The Constitutionality of Federal Grant Conditions after *National Federation of Independent Business v. Sebelius*

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July 17, 2012

Congressional Research Service
7-5700
www.crs.gov
R42367

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

In March 2010, Congress passed the Patient Protection and Affordable Care Act (ACA). The ACA, among other things, requires states to expand Medicaid eligibility or lose Medicaid funding. Following the enactment of the ACA, state attorneys general and others brought several lawsuits challenging various provisions of the act on constitutional grounds. In *National Federation of Independent Business (NFIB) v. Sebelius,* the Supreme Court, among other things, decided that the enforcement mechanism for the ACA Medicaid expansion, withdrawal of all Medicaid funds, was a violation of the Tenth Amendment. The Court went on to hold, however, that the remedy was to sever that enforcement mechanism, effectively making state participation in the Medicaid expansion voluntary.

In the 1987 case of *South Dakota v. Dole,* the Supreme Court held that, in order for a federal grant condition imposed on a state to pass constitutional muster under the Spending Clause, the condition must be related to the particular national projects or programs to which the money was being directed. In addition, in order to comply with the limits of the Tenth Amendment, the level of funds withheld for failure to comply with that condition cannot be coercive. In a controlling opinion in *NFIB*, Justice Roberts suggested that this analysis may vary based on the type of grant condition that was at issue. It is unclear, however, whether *NFIB* significantly changed the *Dole* analysis, or whether the combination of factors that led the Court's decision to limit how ACA Medicaid expansion would be enforced is likely to be repeated.

For instance, if a grant condition is directly related to the expenditure of federal funds in a state program or activity, then, according to Justice Robert's opinion in *NFIB*, the condition is usually constitutional under the Spending Clause. Or even if a grant condition is only generally related to the policy goals of the underlying grant, *NFIB* suggests that withdrawal of all program funds would still, in most foreseeable cases, be constitutional under the Spending Clause and the Tenth Amendment. If a grant condition is unrelated to the general policy goals of the underlying grant, however, then it is most likely unconstitutional under the Spending Clause. This latter standard, however, has been in place since the *Dole* case, and no court has ever struck down a federal law on this basis.

Justice Roberts' concern in *NFIB* arguably dealt with a different question: whether a grant condition attached to a new and independent program (here, the Medicaid expansion) which threatens the funding of an existing program (here Medicaid) is constitutional. In such cases, if the withholding of federal funding represents a significant portion of a state's budget, and there are distinguishing factors among the programs, then that condition may be unconstitutionally coercive under the Tenth Amendment. Justice Roberts did not identify a standard to determine what level of withholding funds would be coercive, or specify what kind of distinguishing factors were necessary. He did conclude, however, that withdrawal of federal program funds which made up ten percent of an average state's budget represented a "gun to the head" and was a form of "economic dragooning."

How courts are to consider grant withdrawals below ten percent, however, is not addressed by the Roberts' opinion, and Justice Roberts declined to speculate where such a line would be drawn. It should be noted, however, that few federal programs even approach the level of Medicaid funds provided to the states. Thus, if the ten percent threshold and the need for distinguishing factors mark the outer limits of Congress's power, then the case may have minimal effect on existing or future federal grant conditions.

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Background

In March 2010, the 111th Congress passed the Patient Protection and Affordable Care Act[1] as amended by the Health Care and Education Reconciliation Act of 2010.[2] Jointly referred to as the Affordable Care Act (ACA), the ACA expands Medicaid eligibility, increases access to health insurance coverage, expands federal private health insurance market requirements, requires the creation of health insurance exchanges to provide individuals and small employers with access to insurance, and in some instances, mandates the provision and purchasing of health insurance.[3]

Following the enactment of the ACA, state attorneys general and others brought several lawsuits challenging various provisions of the ACA on constitutional grounds.[4] One of these cases included a federalism challenge to the ACA's expansion of Medicaid eligibility. This case, *National Federation of Independent Business (NFIB) v. Sebelius*,[5] addressed the issue of whether withholding Medicaid reimbursement to a state unless that state complies with the expansion of its Medicaid program exceeds Congress's enumerated powers under the Spending Clause and violates the Tenth Amendment. In *NFIB*, the Court held that the withdrawal of all Medicaid funds from the states for failure to comply with the expansion of the program did violate the Tenth Amendment, but that withholding of just the funds associated with that expansion raised no significant constitutional concerns.

Medicaid is an entitlement program that finances the delivery of certain health care services to a specific population. Medicaid is financed jointly by the federal and state governments, and states choose whether or not to participate. Currently all 50 states participate. If a state chooses to participate, it must follow federal rules in order to receive federal reimbursement that offsets most of the state's Medicaid costs. It should be noted, however, that a number of these requirements may be waived, with approval from the Secretary of Health and Human Services (HHS).[6]

In general, Medicaid expansion under the ACA: (1) increases Medicaid eligibility by raising the income criteria for certain people; (2) adds both mandatory and optional benefits to Medicaid; (3) increases the federal matching payments for certain groups of beneficiaries and for particular services provided; (4) provides new requirements and incentives for states to improve quality of care and to encourage more use of preventive services; and (5) makes a number of other Medicaid program changes.[7]

[1] P.L. 111-148.

