax, thereby decreasing state revenue and increasing the proportion of the federal spending program in question within the state’s budget. These examples underscore the lack of certainty with a

---

413 See, e.g., id. at 2630.
414 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Justice Stewart famously wrote that pornography was hard to define but that he knew it when he saw it (and the movie at issue was not pornography). Id. He later seemed to recognize that this standard was unworkable, joining the dissent in Miller v. California. See Miller v. California, 413 U.S. 15, 16, 37, 43-44 (1973) (Douglas, J., dissenting) (disagreeing with a criminal sentence imposed under “standards defining obscenity which until today’s decision were never the part of any law” and remarking that “[t]o send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do”).
415 NFIB, 132 S. Ct. at 2581-82 (plurality opinion) (“Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States’ total revenue. . . . If a State does not comply with the Act’s new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medical funds.”).
416 Id. at 2604.
418 See supra Part I.B.2.
419 ANGELES, supra note 417, at 1-2; HOLOHAN ET AL., supra note 170, at 6-7.
quantitative approach to defining coercion, as well as the gaming that can easily occur.

The joint dissent’s focus on approximated figures, like the plurality’s attention to financial statistics, suggested a brighter-line coercion rule than the Court actually announced. Like the plurality, the joint dissent focused on various quantitative measures, including the amount of money the federal government offers, the amount of money the states stand to lose, and the percentage of funding that is at stake. The dissent also pondered the proportion of states’ budgets that would be affected by creating state-financed Medicaid-equivalent programs and the percentage of total state expenditures that amount would represent. The dissent concluded, without explaining its calculations, that “the annual federal Medicaid subsidy is equal to more than one-fifth of the State’s expenditures” and based the remainder of its coercion analysis on that figure. Further, the dissent noted that this amount would be in addition to the federal taxes that state citizens have to pay to support Medicaid programs in other states. The analysis has a quantitative veneer, but neither Congress nor a lower court could possibly glean from either the plurality or the joint dissent which numbers actually point to unconstitutional coercion. Because Marks v. United States tells us that the narrowest rule is the precedent that should be followed from a plurality opinion, the additional quantitative factors from the dissent should be ignored. But future cases may bring the plurality and dissent back into alignment, forcing consideration of the broader view in the dissent.

b. Qualitative Coercion: Political Accountability

Another way of articulating NFIB’s coercion discussion is to consider the federalism value of political accountability. The coercion discussion was a striking continuation of the Federalism Revolution. Analogizing to New York and Printz, Chief Justice Roberts wrote: “Permitting the Federal Government to force the States to implement a federal program would threaten the political

---

420 NFIB, 132 S. Ct. at 2657 & n.7 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).
421 Id. at 2664 (“[T]he Federal Government has threatened to withhold 42.3% of all federal outlays to the states, or approximately $233 billion.”).
422 Id. at 2657.
423 Id. (“A State forced out of the program would not only lose this huge sum but would almost certainly find it necessary to increase its own health-care expenditures substantially, requiring either a drastic reduction in funding for other programs or a large increase in state taxes. And these new taxes would come on top of the federal taxes already paid by the State’s citizens to fund the Medicaid program in other States.”).
424 Marks v. United States, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .’” (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))).
accountability key to our federal system.” He added that when states have a real choice about whether to accept federal conditional funding, state officials may fairly be held politically accountable for their decisions. But when there is no choice, the federal government accomplishes its policy objectives without being held politically accountable.

Political accountability has been a remarkably consistent and central concept in decisions limiting congressional authority under the Tenth Amendment. Neither the phrase “political accountability” nor prior decisions advancing that theme, however, provide a framework for understanding how future coercion claims might play out. It is not a coherent federalism principle, and despite articulating a reason to avoid coercion, it creates no cognizable rule for lower federal courts, let alone Congress, to follow.

Curiously, the plurality did not cite the Tenth Amendment except to introduce the discussion of congressional authority, even though it relied heavily on precedent that enforced the Tenth Amendment as a limit on congressional authority. Chief Justice Roberts paradoxically wrote: “The States are separate and independent sovereigns. Sometimes they have to act like it.” This almost sounds like Chief Justice Roberts is unwilling to mediate between the federal government and the states except in certain circumstances.

See, e.g., Fed. Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 775-97 (1982) (O’Connor, J., concurring in part and dissenting in part) (relying in part on “political accountability” to argue that the Public Utility Regulatory Policies Act should have been held unconstitutional in part). Foreshadowing New York v. United States, Justice O’Connor wrote: “Congressional compulsion of state agencies, unlike preemption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs.” Id. at 787.

For a deconstruction of judicially enforced federalism, see MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 139-43 (2008) (observing “sources of incoherence” in the Court’s “commandeering doctrine and Tenth Amendment cases”).

425 NFIB, 132 S. Ct. at 2602-03 (plurality opinion) (“[W]hen the State has no choice, the Federal Government can achieve its objectives without accountability, just as in New York and Printz.”). See generally Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144, 169 (1992). Quoting New York, the plurality continued: “Where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.” NFIB, 132 S. Ct. at 2603 (plurality opinion) (quoting New York, 505 U.S. at 169).

426 NFIB, 132 S. Ct. at 2602-03 (plurality opinion). The joint dissent also adopted this reasoning. See id. at 2660 (Scalia, Kennedy, Thomas & Alito, J.J., dissenting) (“Where all Congress has done is to ‘encourag[e] state regulation rather than compell[e] it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people. . . .’” (quoting New York, 505 U.S. at 168)).

427 Id. at 2603 (plurality opinion).

428 Curiously, the plurality did not cite the Tenth Amendment except to introduce the discussion of congressional authority, even though it relied heavily on precedent that enforced the Tenth Amendment as a limit on congressional authority. Chief Justice Roberts paradoxically wrote: “The States are separate and independent sovereigns. Sometimes they have to act like it.” Id. This almost sounds like Chief Justice Roberts is unwilling to mediate between the federal government and the states except in certain circumstances.

429 See, e.g., Fed. Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 775-97 (1982) (O’Connor, J., concurring in part and dissenting in part) (relying in part on “political accountability” to argue that the Public Utility Regulatory Policies Act should have been held unconstitutional in part). Foreshadowing New York v. United States, Justice O’Connor wrote: “Congressional compulsion of state agencies, unlike preemption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs.” Id. at 787.

430 For a deconstruction of judicially enforced federalism, see MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 139-43 (2008) (observing “sources of incoherence” in the Court’s “commandeering doctrine and Tenth Amendment cases”).
political one. While it is important for voters to know which level of government is responsible for both popular and unpopular policy, this does not inform which level of government is responsible for creating or maintaining a particular policy, which is the real question for federalism purposes.

The political accountability trope contains two glaring problems, represented by the political climate surrounding passage of the ACA and the remedy adopted by the Court. First, the political accountability narrative is not borne out by these facts. If Congress was attempting to shield itself and force states to take responsibility for Medicaid expansion, then 100% federal funding through “ObamaCare” would seem to be an odd way to hide from voters. By fully funding the Medicaid expansion in the most visible health-policy legislation in a generation, the federal government took complete leadership responsibility. As Justice Ginsburg noted with substantial understatement, the federal role in Medicaid is “hardly hidden from view.”

Second, the political-accountability narrative does not resonate in the ultimate remedy of allowing states to opt in or out of Medicaid expansion. In the States’ Brief and the joint dissent, much was made of the “divisive dynamic” that would occur if citizens in opting-out states paid federal taxes to support Medicaid expansion for citizens in opting-in states. The argument hinges on the fact that all state citizens are necessarily federal taxpayers and the implicit assumption that citizens should garner some direct benefit from the amount of taxes they pay. The point was raised in the context of coercion.

---

431 Political accountability has been described as the “‘answerability’ of representatives to the represented.” D. Bruce La Pierre, Political Accountability in the National Political Process – The Alternative to Judicial Review of Federalism Issues, 80 NW. U. L. REV. 557, 640 (1985). It has also been defined as the ability of constituents “to influence the political process that produces their representatives and governing legislation,” which depends upon the “‘connection between the representative and the represented.’” Robert A. Hammeke, Note, State Autonomy Implications for Congressional Conditional Spending, 24 OKLA. CITY U. L. REV. 349, 355 (1999) (quoting Lewis B. Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 COLUM. L. REV. 847, 856 (1979)).