[2] P.L. 111-152.

[3] For background on the ACA, see CRS Report R41664, *ACA: A Brief Overview of the Law, Implementation, and Legal Challenges*, coordinated by C. Stephen Redhead.

[4] For a detailed analysis of these legal issues, see CRS Report R40725, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, by Jennifer Staman et al..

[5] No. 11-393, slip op. (June 28, 2012). The states joining the suit include Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming. *See* Florida v. Dept. of Health and Human Services, 648 F.3d 1235, 1240 n.2 (11th Cir. 2011).

[6] For background on Medicaid, see CRS Report RL33202, *Medicaid: A Primer*, by Elicia J. Herz.

[7] For a detailed discussion of these provisions, see CRS Report R41210, *Medicaid and the State Children's Health Insurance Program (CHIP) Provisions in ACA: Summary and Timeline*, by Evelyne P. Baumrucker et al..

The most significant of these changes amends a section of federal law outlining what states must offer in their Medicaid coverage plans.[8] Starting in 2014, states were to be required to cover adults under age 65 (who are not pregnant and not already covered) with incomes up to 133 percent of the federal poverty level ("FPL").[9] This is a significant change because previously the Medicaid Act did not set a baseline income level for mandatory eligibility. Thus, many states currently do not provide Medicaid to childless adults and cover parents only at much lower income levels.[10] Failure to comply with such expansion could, in theory, result in the withholding of all Medicaid reimbursements to the states, including payments for persons previously covered by the Medicaid program.

The federal government predicted that if all states chose to participate in the Medicaid expansion, enrollment would increase by approximately 16 million by the end of the decade.[11] To finance the expansion, the federal government calculated that its share of Medicaid spending would increase by $434 billion by 2020, and state spending would increase by at least $20 billion over the same time frame.[12] Other estimates suggest that both federal and state costs could be higher.[13]

The constitutional challenge to the Medicaid expansion in *NFIB* was that, under the Spending Clause and the Tenth Amendment, states would be coerced into paying for the increased Medicaid requirements, as the failure to comply with these increased Medicaid requirements might result in the federal government withholding all Medicaid funding. The argument was bolstered by the states noting that Medicaid represents 40 percent of all federal funds that states receive; that the majority of states receive more than $1 billion in Medicaid funding each year; and that this number is projected to increase under the ACA. The states argued that the withdrawal of this aid would have a dramatic effect on the ability of the states to provide health care to their populations,[14] and that the states had no choice but to comply with the Medicaid expansion provisions.

The Spending Clause

The authority of Congress to specify under what conditions the states will receive Medicaid funds is generally considered to be the Spending Clause.[15] Under the Spending Clause, Congress can

[8] 42 U.S.C. §1396a.

[9] 42 U.S.C. §1396a(a)(10)(A)(i)(VIII).

[10] States currently must provide Medicaid to children under age 6 with family income up to 133 percent of the FPL and children ages 6 through 18 with family income up to 100 percent of the FPL. 42 U.S.C. §§1396a(a)(10)(A)(i)(IV), (VI), (VII), 1396a(l)(1)(B)-(D), 1396a(l)(2)(A)-(C).

[11] Letter from Douglas Elmendorf, Director, Cong. Budget Office, to the Hon. Nancy Pelosi, Speaker, U.S. House of Reps. ("CBO Estimate") 9 (Mar. 20, 2010) *cited in* Petition for Writ of Certiorari, brief at 9-10, Florida v. HHS, No. 11-400 (Sept. 27, 2011)("Petitioner's Writ").

[12] CBO Estimate, Table 4.

[13] Kaiser Comm'n on Medicaid & the Uninsured, *Medicaid Coverage & Spending in Health Reform: National and State-by-State Results for Adults at or Below 133% FPL* at 23 (May 2010) (estimating that increased costs could be as high as $532 billion for federal government and $43.2 billion for states) *cited in* Petitioner's Writ at 9-10.

[14] The states note that, in the past, when Congress sought to expand Medicaid coverage, it offered additional funding to states that agreed to additional obligations, without threatening existing funding of states that did not. Petitioner's Writ. at 22. *See, e.g.,* American Recovery and Reinvestment Act of 2009, P.L. 111-5, §5001(f); Omnibus Budget Reconciliation Act of 1986, P.L. 99-509, §9401(b).

[15] U.S. Const., Art. I, §8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States....").

allocate money to states, private entities, or individuals, but then require those recipients to engage in or refrain from certain activities as a condition of receiving and spending that money. The question arises, however, whether under precepts of federalism, there are limitations on Congress' ability to apply such requirements to the states.

The lines of authority between states and the federal government are, to a significant extent, defined by the United States Constitution and relevant case law regarding federalism. In recent years, the Supreme Court has decided a number of cases that would seem to be a reevaluation of this historical relationship. In particular, a number of these cases have cited the Commerce Clause,[16] the Tenth Amendment,[17] and the Eleventh Amendment of the Constitution as establishing limitations on the power of the federal government over the states.[18]

In contrast to this trend, the Court has generally interpreted congressional power under the Spending Clause expansively, even when that legislation arguably intrudes on state sovereignty. For instance, many areas of federal law that regulate states, such as civil rights statutes,[19] have been enacted pursuant to the Spending Clause. In many situations, such as where these statutes apply to state agencies or institutions, Congress is using its spending power to accomplish goals that cannot be legislated directly because such direct legislation would be unconstitutionally intrusive on state sovereignty or beyond the authority of Congress.[20]

The Tenth Amendment

One of the limits on federal power that would appear to most often stand in contrast with this Spending Clause doctrine is the Tenth Amendment. The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The significance of this language has varied over time. For awhile, the Supreme Court interpreted the Tenth Amendment to provide that certain "core" state powers or "functions" would be beyond the authority of the federal government to regulate.[21] The Court, however, soon overruled that decision, suggesting that the

[16] *See* United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun-Free School Zone Act of 1990).

[17] *See* New York v. United States, 505 U.S. 144 (1992) (striking down provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985); Printz v. United States, 521 U.S. 898 (1997) (striking down provisions of the Brady Handgun Control Act).

[18] *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (Indian tribe may not sue state in federal court under the Indian Gaming Regulatory Act).

[19] *See, e.g.,* 20 U.S.C. §1681 (1994) (prohibiting sex discrimination); 29 U.S.C. §794 (1994 & Supp. V 1999) (prohibiting discrimination on the basis of disability); 42 U.S.C. §§2000d to 2000d-4a (1994) (prohibiting race discrimination).

[20] *See, e.g.*, *New York*, 505 U.S. at 188 (pointing out that the Spending Clause provides an alternative to the congressional "commandeering" of state officials that violated the Tenth Amendment); Lynn A. Baker, *Conditional Federal Spending After Lopez,* 95 Colum. L. Rev. 1911, 1914 (1995) ("Thus, with *Dole*, the Court offered Congress a seemingly easy end run around any restrictions the Constitution might impose on its ability to regulate the states.").

[21] Thus, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court struck down federal wage and price controls on state employees as involving the regulation of core state functions. In *National League of Cities*, the Court conceded that the legislation under attack, which regulated the wages and hours of certain state and local government employees, was within the scope of the Commerce Clause, but it cautioned that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

states should look for relief from direct federal regulation of state activities through the political process, not through the courts.[22]

Modern Tenth Amendment doctrine may be traced to the Court's 1992 decision in *New York v. United States*.[23] In *New York*, Congress had attempted to regulate in the area of low-level radioactive waste by providing that states must either develop legislation on how to dispose of all low-level radioactive waste generated within the states, or the states would be forced to take title to such waste, which would mean that it became the states' responsibility.[24] The Court found that although Congress had the authority under the Commerce Clause to regulate low-level radioactive waste, it only had the power to regulate the waste directly. Here, Congress had attempted to require the states to perform the regulation, and decreed that the failure to do so would require the states to deal with the financial consequences of owning large quantities of radioactive waste. In effect, Congress sought to "commandeer" the legislative process of the states.[25] In the *New York* case, the Court found that this power was not found in the text or structure of the Constitution, and it was thus a violation of the Tenth Amendment.

A later case presented the question of the extent to which Congress could regulate through a state's executive branch officers. P*rintz v. United States,*[26] which involved the Brady Handgun Act, required state and local law enforcement officers to conduct background checks on prospective handgun purchasers within five business days of an attempted purchase.[27] This portion of the act was challenged under the Tenth Amendment, under the theory that Congress was without authority to "commandeer" state executive branch officials. After a historical study of federal commandeering of state officials, the Court concluded that commandeering of state executive branch officials was, like commandeering of the legislature, outside of Congress's power, and consequently a violation of the Tenth Amendment.[28]

In the instant case, if the federal government had directly required states to fund and implement new responsibilities under the Medicaid expansion, then it would appear likely that a legal challenge could be made that Congress was commandeering the states to implement a federal program. However, while Congress will be requiring states to provide expanded service under Medicaid as a condition of receiving federal funds under that program, there is no requirement on states to accept those funds. For this reason, a challenge to the Medicaid expansion does not fit comfortably into the commandeering line of cases. Since the state is free to choose not to receive such funds, then it is difficult to argue that such state is being directly commandeered, as was the case in *New York* and *Printz*.

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[22] Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations" in areas of traditional governmental functions had proven impractical, and that the Court in 1976 had "tried to repair what did not need repair." 469 U.S. at 557. In sum, the Court in *Garcia* seems to have said that most disputes over the effects on state sovereignty of federal commerce power legislation are to be considered political questions. *See also* South Carolina v. Baker, 485 U.S. 505 (1988).