432 NFIB, 132 S. Ct. at 2633 n.17 (Ginsburg, J., concurring in part and dissenting in part).

433 Id. at 2667 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); see also id. at 2657 (plurality opinion) (concluding that a state that chooses to opt out of the Medicaid expansion would be forced to greatly increase state taxes to supplement lost federal funding even as state citizens were still forced to pay federal taxes to support the expansion in other states).

434 Brief of State Petitioners on Medicaid, supra note 196, at 43 (“Were a State to refuse to comply with Congress’ conditions, ‘federal taxpayers in [that State] would be deprived of the benefits of a return from the federal government to the state of a significant amount of the federal tax monies collected.’” (alteration in original) (quoting Jim C. v. United States, 235 F.3d 1079, 1083 (8th Cir. 2000))).


436 Brief of State Petitioners on Medicaid, supra note 196, at 43 (“[The] practical ability
but is arguably relevant to political accountability as well. At oral argument, Justice Kagan asked Mr. Clement whether it would be coercive if the federal government offered to pay for 100% of the costs to expand Medicaid.\(^{437}\) He insisted it would be,\(^{438}\) for one reason: federal taxes are raised from a state's own citizens.\(^{439}\) Mr. Clement's suggestion was that putting states to the difficult choice of having their citizens pay federal taxes to support Medicaid, while garnering a benefit to the state in terms of federal Medicaid dollars, versus paying the same taxes and receiving nothing in return, was unconstitutionally coercive. This linking of taxation and benefit evokes a political-accountability theme, and a line of argument that the States did not pursue. First, the States failed to acknowledge the controlling force of the Sixteenth Amendment, which authorizes the federal income tax on individual citizens of states.\(^{440}\) Second, the argument would prove too much, suggesting that any federally funded conditional spending program that gives states a choice to participate or not would be coercive. Third, \textit{NFIB} allowed states to opt out of the Medicaid expansion, with the clear consequences of that option being loss of national redistribution of federal taxes and local responsibility for medical welfare.\(^{441}\) The states become politically accountable for their own taxation policy choices, but this is not what "political accountability" generally means in the federalism context.

to ask residents, already taxed by the federal government to provide health insurance elsewhere, to contribute additional taxes to supplant the declined federal program is all but nil."); Reply Brief of State Petitioners on Medicaid at 1-2, Florida v. Dep't of Health & Human Servs., 132 S. Ct. 2566 (2012) (No. 11-400) ("Nor does the federal government even try to explain how a State could possibly reject new terms attached to billions of dollars of pre-existing funds . . . particularly when that would mean forfeiting not only all of the tax dollars already being collected from its residents to fund Medicaid, but also billions in new federal spending that the ACA creates. . . . If the federal government can coerce States to administer federal programs, by threatening to withhold billions of dollars extracted from in-State taxpayers, then very little is left of the anti-commandeering doctrine.").


\(^{438}\) \textit{Id}. at 3-6.

\(^{439}\) \textit{Id}. at 5-6. Actually, federal taxes are raised from citizens of the United States, who also happen to be citizens or residents of various states.

\(^{440}\) U.S. CONST. amend. XVI. At oral arguments, Justice Sotomayor asked whether this line of argument was a limit on the federal power to tax. Mr. Clement conceded that it was not. Transcript of Oral Argument, \textit{supra} note 131, at 6-7.

\(^{441}\) Justice Sotomayor noted at oral arguments that Florida, the lead plaintiff, receives more in federal benefits than its residents pay in federal taxes. Mr. Clement responded: "Well, then I'll make that argument on behalf of Texas." Transcript of Oral Argument, \textit{supra} note 131, at 36.
c. Coercion in Fact

The joint dissent’s spending-power analysis helps only slightly in deciphering coercion, and it was more extreme in its views than the plurality. At the outset, the joint dissent questioned the long-settled decision in *Butler*, which interpreted the Spending Clause as a source of federal authority separate from Congress’s other enumerated powers. Grudgingly, however, the dissent accepted that the Hamiltonian view, as espoused in *Butler*, was settled law. 442 The joint dissent also relied heavily on Justice Kennedy’s dissent in *Davis v. Monroe County Board of Education*, a 1999 decision in which Kennedy articulated a desire to limit congressional spending by using federalism principles. 443 The *NFIB* joint dissent’s reliance on a prior dissent amounts to double dicta – a non-binding opinion citing another non-binding opinion. Still, it provides insight into the direction the Court may take in cases involving the spending power and the coercion doctrine.

Like the plurality, the joint dissent refused to create a rule for coercion, instead simply concluding that “Congress effectively engages in this impermissible compulsion when state participation in a federal spending program is coerced, so that the States’ choice whether to enact or administer a federal regulatory program is rendered illusory.” 444 The dissent seems to have satisfied itself by declaring that a law must be “coercive in fact” (as opposed to in theory). 445 But the distinction between fact and theory is meaningless if coercion remains undefined. 446 The joint dissent acknowledged that it effectively created no standard for courts to follow, writing: “The question whether a law enacted under the spending power is coercive in fact will sometimes be difficult, but where Congress has plainly ‘crossed the line distinguishing encouragement from coercion,’ a federal program that coopts the States’ political processes must be declared unconstitutional.” 447

The greatest irony of the dissent’s “coercion in fact” analysis is how badly wrong it got the facts on Medicaid. 448 Despite that fundamental

---


444 Id. at 2660.

445 Id. at 2661.

446 Id. at 2661 (“Once it is recognized that spending power legislation cannot coerce state participation, two questions remain: (1) What is the meaning of coercion in this context? (2) Is the ACA’s expanded coverage coercive?”). For an attempt to define coercion in ethical theory, see Cohen, *supra* note 32.

447 *NFIB*, 132 S. Ct. at 2661 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (citation omitted) (quoting *New York v. United States*, 505 U.S. 144, 175 (1992)).

448 For a factual discussion of Medicaid’s history, see *supra* Part I. The joint dissent reiterated its proposed non-rule only a page after articulating it, writing: “Whether federal spending legislation crosses the line from enticement to coercion is often difficult to
misunderstanding of the program, the joint dissent suggests a preference for case-by-case resolution of coercion challenges; in essence, as-applied rather than facial challenges. Under this approach, the Court should recognize that each state has different financial circumstances and priorities, which Medicaid amply illustrates. Accordingly, a federal spending program deemed coercive in Mississippi perhaps could be perfectly acceptable in Massachusetts. Of course, politicians within a state may disagree as to whether a particular piece of spending legislation is beneficial or coercive; this conflict was seen in the amicus briefs submitted on the Medicaid expansion. But seven members of the Court were unwilling to wait for an as-applied challenge, instead hearing a facial challenge to a statute that would not take effect until January 1, 2014. This anomaly between the dissent’s stated preference for as-applied challenges and the Court’s willingness to hear a facial challenge to Medicaid expansion was never explained. Moreover, the Court provided no theory, test, or set of factors to guide lower courts hearing either facial or as-applied challenges to exercises of the spending power.

The difficulty distinguishing between as-applied and facial challenges to federal spending programs is more than merely hypothetical. Lower courts have previously struggled with this precise issue in the context of § 1396c and Medicaid. For example, in West Virginia v. United States Department of Health & Human Services, the State challenged new cost-recovery provisions in Medicaid, claiming, “thirty years later [] Congress changed the rules of the game.” The State asserted that loss of Medicaid funds would have caused West Virginia’s healthcare system to “effectively collapse.” But the Fourth Circuit found no unconstitutional coercion. The key point was § 1396c, which grants discretion to the Secretary for dealing with state noncompliance with federal Medicaid rules by withholding all, or some unspecified portion, of federal funding. In the view of the Fourth Circuit, “[t]his small difference in language makes all the difference in our analysis.” Because the federal government had not threatened to withhold all funding, the penalty was merely
determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear.” NFIB, 132 S. Ct. at 2662 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).