[23] 505 U.S. 144 (1992).

[24] Low-Level Radioactive Waste Policy Amendments Act of 1985, P.L. 99-240.

[25] 505 U.S. at 175-76.

[26] 521 U.S. 898 (1997).

[27] Brady Handgun Violence Prevention Act, P.L. 103-159, §102.

[28] 521 U.S. at 935.

However, in a separate line of cases, the Supreme Court has considered the question of whether conditioning a government benefit on the waiver of a constitutionally based right may in itself be a constitutional violation. The legal theory behind these cases is generally referred to (although not always explicitly by the courts) as the doctrine of "unconstitutional conditions." Thus, the question which was before the Supreme Court in *NFIB* was whether a state may constitutionally be required to accede to the Medicaid expansion as a condition of receiving federal funds, despite the fact that, under *New York* and *Printz*, such requirements could not be imposed directly.

Voluntary Waiver of States' Rights

The Supreme Court has long held that constitutional rights may be "waived" voluntarily by either individuals, private entities, or states. Even rights of the most profound importance, such as the right of the individual to challenge the imposition of capital punishment under the Eighth Amendment, may knowingly be waived.[29] A more difficult question arises, however, where some form of inducement is offered that is conditioned on such a waiver, bringing into question whether such waiver is voluntary.

In some cases, such a waiver is considered unremarkable, even though the rights waived are significant and the inducements are serious. For example, the Court has held that as a result of plea bargaining, a criminal defendant may choose to waive his or her right to a trial in exchange for a reduction in the level of penalty to which the defendant may be subjected.[30] Arguably, such an inducement is unlikely to violate a defendant's rights because the defendant can use his or her estimation of the likelihood of conviction in deciding whether to accept such a bargain.

In other cases, it may be more difficult to evaluate whether the circumstances surrounding the waiver of a constitutional right are so coercive as to in some way infringe on the waived right. In other words, in some cases a grant requirement may be an "unconstitutional condition," because the recipient of the grant is being asked to give up a constitutional right to receive the federal benefit. It is of some concern that the Court has not laid out a universal doctrine for evaluating which rights may be made as a condition of receiving a government benefit, and what circumstances must be in place for such conditioning to be valid. Rather, the Court appears to vary significantly in its approach, changing its level of scrutiny based on the nature of the governmental inducements and the importance of the constitutional right which is sought to be waived. At least one scholar has suggested that attempting to discern doctrinal consistencies in the area yields little predictive benefit.[31]

Despite this lack of a universal approach, there are two consistent themes in evaluating the possibility that a required waiver of a constitutional right is an "unconstitutional condition." First, a court will evaluate whether there is a logical relationship between the purposes of the overall

[29] *See* Gilmore v. Utah, 429 U.S. 1012, 1014-16 (1976) (finding that the prisoner knowingly and intelligently waived his rights).

[30] *See* Brady v. United States, 397 U.S. 742, 748 (1970). In modern criminal practice, the right to a jury trial is often bargained away by a defendant in order to be allowed to plead guilty to lesser charges.

[31] Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES at 798 (1997) ("[P]erhaps the cases cannot be reconciled, and the decisions simply turn on the views of the Justices in particular cases. If the Court wishes to strike down a condition, it declares it to be an unconstitutional condition; if the Court wishes to uphold a condition, it declares that the government is making a permissible choice to subsidize some activities and not others.").

legislation and the burden imposed (relatedness).[32] In addition, a court will evaluate the subjective value of the governmental interest to determine whether the threatened loss of the benefit so outweighs the burdens of compliance that the recipient has little choice but to comply (coercion).[33] The relative weight of two of these factors and their relationship to each other, however, may vary depending on the circumstance to which they are applied.

It should be noted that many recipients of federal money are private individuals or entities. In general, the Court has been more sensitive to grant conditions that limit these private grant recipients' constitutional rights than it has been to states. One theory suggests that the reason for this deference is that the Supreme Court is most concerned in the area of unconstitutional conditions when there is an imbalance in bargaining power, such as can occur between individuals and the government. Such imbalances are particularly exacerbated when the government holds a monopoly power over the offered benefit.[34] For this reason, the doctrine of unconstitutional conditions has been most robust when the cases have involved private individuals being limited in the exercise of either personal autonomy or property rights.[35]

Prior to *NFIB*, the doctrine of unconstitutional conditions had not been successfully invoked by the states. For instance, neither the Supreme Court nor any other court had held that a grant condition imposed on a state failed either a relatedness or coercion test.[36] In part, this appears to reflect the view that states, holding far more financial and political power than most private entities, were more able to withstand federal coercion. Consequently, the Supreme Court's decision in *NFIB*, to the extent that it represents a shift in the Court's approach to Spending Clause cases, could have a significant impact on federal authority to impose spending conditions on states.

An example of a grant condition that does not violate the Tenth Amendment can be found in *South Dakota v. Dole*.[37] In *Dole*, the Court found that Congress was well within its authority to withhold five percent of federal highway funds from states in which the age for purchase of alcohol was below twenty-one years.[38] In that case, the State of South Dakota, which permitted nineteen-year-olds to purchase beer, brought suit challenging the grant requirement, arguing that the law was an invalid exercise of Congress's power under the Spending Clause[39] to provide for the "general welfare." Finding that the legislation was a clear exercise of Congress's power under the Spending Clause,[40] the Court went on to hold that, under this Clause, the condition must be

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[32] Angel D. Mitchell, *Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions*, 48 Kan. L. Rev. 161, 176 (1999).

[33] "The Supreme Court not only requires that the exchange be in some sense 'like kind,' but that the exchange be fair so that the foregone right is not in some sense disproportionate." Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 Florida State University L. Rev.913 (2003).

[34] Richard Epstein, *Unconstitutional Conditions, State Power and the Limits of Consent*, 102 Harv. L. Rev. 5, 21-22 (1988).

[35] Pace v. Bogalusa City School Bd., 403 F.3d 272, 286 (5th Cir. 2005). However, as is discussed later, the more related the condition is to the underlying federal benefit, the more reluctant the courts has been to find that the constitutional right is being "coerced."

[36] *NFIB*, slip op. at 47 (Ginsburg, J., dissenting).

[37] 483 U.S. 203 (1987).

[38] National Minimum Drinking Age Amendment of 1984, 23 U.S.C. §158.

[39] U.S. Const., Art I, §8, cl. 1 (Congress has the power to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States").

[40] The Court easily dispensed with two preliminary questions. First, it held that the law was consistent with the (continued...)

related to the particular national projects or programs to which the money was being directed (relatedness).[41] Further, the Court considered whether other constitutional provisions, such as the Tenth Amendment, may independently bar the conditional grant of federal funds.[42]

The relatedness requirement was of some concern to the Court. In *Dole*, however, the congressional condition imposing a specific drinking age was found to be related to the national concern of safe interstate travel, which was one of the main purposes for expenditure of highway funds.[43] It should be noted that this standard of relatedness was relatively lenient, in that the condition was only indirectly related to how the federal money was being spent or to the specific federal projects involved. Instead, the condition was related to the overall regulatory goal (transportation safety) of the provided funds.

Next, the Court turned to the question of whether the Tenth Amendment (which provides that state legislatures or executive branch officials may not be "commandeered") was an independent constitutional bar to the grant condition. The argument that the Court considered was whether the grant condition was intruding on the state's authority to regulate alcohol or on the right of the state legislature to be free from federal directives as to how to legislate regarding its own state liquor laws. The Court held that because the state had voluntarily agreed to comply with the grant condition in question, the statute was not a violation of the Tenth Amendment.

The Court did suggest, however, that there were some Tenth Amendment limits to Congress's power under the Spending Clause, noting that financial inducements offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion."[44] In *Dole*, however, the percentage of highway funds that were to be withheld from a state with a drinking age below twenty-one was relatively small, so that Congress's program did not coerce the state to enact higher minimum drinking ages than it would otherwise choose.

NFIB v. Sebelius

In *NFIB*, the Supreme Court reviewed a decision by the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) regarding a challenge to the Medicaid expansion.[45] In its opinion, the Eleventh Circuit considered a Spending Clause/Tenth Amendment "coercion" challenge to the Medicaid expansion provisions of the ACA, and rejected it. First, the court noted the difficulty of distinguishing persuasion and coercion. The Eleventh Circuit also noted that after *Dole*, the Court had never devised a test to ascertain when financial pressure would lead to coercion, which had

(...continued)

requirements of Article I, §8, cl. 3 that spending be "in pursuit of 'the general welfare.'" Second, it held that a requirement that the condition be unambiguous so that states can make choices knowingly and be aware of the consequences was met. *Dole*, 483 U.S. at 207 (citing Helvering v. Davis, 301 U.S. 619, 640-41 (1937); United States v. Butler, 297 U.S. 1, 65 (1936)).

[41] 483 U.S. at 207.

[42] *See* 483 U.S. at 208.

[43] 483 U.S. at 208.

[44] 483 U.S. at 211.