451 Id.

452 Id. at 292 (citing 42 U.S.C. § 1396c (2006)).

453 Id.
“hypothetical,” leading the Court to conclude that West Virginia was “mounting a facial challenge to the constitutionality” of the statute. 454

The danger of the judicially enforced, fact-specific coercion theory is not only that it may affect a host of established cooperative-federalism programs for education, welfare, environmental protection, and highway infrastructure, to name a few, but also that we still do not know what coercion is. NFIB, which applied the coercion doctrine to a set of facts, provides no greater clarity than Butler and Dole, which flagged coercion as an issue but declined to apply it to the facts at hand. Both the Roberts plurality and the joint dissent expressly declined to articulate any sort of test, instead merely providing nomenclature: the “anticoercion rule.” 455 The dissent’s formula was simply: “[I]f States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power.” 456 Perhaps the dissent acknowledged the ambiguity in its invitation for coercion litigation by stating, at least twice, that determining the difference between influence and coercion is “difficult.” 457

In lieu of a satisfactory test for “coercion in fact,” the plurality and joint dissent offered alarmist slogans. Chief Justice Roberts described the Medicaid expansion vividly as “a gun to the head” and “economic dragooning,” 458 continuing the bizarre references to “dragooning” that began with Printz. 459 Both phrases are inappropriately incendiary. Historically, “dragoons” were French monarchist cavalry units 460 who destroyed Huguenot churches and closed Protestant schools, leading to the revocation of the Edict of Nantes in October 1685. 461 Dragoons destroyed religious freedom and drove hundreds of

454 Id.
455 NFIB, 132 S. Ct. 2566, 2662 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). While not using the same nomenclature, the plurality affirmed the same idea, insisting there was “no need to fix a line” defining coercion. Id. at 2606 (plurality opinion).
456 Id. at 2661 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).
457 Id. at 2661-62.
458 Id. at 2604-05 (plurality opinion).
459 Printz v. United States, 521 U.S. 898, 928 (1997) (adopting the rhetoric of dragooning from a dissenting opinion in the court below and using it to describe the federal government’s perceived derogation of state autonomy, forcing states to “administer[] federal law”).
460 Keith P. Luria, Conversion and Coercion: Personal Conscience and Political Conformity in Early Modern France, 12 MEDIEVAL Hist. J. 221, 224-25 (2009) (“[Dragoons] were lodged in Huguenot houses and given free rein to brutalise their hosts into submission. Huguenots who did not convert had to pay heavy taxes and faced financial ruin. The dragoons worked in tandem with the Catholic clergy, who received the beleaguered neophytes’ abjurations.”)
461 Id. at 225 (“In 1685, the royal government unleashed a new and more widespread dragonnade . . . . By October 1685, [King] Louis could claim so many Huguenots had converted that their community had essentially ceased to exist and the Edict of Nantes was no longer necessary. He revoked it . . . .”). The Edict of Nantes had been promulgated in
thousands of religious dissenters from France, without democratic legitimacy or due process of law.\textsuperscript{462} Comparing the Medicaid expansion to “dragooning” demonstrates either an ignorance of the historical context from which the term arises or a profound misunderstanding of the program, neither of which contributes to clear constitutional guidelines. As for the “gun to the head,” this image casts the federal government as a violent criminal, threatening coldly to “shoot” unless the state/victim complies.\textsuperscript{463} Ironically, the only lives actually threatened will be those cut off from Medicaid as a result of choices made by states.

3. Severability After Unconstitutional Coercion

For the Minimum Coverage Provision, severability was a major issue briefed and decided in the courts below, with splits among the circuits. The Court gave the issue prominence, with separate time for oral arguments and Court-appointed amici. By comparison, the question of Medicaid severability appears to have caught nearly everyone by surprise.\textsuperscript{464} No court below had found the Medicaid expansion to be unconstitutional, so there was no prior decision on the remedial issue. Even when the Court granted certiorari, the question presented on severability focused exclusively on the Minimum Coverage Provision.\textsuperscript{465}

The first substantive discussion of Medicaid severability appeared in a single paragraph in the United States’ brief,\textsuperscript{466} filed on February 10, 2012, followed by more robust discussion in amicus briefs filed a week later.\textsuperscript{467} The

\textsuperscript{1598} to ensure religious freedom for the Protestant Huguenots in Catholic France. \textit{Id.} at 224.

\textsuperscript{462} \textit{Id.} at 225 (stating that more than 39,000 Huguenots abjured their Protestant beliefs based on the dragoons’ persecution).

\textsuperscript{463} For another, similar analogy from the oral argument, see Transcript of Oral Argument, \textit{supra} note 131, at 31-32 (Justice Scalia comparing “your money or your life” with “your life or your wife’s”).

\textsuperscript{464} Except, that is, for those of us following the issue closely. \textit{See, e.g.}, Health Law Brief, \textit{supra} note 14, at 38-41.

\textsuperscript{465} Florida v. Dep’t of Health & Human Servs., 132 S. Ct. 604 (2012) (mem.). Counsel for Respondents’ amici informally discussed whether it was even proper to raise the issue, given the language of the Court’s order granting certiorari.

\textsuperscript{466} Brief for Respondents, \textit{supra} note 129, at 52-53 (“There is no basis to believe that Congress would have preferred no Medicaid eligibility extension at all to an eligibility extension that applies only to consenting States.”).

\textsuperscript{467} \textit{See, e.g.}, Brief for Amici Curiae American Medical Student Association et al. in Support of the United States on Severability at 16-19, \textit{Florida v. HHS}, 132 S. Ct. 2566 (No. 11-400) (“Because Congress expressly stated which provisions it might not have enacted if it could not have also enacted a minimum coverage provision, that express statement of legislative intent must define the outer limits of this Court’s severability inquiry.”); Health Law Brief, \textit{supra} note 14, at 29-41 (analyzing petitioners' arguments concerning the Medicaid Amendments); National Health Law Brief, \textit{supra} note 130, at 3-43 (discussing
Court ultimately adopted these points as the basis of their formal decision on Medicaid severability. By contrast, the States’ briefs and their amici had little to say on the subject, other than a passing mention in a footnote.\textsuperscript{468} But at the end of the oral arguments, after the allotted time had expired, Justice Ginsburg posed a remarkable question to Mr. Clement, proposing to preserve the Medicaid expansion by giving states the choice to opt out.\textsuperscript{469} Clement was amenable to the suggestion, agreeing that his clients would be “certainly happy” with that result.\textsuperscript{470} Five Justices, including Justice Ginsburg and Chief Justice Roberts, ultimately adopted this approach.

But we cannot expect and, for reasons explained below, might not welcome similar concessions in future litigation. The narrow remedy adopted by the Roberts plurality and the Ginsburg opinion creates a host of unintended consequences for Medicaid and ACA implementation.\textsuperscript{471} First, this Article offers some preliminary thoughts on the effect of severability after a finding of unconstitutional coercion under the spending power. Second, it describes two of the many implementation challenges the Court’s severability decision creates.

In many respects, the narrow remedy adopted by the five Justices reflects the particular context of NFIB, which was a pathbreaking case that carried significant political baggage. These features may have induced the majority to

\textsuperscript{468} Brief of State Petitioners on Medicaid, \textit{supra} note 196, at 54 n.18. This was due, in part, to how the Court structured the briefing and oral arguments, giving prominence to the severability issue under the Commerce Clause challenge, but failing to mention it in the context of Medicaid coercion.

\textsuperscript{469} The exchange was as follows:

\textquote{JUSTICE GINSBURG: Mr. Clement, may I ask one question about the bottom line in this case? It sounds to me like everything you said would be to the effect of, if Congress continued to do things on a voluntary basis, so we are getting these new eligibles, and say, States, you can have it or not, you can preserve the program as it existed before, you can opt into this.

But you are not asking the Court as relief to say . . . that’s how we cure the constitutional infirmity; we say this has to be on a voluntary basis. . . .

MR. CLEMENT: Well, Justice Ginsburg, if we can start with the common ground that there is a need for repair because there is a coercion doctrine and this statute is coercion, then we are into the question of remedy. And . . . we do take the position that you describe in the remedy, but we would be certainly happy if we got something here, and we got a recognition that the coercion doctrine exists; this is coercive; and we get the remedy that you suggest in the alternative.

Transcript of Oral Argument, \textit{supra} note 131, at 84-85.}

\textsuperscript{470} \textit{Id.} at 85.

\textsuperscript{471} For a review of the ACA implementation challenges in the states before the NFIB decision, see U.S. G\textsuperscript{OV’T} ACCOUNTABILITY OFFICE, GAO-12-281, MEDICAID EXPANSION: STATES’ IMPLEMENTATION OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 17-27 (2012) (describing how states are addressing changes that must be made to their existing Medicaid programs and dealing with “implementation challenges”).
choose a more conciliatory approach when it came to the remedy. One commentator has gone so far as to call this decision a “Marbury for our time.” Chief Justice Roberts’ severability analysis, like his salvaging of the Minimum Coverage Provision under the taxing power, suggests a political judgment regarding the case, asserting that “[w]e are confident that Congress would have wanted to preserve the rest of the Act.” This assessment notably conflicts with the plurality’s lack of deference to Congress elsewhere in the opinion, including the Court’s conclusion that the ACA did not simply amend Medicaid but created an entirely new conditional spending program. The Court similarly refused to give controlling weight to Congress’s characterization of the individual mandate as a penalty, not a tax. The compulsion to preserve the ACA, it seems, was more a perception of political will than a judicial finding.

Other lines of reasoning underlying the plurality’s severability analysis are specific to the facts of the case, suggesting that the decision was influenced by the political context, rather than more generally applicable legal reasoning. For example, the plurality relied on § 1303, the severability clause present in the SSA since 1935, but was unclear as to whether § 1303 was determinative of, or merely helpful to, the ultimate decision. Congress surely did not include a severability clause in the SSA for the purpose of providing a remedy for successful coercion challenges to spending power programs. But it is not difficult to imagine future decisions in which the Court holds Congress to a legislative drafting standard that could not have been known at the time a law was written.

Ironically, the mischaracterization of Medicaid into “old” and “new” programs helped preserve the ACA from being struck down in its entirety because the severed provision, § 1396c, was part of the “old” Medicaid Act. But as a matter of statutory interpretation, the Court inexplicably deemed the Medicaid expansion part of the Medicaid Act for the statutory severability remedy, but not for purposes of the constitutionality of the Medicaid expansion. This interpretive paradox is more baffling given that the plurality expressly deferred to Congress in narrowly applying the severability remedy to the Secretary’s authority in administering Medicaid but did not defer in

---

474 Id. at 2605 (rejecting the Government’s claim that “the Medicaid expansion is properly viewed merely as a modification of the existing program”).
475 Id. at 2597 (dismissing the joint dissent’s argument that “we cannot uphold [the individual mandate] as a tax because Congress did not ‘frame’ it as such”).
476 See, e.g., United States v. Morrison, 529 U.S. 598, 608-17 (2000) (holding elements of the Violence Against Women Act (VAWA) to be outside Congress’s Commerce Clause authority as delineated in United States v. Lopez, a decision announced after VAWA was passed).
determining that “new” Medicaid was unconstitutionally coercive.\textsuperscript{477} Indeed, the severability provision the Court relied on for the Medicaid remedy, § 1303, dates to the original SSA and is even older than the Medicaid Act.

Additionally, the plurality opinion raised some troubling severability questions external to the facts of this case. The first is the relationship between severability jurisprudence generally and severability in the specific context of unconstitutional coercion. While the severability issue was briefed and argued extensively for the Minimum Coverage Provision challenge, the plurality’s severability analysis for the Medicaid issue was relatively thin.\textsuperscript{478} We do not know if the plurality’s decision establishes new standards for severability of congressional statutes or a more limited holding specific to the issue of coercion under conditional spending statutes.

Second, in our Brief of Amici Curiae Health Law & Policy Scholars and Prescription Policy Choices in Support of Respondents on the Constitutional Validity of the Medicaid Expansion in \textit{Florida v. Department of Health and Human Services},\textsuperscript{479} we suggested a federalism rationale for a narrow view of severability in the event the Court found unconstitutional coercion.\textsuperscript{480} As observed, each state has different financial circumstances, so a federal spending program deemed coercive in Mississippi could be perfectly acceptable in Massachusetts.\textsuperscript{481} But as previously explained, that approach seems consistent with the dissent’s preferred coercion-in-fact approach.\textsuperscript{482} Put another way, why insist that all fifty states have been coerced when only twenty-six chose to sue? If a state’s political leadership deems itself coerced, the state can opt out. The narrow severability remedy bypasses subjective judicial judgments and allows the revealed preferences of each state to determine whether it has in fact felt coerced. By contrast, a holding that strikes down a conditional spending program as unconstitutional mutes states’ ability to express their support for, or objection to, the federal program. The Red State Option might be federalism’s preferred remedy as opposed to mere political expediency.

Third, the Court’s narrowly crafted remedy, as opposed to the joint dissent’s argument to strike down the entire ACA, highlights the uncertainty over whether \textit{NFIB} was a facial challenge. The Roberts plurality ignored the issue of facial versus as-applied challenges, despite briefing and oral arguments.

\textsuperscript{477} See \textit{NFIB}, 132 S. Ct. at 2607 (plurality opinion) (“Our ‘touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature.’” (quoting Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 330 (2006))).

\textsuperscript{478} For a summary of the severability briefs, see Outterson, supra note 14.

\textsuperscript{479} See Health Law Brief, supra note 14.

\textsuperscript{480} \textit{Id.} at 38-41.

\textsuperscript{481} See, e.g., Brief of the State of Oregon et al. as Amici Curiae in Support of Respondents, supra note 449, at 9-14.

\textsuperscript{482} See supra Part III.B.2.c.
clarifying that the Secretary had not threatened to withhold all Medicaid funding from any litigant state.\textsuperscript{483} Instead, at oral argument the Chief Justice focused on the worst-case hypothetical, i.e., the Secretary directly threatening to cut off all Medicaid funds, while Solicitor General Verrilli did little to dissuade him.\textsuperscript{484} Justice Breyer tried to throw the Solicitor General a bone, noting the Secretary’s administrative discretion under § 1396c and the Administrative Procedure Act, but Solicitor General Verrilli did not pick it up.\textsuperscript{485} Perhaps Justice Breyer was looking for a commitment that the Secretary would never actually cut off all existing Medicaid funds, given the strong commitment of the federal government to delivering health insurance and health care to Americans in need.\textsuperscript{486} Alternatively, Justice Breyer suggested at oral argument that the Administrative Procedure Act might cabin the Secretary’s discretion and provide an avenue for judicial review.\textsuperscript{487} Justice

\textsuperscript{483} See, e.g., Health Law Brief, supra note 14, at 21.

\textsuperscript{484} The discussion was as follows:

CHIEF JUSTICE ROBERTS: Well, but that’s just saying that when, you know, the analogy that has been used, the gun to your head, “your money or your life,” you say, well, there’s no evidence that anyone has ever been shot.

GENERAL VERRILLI: But –

CHIEF JUSTICE ROBERTS: Well, it’s because you have to give up your wallet. You don’t have a choice.

GENERAL VERRILLI: But that –

CHIEF JUSTICE ROBERTS: And you cannot – you cannot represent that the Secretary has never said: And if you don’t do it, we are going to take away all the funds.

They cite the Arizona example; I suspect there are others, because that is the leverage.

Transcript of Oral Argument, supra note 131, at 54-55.

\textsuperscript{485} The discussion was as follows:

JUSTICE BREYER: I don’t know if that’s so. And all I asked in my question was I didn’t ask you to commit the Secretary to anything. I wanted to know what the facts are.

GENERAL VERRILLI: I –

JUSTICE BREYER: I wanted to know what you found in researching this case. I wanted you, in other words, to answer the question the Chief Justice has: Is it a common thing, that that happens, that this unrelated threat is made? Or isn’t it?

GENERAL VERRILLI: It’s – my understanding is that these situations are usually worked out back and forth between the States and the Federal Government. And I think that most –

JUSTICE BREYER: And you are not privy to what those are.