[45] Florida v. HHS, 648 F.3d 1235 (11th Cir. 2011).

led many appeals courts to hold that the doctrine was not a viable defense to Spending Clause legislation.[46]

The Eleventh Circuit did, nonetheless, proceed to analyze whether the ACA Medicaid expansion had passed the point where "pressure turns into compulsion," and found that those provisions were not unduly coercive under *Dole*. The court relied on a variety of factors. First, the Medicaid-participating states were warned from the beginning of the Medicaid program that Congress reserved the right to make changes to the program,[47] and since that time Congress had made numerous amendments to the program.[48] Second, most of the cost of the Medicaid expansion will be borne by the federal government until 2016, after which states will gradually become responsible for up to ten percent of the increase.[49]

Third, the court noted that the states would have nearly four years from the date the bill was signed into law to decide whether they will continue to participate in Medicaid, or, if they declined to do so, to develop a replacement program in their own states. Finally, the court noted that, under the Medicaid Act, HHS need not withhold all Medicaid funding to a state refusing to comply with the expansion, but it may withhold only a portion of such funding.[50]

The Supreme Court reversed the Eleventh Circuit, and held that the threat of withholding all Medicaid funding for failure to comply with the ACA Medicaid expansion was coercive, and so it violated the Tenth Amendment. The Supreme Court went on to hold, however, that to the extent that enforcement of the ACA Medicaid expansion through withdrawal of existing Medicaid funds was unconstitutional, that the remedy was to sever that enforcement mechanism. Based on both an explicit statutory severability clause[51] and on discernment of congressional intent,[52] the Court held that the Congress would have wanted the ACA Medicaid expansion to go forward. Thus the Court limited withholding of funds for failure to serve the expanded Medicaid population to

[46] *See, e.g.*, Pace v. Bogalusa City School Bd., 403 F.3d 272, 278 (5th Cir. 2005) (en banc) ("It goes without saying that, because states have the independent power to lay and collect taxes, they retain the ability to avoid the imposition of unwanted federal regulation simply by rejecting federal funds."); A.W. v. Jersey City Pub. Schools, 341 F.3d 234, 243-44 (3d Cir. 2003) (noting that the state's freedom to tax makes it difficult to find a federal law coercive, even when that law threatens to withhold all federal funding in a particular area); California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997) (noting in a Medicaid expansion case that "to the extent that there is any viability left in the coercion theory, it is not reflected in the facts of this record"); Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) ("The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments.").

[47] *See* 42 U.S.C. §1304 ("The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress").

[48] For example, in 1972, Congress required participating states to extend Medicaid to recipients of Supplemental Security Income, thereby significantly expanding Medicaid enrollment. Social Security Act Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972). In 1989, Congress again expanded enrollment by requiring states to extend Medicaid to pregnant women and children under age six who meet certain income limits. Omnibus Budget Reconciliation Act of 1989, P.L. 101-239, 103 Stat. 2106 (1989).

[49] 648 F.3d at 1267.

[50] 648 F.3d at 1286. *See* 42 U.S.C. §1396c.

[51] 42 U.S.C. §1396c ("If any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby.").

[52] NFIB, slip op at 57 ("We are confident that Congress would have wanted to preserve the rest of the Act. . . . . We have no way of knowing how many States will accept the terms of the expansion, but we do not believe Congress would have wanted the whole Act to fall, simply because some may choose not to participate.").

withholding of those new funds, effectively making state participation in the Medicaid expansion voluntary.

As noted, the Supreme Court in *Dole* had identified two important factors in evaluating whether a congressional spending condition should be struck down under the Tenth Amendment – relatedness and coercion. The *NFIB* decision seemed to have most explicitly focused on the issue of coercion, but strains of relatedness permeate the opinion. This is seen most clearly in the concern expressed by the Court as to whether the states, upon entering the original Medicaid program, had been given sufficient notice of the possibility that such a significant expansion of the program might be imposed as a condition of participation.

The specific question accepted for consideration by the Supreme Court in *NFIB* was whether the ACA "violates basic principles of federalism" by "coerc[ing]" states into accepting "onerous conditions" in violation of *Dole*.[53] It should also be noted that the Court granted argument on this issue despite the fact that the Eleventh Circuit upheld the Medicaid expansion; that no other circuit has struck down these provisions;[54] and that no similar spending provisions have been previously invalidated under the coercion theory.[55]

Justice Roberts did not suggest that the decision in *NFIB* was inconsistent with prior Supreme Court cases, although it can be argued that the cursory analysis of relatedness and coercion in *Dole*[56] were elaborated significantly by his opinion, and may have been in some ways modified. Further, as will be discussed later, it would appear that coercion and relatedness were treated as separate factors by the Court in *Dole*.[57] In *NFIB*, however, the concepts appear to have become closely intertwined, so that in some contexts, relatedness and coercion must be considered together, not separately.

This latter approach is not inconsistent with unconstitutional conditions cases in non-state contexts. Where conditions associated with a governmental benefit have been challenged by a private person or entity, the "fit" of the benefit condition to the stated governmental purpose has been considered to increase concerns regarding coercive governmental behavior. For instance, in *Nollan v. California Coastal Commission,*[58] the owners of beachfront property in California sought a permit to demolish a bungalow and replace it with a three-bedroom house. The permit was granted subject to the condition that the owners record an easement allowing the public to cross their property in order to reach the beach. The permit condition was challenged as a taking

[53] Supreme Court Order List (November 14, 2011)(cert. granted to question: Does "Congress[s] exceed its enumerated powers and violate basic principles of federalism when it coerces States into accepting onerous conditions that it could not impose directly by threatening to withhold all federal funding under the single largest grant-in-aid program, or does the limitation on Congress's spending power that this Court recognized in *South Dakota v. Dole*, 483 U.S. 203 (1987), no longer apply?," Petitioner's Cert., at i).