GENERAL VERRILLI: And I’m not. But –

JUSTICE SCALIA: And who wins?

\textit{Id.} at 55-56.

\textsuperscript{486} In the realm of politics, one can imagine the difficulties faced by any Secretary of HHS who actually cut off all funds. Practically speaking, the Secretary would generally be “coerced” into negotiating a settlement with a wayward state.

\textsuperscript{487} Transcript of Oral Argument, supra note 131, at 13-14.
Scalia teased Justice Breyer about the suggestion, and no mention of these ideas appears in the decision.

In the near future, a federal court may be called upon to consider severability after deeming a congressional enactment unconstitutionally coercive. If so, the foregoing discussion will hopefully provide a useful set of proceed-with-caution signs through this novel territory, especially since the Court has left so much of it unmarked.

IV. MEDICAID AND THE EXCHANGES AFTER NFIB

This final Part briefly explores challenges to the future of Medicaid which have been created by the decision in NFIB. Even this exceedingly narrow severability opinion left many unanswered Medicaid questions. Primarily, two categories of questions arise: those concerning the uncertain scope of Medicaid severability and those concerning tax credits in the exchanges created pursuant to the ACA.

A. The Uncertain Scope of Medicaid Severability

The severability holding seems straightforward: the Secretary simply cannot use § 1396c to withhold existing Medicaid funds for a state’s failure to adopt the Medicaid expansion. What is unclear, however, is the precise antecedent. What exactly was the “Medicaid expansion” which is now optional? This question is surprisingly difficult. This Article sorts all of the new Medicaid provisions into three categories: (1) provisions clearly excluded from the coercion analysis, and therefore still mandatory for all states; (2) provisions clearly included in the coercion analysis, and therefore optional for any state; and (3) other Medicaid provisions, for which it is contestable whether they are now optional.

488 Id. at 62-63.
489 See Rosenbaum & Westmoreland, supra note 14, 1667-70 (describing the questions surrounding application of the NFIB opinion and its impact on Medicaid).
490 This Article limits this analysis to the new provisions of Medicaid added by the ACA. States are still responsible for following all pre-ACA requirements, such as due process when coverage or care is denied. 42 U.S.C. § 1396a(a)(3) (2006); see also Jane Perkins, Nat’l Health Law Program, Fact Sheet: The Supreme Court’s ACA Decision & Its Implications for Medicaid 8 (2012), available at http://www.healthlaw.org/images/stories/ACA_July_2012_Fact_Sheet.pdf (“[B]eneficiaries covered through the Medicaid expansion will be protected by provisions requiring medical assistance to be provided with reasonable promptness and due process to be accorded where assistance is denied, reduced, or terminated.” (citations omitted)).
491 The Eleventh Circuit opinion lists the Medicaid provisions relevant to the litigation. See Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235, 1261 (11th Cir. 2011) (enumerating elements of Medicaid expansion under the ACA); id. at 1367-68 (Marcus, J., concurring in part and dissenting in part) (same). Most of these provisions are never described as coercive by Chief Justice Roberts in NFIB.
First, most of the new Medicaid provisions were never challenged in *NFIB*. Examples include enhanced reimbursement for primary care doctors in Medicaid, changes to the Medicaid drug-rebate rules for new formulations of existing drugs, and expansion of Medicaid coverage starting in 2019 for former foster-care children. Other new Medicaid provisions were discussed by the States in their complaint and briefing or by their amici, but were entirely absent from the Court’s coercion analysis. Examples include the five percent “income disregard” adjustment to the calculation of “modified adjusted gross income” for income eligibility purposes, and section 2304 of the ACA (“Clarification of Definition of Medical Assistance”). Section 2304 was attacked by the States in their initial brief, but this line of argument was dropped from discussion after our Health Law and Policy Scholars’ brief highlighted textual and factual errors in the States’ selective reading of the statute. The great majority of the new Medicaid provisions fall into this category of provisions unaffected by the Court’s coercion decision.

---


493 Id. § 1206 (amending 42 U.S.C. § 1396r-8(c)(2)) (originally enacted as Patient Protection and Affordable Care Act § 2501(d)).


496 Brief of State Petitioners on Medicaid, supra note 196, at 9 (“[Section 2304] effectively exposes States to liability if the demand for services is greater than the supply of hospitals and doctors willing to provide them.”).

497 See Health Law Brief, supra note 14, at 36-38.
Second, two Medicaid provisions in the ACA were central to Chief Justice Roberts’ coercion analysis: the addition of an eighth mandatory category of adults eligible for Medicaid (otherwise ineligible adults under 133% FPL)\textsuperscript{498} and the enhanced federal matching rate, starting at 100% for the first three years.\textsuperscript{499} Only the former bears directly on the coercion holding; thus, the latter seems to operate unaffected. \textit{NFIB} makes clear that if states fail to extend eligibility to all adults under 133% FPL, the Secretary cannot use § 1396c to cut off existing Medicaid funds. Although the plurality highlighted the enhanced federal match in support of its characterization of the Medicaid expansion as a “new” program, that very generous federal offer is not, in and of itself, coercive. Accordingly, states that do elect to expand Medicaid would seem entitled to the elevated federal match for the newly eligible population. In other words, the enhanced federal match provision of the ACA is still fully applicable to opting-in states.

The third category of Medicaid provisions offers a roadmap for future litigation. The contestable provisions include: (1) the mandatory expansion of coverage to children aged six to eighteen under 133% FPL;\textsuperscript{500} (2) the MOE rules locking in previous state expansions while the ACA phases in;\textsuperscript{501} (3) provisions defining the new “essential health benefits” package for the expansion populations;\textsuperscript{502} and (4) partial or delayed Medicaid expansions for adult populations under 133% FPL.\textsuperscript{503} It is not entirely clear from \textit{NFIB} whether states may choose to ignore these provisions, either individually or in combination.\textsuperscript{504} This Article will briefly explore all four.

\textsuperscript{498} \textit{NFIB}, 132 S. Ct. 2566, 2601 (2012) (plurality opinion) (“The Medicaid provisions of the [ACA] . . . require States to expand their Medicaid programs by 2014 to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line.”); \textit{see also supra} Parts II.B.1, III.B.1 and citations therein. This provision is found in the opening paragraph of Title II, section 2001(a)(1) of the ACA. \textit{Patient Protection and Affordable Care Act} § 2001(a)(1) (amending 42 U.S.C. § 1396a).

\textsuperscript{499} \textit{See supra} Part I.D and citations therein. This provision is found in section 2001(a)(3) of the ACA. \textit{See Patient Protection and Affordable Care Act} § 2001(a)(3) (amending 42 U.S.C. § 1396a).

\textsuperscript{500} \textit{Patient Protection and Affordable Care Act} § 2001(a)(1) (amending 42 U.S.C. § 1396a); \textit{id}. §§ 2101-2102 (amending CHIP).

\textsuperscript{501} \textit{Id.} § 2001(b) (amending 42 U.S.C. § 1396a) (adding a new subsection, 1396a(gg), defining MOE requirements).

\textsuperscript{502} \textit{Id.} § 2001(a)(2) (amending 42 U.S.C § 1396a) (adding subsection 1396a(k)(1), providing for minimum essential coverage); \textit{id.} § 2001(c) (amending 42 U.S.C § 1396a) (adding subsection 1396u-7(b)(5), setting the minimum standards for all benchmark benefit packages).

\textsuperscript{503} Letter from Jane Perkins, Legal Dir., NHeLP, to Cindy Mann, Deputy Adm’r & Dir., Ctr. for Medicaid, CHIP, & Survey & Certification (Aug. 26, 2012) (on file with authors) (arguing that \textit{NFIB} did not permit partial expansions short of 133% FPL to 138% FPL after the 5% income offset).