[54] Generally, the criterion for the Supreme Court to take a case is that there is disagreement between federal circuit courts on an issue, or because a federal law has been struck down. Robert Stern, Eugene Gressman, Stephen Shapiro, SUPREME COURT PRACTICE at 194, 213 (6th Ed. 1986).

[55] *See* Nevada v. Skinner, 884 F.2d 445, 448-49 (9th Cir. 1989) ("The coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party.").

[56] The discussion of relatedness took two paragraphs, *Dole*, 483 U.S. at 207-09, while the discussion of coercion extended over slightly more than one page. *Dole*, 483 U.S. at 211 – 212.

[57] *Dole*, 483 U.S. at 207-09, 211-12.

[58] 483 U.S. 825 (1987).

of property without the just compensation required by the Constitution.[59] The California government argued that the new construction would increase blockage of the view of the ocean, creating a psychological barrier to beach access, and that the easement was necessary to counter this effect.[60] The Court, however, evaluated whether the condition in question, providing "physical access," served the purpose put forward as the justification for the prohibition, since the remedy for losing visual "access" to the beach was to provide the more significant physical "access" to the beach. Thus, the Court found that, at least in the takings context, there must be a close "fit" between the purpose of the regulation and the burden imposed, and that the conditioning of the permit in this manner was unconstitutional.[61]

Relatedness

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. It had been suggested previously that the more closely federal grant conditions on states are tied to the purpose of the grant, the less likely courts will be to find coercion.[62] While the Justice Roberts' opinion in *NFIB* did not explicitly establish such a relationship between relatedness and coercion, it did indicate that certain categories of grant conditions are more vulnerable to a constitutional challenge under the doctrine of coercion than others.

In evaluating this relationship, Justice Roberts discusses several types of grant conditions: 1) conditions directly related to the expenditure of federal funds (hereinafter "directly related conditions"); 2) conditions related to the policy goals underlying grants (hereinafter "indirectly related conditions)"; 3) conditions related to the goals of a "new and independent" grant program ("independent grant conditions"); and 4) grant conditions not-related to the policy goals of the underlying grant ("unrelated grand conditions"). It should be noted, however, that these categories are not presented by Justice Roberts systematically, but rather are identified explicitly or implicitly at various places in the opinion. Consequently, it is not clear if the above categories should be considered as an exclusive listing of all possible types of grant conditions; whether one or more of these are variants of the same category; or whether these categories may to some extent overlap. However, for purposes of this report, it would appear that once it is determined what type of grant condition is before the court, this will inform whether the grant condition is likely to be coercive or not.

For instance, Justice Roberts indicated that if a grant condition was directly related to the expenditure of federal funds, then it would appear that the condition will usually be constitutional under the Spending Clause. Second, if the grant condition is generally related to the policy goals

[59] The Fifth Amendment (which has been incorporated against the states through the Fourteenth Amendment), provides that "nor shall private property be taken for public use, without just compensation."

[60] The Court noted that if California had merely taken the easement outright, this would have required payment of just compensation. On the other hand, the Court opined that the government's "power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." 483 U.S. at 836.

[61] 483 U.S. at 838.

[62] *See, e.g.*, Angel D. Mitchell, *Conditional Federal Funding to the States: The New Federalism Demands a Close Examination for Unconstitutional Conditions*, 48 Kan. L. Rev. 161 (1999); Virginia Department of Education v. Riley, 106 F.3d at 570 (en banc) (per curiam) (incorporating Judge Luttig's dissent from prior panel decision) (federal decision to withhold special education funds because of a state policy allowing suspension of special education students intrudes on disciplinary issues, an area of state, not federal, concern).

of the underlying grant, then in most foreseeable cases, withdrawal of all the program funds would be constitutional under the Spending Clause and the Tenth Amendment. 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. Finally, if a grant condition is unrelated to the general policy goals of the underlying grant, then it is most likely unconstitutional under the Spending Clause.

Directly Related Conditions: Use of Federal Funds

It has long been suggested in unconstitutional conditions cases that there is a distinction to be made between grant conditions that limit how federal funds are used, and conditions that limit or direct how a recipient will act in activities that are separate from such expenditures. In effect, concerns about coercion are substantially diminished when there is a direct relationship between the activity being directly subsidized by the government and the conditions imposed. This line of reasoning appears to hold true regardless of whether the grant recipient is a state or a private individual or entity, and it would appear to include situations where federal dollars provide just a part of the funding for a program or activity.