\textsuperscript{504} The National Health Law Project views the scope of the option very narrowly. \textit{See
First, until the Medicaid expansion’s implementation in 2014, current law requires that children up to five years old are covered up to 133% FPL. For those between the ages of six to eighteen, current law mandates eligibility only up to 100% FPL. The plurality’s reasoning focused almost entirely on the novelty of the expansion of Medicaid to adults under 133% FPL but did not discuss any relevant constitutional distinctions regarding expansion to 133% FPL for children aged six to eighteen. Thus, the scope of the optional expansion population is unclear. The HHS Secretary, for one, read the Court’s coercion decision as limited to newly eligible adults. But the ACA’s new catchall eighth category extends eligibility for everyone who is under sixty-five earning 133% FPL. It is unclear whether Chief Justice Roberts believed constitutional significance attaches to celebrating one’s sixth birthday with family income between 100% and 133% FPL. If so, he did not explain why this particular change for children aged six to eighteen was, or was not, a “shift in kind.”

Second, federal law frequently has resorted to mandatory MOE provisions during transition periods. A challenge to the MOE provision of the ACA was briefed and discussed at oral arguments, but was not included in the NFIB opinions. A bill introduced in the 112th Congress, the State Flexibility Act, would repeal the MOE requirements under the American Recovery and Reinvestment Act of 2009, CHIP, and the ACA. There is little or no basis

---

NAT'L HEALTH LAW PROJECT, THE SUPREME COURT’S DECISION ON THE ACA’S MEDICAID EXPANSION (2012), available at http://www.healthlaw.org/images/stories/2012_07_23_NHe LP_QA_1.pdf (stating that the coercion ruling in NFIB “only addresses . . . three ACA Medicaid provisions” and affirmatively answering questions regarding the continued applicability of other key provisions).

505 See supra Part I.D.

506 NFIB, 132 S. Ct. 2566, 2581-82, 2601 (2012) (plurality opinion) (discussing the effects of Medicaid expansion on adults); see also Health Law Brief, supra note 14, at 30-31 (arguing that Medicaid expansion to women and children is constitutional).

507 See Letter from Kathleen Sebelius, Sec’y of Health & Human Servs., to State Governors (July 10, 2012) (“The Supreme Court held that, if a state chooses not to participate in this expansion of Medicaid eligibility for low-income adults, the state may not, as a consequence, lose federal funding for its existing Medicaid program.” (emphasis added), available at http://www.washingtonpost.com/blogs/ezra-klein/files/2012/07/Secretary-Sebelius-Letter-to-the-Governors-071012.pdf.

508 NFIB, 132 S. Ct. at 2605 (plurality opinion).

509 See supra Part I.D.

510 Brief of State Petitioners on Medicaid, supra note 196, at 6, 8-9, 45 n.17; Brief for Respondents, supra note 129, at 30-31; see also Health Law Brief, supra note 14, at 34-36.

511 Transcript of Oral Argument, supra note 131, at 51, 72.

512 There was also no substantive discussion in the Eleventh Circuit decision. See Florida ex rel. Att’y Gen., v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235 (2011).

for a state to conclude the MOE provision does not apply.\textsuperscript{514} and yet the National Association of Medicaid Directors, in a letter issued shortly after \textit{NFIB} was handed down, asked if states are “still subject to the MOE requirements” and what “penalty is there for non-compliance?”\textsuperscript{515} Notably, the Congressional Research Service concluded that \textit{NFIB} did not affect the MOE requirement.\textsuperscript{516} Nevertheless, the State of Maine promptly filed suit in the First Circuit, claiming that \textit{NFIB} also struck down the MOE requirement as unconstitutionally coercive.\textsuperscript{517} While the claim was quickly dismissed on procedural grounds, it is likely to reappear.\textsuperscript{518} Given the briefing on the MOE issue and the Court’s complete silence, it is clear that \textit{NFIB} did not strike down the MOE requirement along with mandatory Medicaid expansion. But that will not prevent states from making the argument and asking federal courts to expand the coercion analyses in \textit{NFIB} to also strike down the MOE provision.

Third, the definition of the Medicaid package of benefits remains an open question.\textsuperscript{519} The ACA modified the mandatory Medicaid benefits package by

\textsuperscript{514} NAT’L HEALTH LAW PROJECT, supra note 504, at 4; PERKINS, supra note 490, at 9 (“Whether or not a State implements the mandatory Medicaid expansion, the ACA’s maintenance of effort (MOE) provision will continue to apply.”). \textit{But see} Matthew Stone, \textit{Can Maine Cut Medicaid? Depends on How Broadly You Read the Supreme Court Ruling}, BANGOR DAILY NEWS (Aug. 10, 2012, 4:51 PM), https://bangordailynews.com/2012/08/10/health/can-maine-cut-medicaid-depends-on-how-broadly-you-read-the-supreme-court-ruling/ (explaining that the gubernatorial administration of Maine interpreted the Medicaid coercion ruling in \textit{NFIB} to mean “it could make cuts to its existing Medicaid program through a routine process” without concern for MOE requirements).


\textsuperscript{516} Swendiman & Baumnucker Memo, supra note 495, at 5-7 (“A careful reading of the Court’s holding supports the conclusion that [the MOE provision is] unaffected by the Supreme Court’s ruling . . . .”); \textit{see also} Outterson, supra note 23.


\textsuperscript{519} Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2001(a)(2)(A),
reference to the EHB provision also applicable to private health insurance plans under the ACA. HHS has authority to further define the ten categories of services included in EHB, and has exercised its discretion by partially delegating the task of defining EHB to the states, through a process which is still being worked out. In assessing the effect of the Court’s coercion decision, the Congressional Research Service did not include the EHB on its list of optional Medicaid provisions, but the National Health Law Program did. Thus, it remains unclear whether states that opt into Medicaid expansion must provide EHB or whether the package of benefits they provide to the newly eligible population can be negotiated with the HHS. The National Health Law Project strongly opposes partial expansions and modifications by some states, unless the state plan qualifies for a demonstration waiver under SSA section 1115.

Despite that uncertainty, the EHB provision is an unlikely trigger for a Tenth Amendment challenge. Of all the Medicaid provisions discussed in this Part, the EHB is by far the most flexible from a federalism perspective, giving each individual state significant room to follow the characteristics of their local commercial health insurance markets. It would be difficult to find coercion.


520 Id. § 2001(c) (requiring all benchmark benefit packages to offer, at a minimum, coverage for essential health benefits as defined by the ACA).

521 Id. § 1302(b)(1) (codified at 42 U.S.C. 18022(b)(1) (Supp. IV 2011)) (providing that “the Secretary shall define the essential health benefits” but requiring the inclusion of, at a minimum, the ten categories of coverage defined in the ACA).

522 See Press Release, U.S. Dep’t of Health & Human Servs., HHS to Give States More Flexibility to Implement Health Reform (Dec. 16, 2011), available at http://www.hhs.gov/news/press/2011pres/12/20111216c.html (allowing states to select a plan to count as their Essential Health Benefits Package and to make modifications to that plan so long as such modifications are consistent with the ten defined coverage categories in the ACA).

523 Swendiman & Baumrucker Memo, supra note 495, at 5-7 (discussing a variety of Medicaid-expansion provisions as either mandatory or voluntary, but not including a discussion of EHB).

524 See NAT’L HEALTH LAW PROJECT, supra note 504, at 1.

525 42 U.S.C. § 1315 (2006) (providing states a process to waive some Medicaid requirements for “experimental, pilot, or demonstration project[s]”); Letter from Jane Perkins to Cindy Mann, supra note 503, at 1-2 (stating that demonstration waivers must be budget neutral and should only be granted where the requesting state proves a valid, demonstrative purpose).

526 See Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. 41,866, 41,893 (July 15, 2011) (to be codified at 45 C.F.R. pts. 155-56) (announcing regulations granting states “significant flexibility” in determining how to apply standards for qualified health plans to the ACA’s required health exchanges); Health Law Brief, supra note 14, at 33 (“[T]he federal government has, in the
in the EHB’s application to Medicaid, as benchmark and benchmark-equivalent coverage were created to be less restrictive than previous Medicaid benefits standards. Chief Justice Roberts mentioned EHB only in passing, erroneously suggesting that Medicaid expansion is a “new” program because it offers a different set of benefits, even though states have had the option to offer benchmark plans since 2005.527 But he did not discuss the provision in any detail or suggest that this change to the Medicaid benefits package would be “unrelated” to the historical program, thus rendering it unconstitutionally coercive.

Finally, some states were exploring partial or delayed Medicaid expansions after NFIB. Soon after the NFIB decision, the National Governors Association,528 the Republican Governors Association,529 and the National Association of Medicaid Directors530 peppered the Administration with questions, seeking guidance. On July 10, 2012, Secretary Sebelius wrote back to the governors, promising to provide “as much flexibility as we can.”531 But in that letter, she phrased the antecedent very narrowly:

As you know, beginning in 2014, the Affordable Care Act provides for the expansion of Medicaid eligibility to those adults under the age of 65 with incomes up to 133 percent of the federal poverty level who were not previously eligible for Medicaid. The Supreme Court held that, if a state chooses not to participate in this expansion of Medicaid eligibility for low-income adults, the state may not, as a consequence, lose federal funding for its existing Medicaid program. The Court’s decision did not affect other provisions of the law. For example, the decision did not change the fact that the federal government will completely pay for coverage under the eligibility expansion in 2014-2016, and for at least 90

---

530 NAT’L ASS’N OF MEDICAID DIRS., supra note 515.
531 Letter from Kathleen Sebelius to State Governors, supra note 507, at 1.
percent of such costs thereafter, or that states have flexibility to design the
benefit package for the individuals covered.532

The Secretary apparently does not consider the eligibility expansion to children
or the EHB to be made optional by NFIB.533 For the adult population below
133% FPL, the Obama Administration initially hinted at providing flexibility
even beyond what the NFIB opinion requires, although reelection may have
strenthened the Administration’s position and tempered its desire to negotiate
with states. In fact, HHS has recently indicated that partial expansion is not
possible under the terms of ACA.534 Nevertheless, the level of voluntary
flexibility promised has been extraordinary and, to some observers,
surprising.535 States have been promised the ability to expand now and contract
later, or miss the January 2014 deadline and join when they are ready. It also
appears that states will be permitted to expand and contract piecemeal, which
is not clearly supported by either the text of the ACA, including the MOE
provision,536 or the Court’s opinion. In effect, the Administration has read

532 Id. at 1-2 (emphasis added). The letter also promises to aggressively protect otherwise
eligible adults in opt-out states from the individual mandate penalty. Id. at 2.

533 See Rosenbaum & Westmoreland, supra note 14, at 1668 (reasoning that “[Chief
Justice Roberts] clearly emphasized that the transformative dimension of the Affordable
Care Act was the extension of coverage to ‘childless adults’” and that the extension to low-
income children was thus excluded from NFIB’s remedial holding).

534 Memorandum from the Dep’t of Health & Human Servs., Exchanges and Market
states that the ACA does not permit partial coverage expansions).

535 See Michael Bologna, CMS Points to New Flexibility for States Under Health
points-new-n12884911073/; Nicole Huberfeld, The Trope of Flexibility, HEALTHLAWPROF
BLOG (Aug. 9, 2012), http://lawprofessors.typepad.com/healthlawprof_blog/2012/08/nothin
g-short-of-block-grants-will-do.html; Kevin Outterson, CMS Interpreting the Red State
onomist.com/wordpress/cms-interpreting-the-red-state-option-after-nfib/; Sara Rosenbaum
& Timothy Westmoreland, CBO’s Updated Affordable Care Act Estimates: Resting on
Shaky Assumptions?, HEALTH AFF. BLOG (July 31, 2012), http://healthaffairs.org/blog/2012/
07/31/cbos-updated-affordable-care-act-estimates-resting-on-shaky-assumptions/; Dylan
Scott, CMS: States Could Adopt Medicaid Expansion, Then Drop It, GOVERNING STS. &
deadline-for-state-decisions-on-medicaid-expansion.html.

536 PERKINS, supra note 490, at 7 (“[T]he new decision . . . curb[s] the power of the
federal government to enforce the Medicaid expansion but maintains the ACA and the
Medicaid Act in all other respects.”); Rosenbaum & Westmoreland, supra note 14, at 1669
(“[T]reating the expansion group as an option and then beginning to disassemble and
reassemble it would cross the line between reasonable ‘interpretation’ of the Affordable
Care Act and a wholesale revision of the statute’s definition of the expansion group.”);
Letter from Jane Perkins to Cindy Mann, supra note 503; Rosenbaum & Westmoreland,
supra note 535; see also MARYBETH MUSUMECI, KAISER FAMILY FOUND., A GUIDE TO THE
NFIB as establishing an opening bid, from which states can bargain with the Secretary about the timing, covered population, and benefits package for Medicaid expansion within their individual states. But this is not a garden-variety expansion of the administrative state; the Court set the stage itself through the imprecise language in NFIB. At least until Congress can revisit the issue, the Court has given the Administration nearly carte blanche authority, de facto if not de jure, to cut Medicaid deals with the states.

B. Tax Credits in the Exchanges

A second major implementation question raised by NFIB concerns the premium assistance tax credits in the exchanges. For legal residents with incomes between 100% and 400% FPL, the Affordable Care Act provides tax credits to subsidize the purchase of private health insurance in the exchanges. The mechanism is § 36B of the Internal Revenue Code.

The ACA encourages states to create their own exchanges, but the federal government will create backup federal exchanges for states that fail to do so. According to the text of the statute, the tax credits are available only to people who are enrolled in a qualified health plan purchased “through an Exchange established by the State under [section] 1311” of the ACA. This was inartful wording, as it has led Michael Cannon of the Cato Institute and Jonathan Adler from Case Western Reserve University to allege that tax credits will not be available for otherwise eligible lawful residents in the backup federal exchanges because these exchanges were not “established by the State.” The textual argument is fairly straightforward.

The IRS was aware of the issue more than a year ago and issued proposed tax regulations on August 17, 2011 that broadened the definition of “exchange” to include both state and federal backup exchanges. A public
hearing was held on November 17, 2011, and the regulations were finalized on May 23, 2012.\footnote{See 77 Fed. Reg. at 30,377 (publishing, on May 23, 2012, a final regulation related to the health insurance premium tax credit that was finalized pursuant to a November 17, 2011, public hearing). But see Jonathan H. Adler & Michael F. Cannon, Op-Ed, Another ObamaCare Glitch, WALL ST. J. (Nov. 16, 2011), http://online.wsj.com/article/SB10001424052970203687504577006322431330662.html (opining, in an op-ed published the day before the IRS’s public hearing, that “the law has a major glitch that threatens its basic functioning,” and further that “states that refuse to create an exchange can block much of ObamaCare’s spending and practically force Congress to reopen the law for revisions”).} Congress clearly intended for the tax credits to be available to people in all fifty states, irrespective of whether the exchanges are state, federal, or multi-state operations.\footnote{See JUDITH SOLOMON, CTR. ON BUDGET & POL’Y PRIORITIES, HEALTH REFORM LAW MAKES CLEAR THAT SUBSIDIES WILL BE AVAILABLE IN STATES WITH FEDERALLY OPERATED EXCHANGES 1 (2012), available at http://www.cbpp.org/files/7-16-12health.pdf (“The argument that premium credits are not available to purchase coverage offered through a federally operated exchange rests on a distorted and incorrect reading of the ACA.”); Timothy Jost, Tax Credits in Federally Facilitated Exchanges Are Consistent with the Affordable Care Act’s Language and History, HEALTH AFF. BLOG (July 18, 2012), http://healthaffairs.org/blog/2012/07/18/tax-credits-in-federally-facilitated-exchanges-are-consistent-with-the-affordable-care-acts-language-and-history/. But see Michael Cannon & Jonathan Adler, The Illegal IRS Rule to Expand Tax Credits Under the PPACA: A Response to Timothy Jost, HEALTH AFF. BLOG (Aug. 1, 2012), http://healthaffairs.org/blog/2012/08/01/th e-illegal-irs-rule-to-expand-tax-credits-under-the-ppaca-a-response-to-timothy-jost/; Sarah Kliff, Could One Word Take Down Obamacare?, WASH. POST (July 16, 2012, 4:56 PM), http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/07/16/could-a-missing-word-take-down-obamacare/ (quoting an interview with Professor Kevin Outterson on the ambiguity of the state exchange language in the ACA).} This issue has gained additional political salience after the NFIB decision. As written, the ACA provided Medicaid for individuals up to 133% FPL, and eligibility for tax credits in the exchanges for individuals between 100% and 400% FPL. The policy design was that very low-income individuals would receive full public assistance while less-impoverished individuals would purchase private insurance with some government assistance. For individuals above 400% FPL, the employer mandate, insurance market reforms, the individual mandate, and other provisions kick in to make coverage more readily available. In states that exercise their NFIB Red State Option to not expand adult eligibility to 133% FPL, we have a new healthcare “donut hole.”\footnote{The “old” healthcare donut hole is the out-of-pocket payments in Medicare Part D, which is addressed over time by the ACA. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 3301, 124 Stat. 119, 461-68 (2010) (amending 42 U.S.C. §§ 1395w-101, 102, 153 (2006)).} The poorest adults will still have Medicaid under current law, but to widely varying levels of eligibility. In some states, for example, unemployed...
adults are covered only up to 17% FPL while other states already opt to cover adults up to 133% FPL and beyond. Slightly less-impoverished people will have tax credits in the exchanges, that is, from 100% to 400% FPL. People in the middle will be left out, with neither a government healthcare program nor government assistance to purchase private health insurance.

If Cannon and Adler’s interpretation of the non-availability of tax credits in federally operated exchanges is correct, then low-income individuals in Medicaid opt-out states with federal exchanges will be even more exposed. Citizens understandably may hold their state-elected officials politically accountable for these anomalies, even though it was Congress that drafted the ambiguous provision. One apparent political goal of the tax-credit challenge is to deny coverage to millions of additional people, while laying the blame for ACA’s failures on the federal tax code rather than state officials who opt out of Medicaid expansion or a state exchange. Federalism’s political accountability would thereby be further confused and muddled.

One further wrinkle is that the operative language – an exchange “established by the state” – is also used to terminate the MOE requirement. Most people speak of the MOE requirement terminating in 2014 when each state will have either a state or federal exchange. But if the stricter interpretation is correct, any state that failed to create an exchange would continue to be subject to the MOE requirement indefinitely.

We are skeptical of this tax challenge on substantive and procedural grounds. Substantively, the IRS has significant discretion, especially when it is arguably being too generous to taxpayers. Procedurally, states would not have standing to bring this suit and the Anti-Injunction Act should delay suit in any event until no earlier than 2015. The Congressional Budget Office

---

547 See Kevin Outterson, The Rest of the Story, INCIDENTAL ECONOMIST (July 16, 2012, 8:34 PM), http://theincidentaleconomist.com/wordpress/the-rest-of-the-story/ (discussing I.R.C. § 36B and remarking that the “IRS has broad regulatory authority, which they exercised in the proposed rule, defining Exchange in a [] broad[] way”).
generally concurs\textsuperscript{549} as does the Congressional Research Service,\textsuperscript{550} Professor Timothy Jost,\textsuperscript{551} and Judith Solomon from the Center for Budget and Policy Priorities.\textsuperscript{552} But this issue need not be resolved for the purposes of this Article. It is sufficient to note that no federalism or coercion issue is present. The creation of tax credits under § 36B of the Internal Revenue Code is clearly a permissible exercise of the taxing power. The only question is whether the statute and regulations will be interpreted to maximize access to health insurance, which was the clear purpose of the ACA.

CONCLUSION

Of the four discrete questions presented to the Court, the Medicaid expansion issue offered the greatest potential for destabilization from both a statutory and a constitutional perspective. As this Article reveals, \textit{NFIB} stands precipitously to fulfill that promise. The \textit{NFIB} decision cut many corners on the actual history and facts of the Medicaid program, pounding many a square peg into round holes in order to fit a narrative of coercion. This Article has highlighted many of these missteps lest future decisions simply parrot the factual inaccuracies promulgated by the Court.

Doctrinally, the Roberts Court blazed a long-desired trail in the Federalism Revolution. The Court implicitly incorporated, seemingly modified, and reinvigorated two elements of the \textit{Dole} test for conditional spending, infusing them into the coercion decision of first impression. The Court intertwined the \textit{Dole/Pennhurst} clear-notice requirement with a beefed-up version of the \textit{Dole} germaneness limit in order to artificially divide Medicaid in two parts: “old” and “new” Medicaid. Thus divided, the Court then concluded that the coercion doctrine barred Congress from conditioning federal funding for an “old”

\textsuperscript{549} \textit{Cong. Budget Office, Estimates for the Insurance Coverage Provisions of the Affordable Care Act Updated for the Recent Supreme Court Decision} 7 n.14 (2012), \textit{available at} http://www.cbo.gov/sites/default/files/cbofiles/attachments/43472-07-24-2012-CoverageEstimates.pdf (“CBO and [the Joint Committee on Taxation] expect that subsidies will be available to people in exchanges run entirely by states, exchanges run entirely by the federal government, and exchanges run together by states and the federal government.”).

\textsuperscript{550} Memorandum from Jennifer Staman & Todd Garvey, Legislative Att’ys, Cong. Research Serv., \textit{Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act} 9-10 (July 23, 2012) (“Thus, if a reviewing court determines that there is ambiguity surrounding the issue of whether premium credits are available in federal exchanges and reaches step two of the \textit{Chevron} analysis with respect to the regulations issued under § 36B, the regulations will very likely be considered a reasonable agency interpretation on the statute and accorded deference by the court.”).

\textsuperscript{551} Jost, \textit{supra} note 542 (“Employers . . . would be barred from [bringing suit] by the Tax Anti-Injunction Act . . . probably until 2015.”).

\textsuperscript{552} SOLOMON, \textit{supra} note 542, at 1-4 (presenting arguments against a reading of “exchange” that would leave supplements unavailable in states that choose not to adopt the Medicaid expansion).
program on states’ agreement to participation in a “new” conditional spending program. Although the Court has consistently enforced the Dole clear-notice requirement for conditions placed on federal spending, this was the first time the Court drew upon the relatedness prong of the Dole factors. Clear notice and relatedness now appear to be folded into the newly fashioned, yet undefined, coercion doctrine.

The Court left unanswered not only how those elements will operate in future cases but, even more fundamentally, what coercion means. Self-consciously avoiding any definable test, the Court instead relied on problematic quantitative as well as qualitative analyses to determine that the Medicaid expansion excessively invaded states’ prerogatives. The joint dissent relied heavily on facts specific to the litigant States such as their current budgets, Medicaid funding levels, and federal expenditures on Medicaid. The Roberts plurality rested on colorful analogies: “economic dragooning” and “a gun to the head.” Both opinions invoked familiar federalism principles, including political accountability, but the reasoning was muddled and failed to clarify the constitutional significance of those themes in the coercion context. With no further guidance, we can only hope that we will know a “gun to the head” when we see it. But we can be sure there will be many future challenges to a host of federal spending power programs alleging just that.

This fractured, obliquely reasoned decision leaves open a host of additional questions. Not only do we not know the meaning of coercion but also the extent to which the Court will apply NFIB’s unique severability analysis in future disputes. The Court’s novel remedy of turning a conditional spending program into an optional provision which states are free to adopt or not could be limited to coercion challenges or could signal a new approach to severability more generally. Many questions also remain unanswered with respect to severability of other ACA Medicaid provisions and implementation of the Medicaid expansion within the larger scheme of the ACA. Judicial dockets and academic debates are already reverberating with these open questions.

Thanks to their success before the Court, the states are now facing a decision whether to exercise the Red State Option to accept or decline unprecedentedly generous federal funding for previously uninsured residents. States are no longer plaintiffs claiming coercion, powerless with a “gun to the head.” Perhaps they had hoped for a different result in the 2012 Presidential election. But they must now make difficult political choices upon which the lives of some of their most medically fragile, disenfranchised citizens will rely. The effect of these decisions on the political dance between federal and state authorities to cast blame and claim credit for healthcare reform will play out over the next several years as the ACA is fully implemented. Both legally and politically, we have plunged into the “endless difficulties” that Justice Cardozo so rightly feared.