For instance, in the case of *Rust v. Sullivan*,[63] a First Amendment free speech challenge was brought against regulations that prohibited health care providers who received federal funds under Title X (which provided funds for family-planning services) to engage in abortion advocacy and counseling in any program receiving these funds.[64] If persons or entities associated with Title X projects sought to engage in these activities, they were required to do so in "physically and financially separate" locations.[65] Based on this distinction, the Court rejected the challenge to these regulations, holding that the government was not denying a subsidy or benefit because of the exercise of a constitutional right, but was only requiring that the federal funds be used for the purposes required by the statute: "to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities."[66] Unlike other less related statutes, the Court here seemed to find that the direct relationship between the federal benefit and the activity in question justified the First Amendment limitations.

As noted, this same distinction has been true for Tenth Amendment challenges to federal grants to states. When a state is voluntarily receiving and spending federal funds, it is generally required to comply with federal conditions on how those funds are to be spent. For instance, in *Oklahoma v. Civil Service Comm'n*,[67] the Court considered the validity of the Hatch Act as applied to the political activities of state officials whose employment was financed in whole or in part with federal funds. The state contended that the withholding of federal funds unless a state official was removed invaded its sovereignty in violation of the Tenth Amendment. Though finding that the United States did not have the power to regulate the local political activities of such state

[63] 500 U.S. 173 (1991).

[64] 500 U.S. at 179-80.

[65] 500 U.S. at 180-81.

[66] H. R. Conf. Rep. No. 91-1667, at 8 (1970).

[67] 330 U. S. 127 (1947).

officials, the Court held that the federal government "does have power to fix the terms upon which its money allotments to states shall be disbursed."[68]

This distinction between conditions on spending federal funds and other grant conditions was confirmed by Justice Roberts in *NFIB*. Justice Roberts' opinion stated that Congress's authority to condition the receipt of funds on the states' complying with restrictions on the use of those funds was the "means by which Congress ensures that the funds are spent according to its view of the 'general Welfare.'"[69] Although not explicitly finding that such restrictions could never be unconstitutional, there appears to be no suggestion in *NFIB* or any previous case that a state could be relieved from compliance with federal conditions on how to spend federal grant funds based on the size of the federal program or the amount of funds that would be withheld from that program for a violation.

Although a survey of existing state grant programs is beyond the scope of this report, it would appear that many federal grant conditions are conditions either directing or limiting certain behaviors in programs or activities that are spending federal funds.[70] Under the above analysis, it would appear that these restrictions would not be amenable to constitutional challenge under the Tenth Amendment. With regard to adding new federal conditions to existing state programs using federal funds, relevant case law does not appear to make a distinction between directly related grant conditions imposed at the time of a grant program's inception and conditions imposed later.[71] Thus, adding grant conditions to existing programs or activities receiving federal funds appears to be unremarkable, and arguably would not be subject to significant Tenth Amendment challenge.

Indirectly Related Conditions: Meeting Similar Policy Goals

Under a *Dole* analysis, a court will first analyze whether a grant condition is sufficiently related to an underlying grant. This inquiry, however, appears to be highly deferential to Congress, so that if any reasonable relationship between the policy goals of a program and the policy goals of the grant condition can be discerned, then the grant condition will be upheld. As noted, the relationship in *Dole* between raising the drinking age to twenty-one and the withholding of transportation funds was that both were associated with the issue of transportation safety. One can suggest that the Court's resort to such a high level of generality in finding that a condition was related would indicate that the relatedness standard in *Dole* would in most cases be easy to meet.

Thus, in the *NFIB* case, one would expect the Court to have little problem finding that grant conditions directly related to Medicaid's purpose of providing medical treatment to disadvantaged populations would meet the standard set forth in *Dole*. At a minimum, the new benefits provided under the Medicaid expansion would appear more closely tied to the purposes of the Medicaid program than the 21-year-old drinking age was to the purpose of the federal highway

[68] 330 U.S. at 143.

[69] *NFIB*, slip op. at 50.

[70] *See, e.g.,* note 19, *supra* (prohibiting discrimination in programs or activities receiving federal funds).

[71] *See* Bennett v. Kentucky Dept. of Ed., 470 U. S. 656, 659–660 (1985) (enforcing restriction added five years after adoption of educational program); *NFIB*, slip op. at 46 (Ginsburg, J., dissenting).

transportation funds under *Dole*. Justice Ginsburg, in dissent, suggests that the relatedness of Medicaid and the Medicaid expansion is undeniable.[72]

Justice Roberts' opinion, however, did not directly address whether the policy goals of the Medicaid expansion or any previous Medicaid amendments were related to the policy goals of the existing Medicaid program. Rather, as discussed below, Justice Roberts' opinion explored the narrower question as to whether the Medicaid expansion was a "new and independent" program. While this analysis might be seen as a variant of the *Dole* relatedness standard, Justice Roberts did not make this point explicitly. However, the opinion did suggest that all prior grant conditions which had been added to Medicaid over the years since its inception were constitutional. This would imply that, under *Dole*, those previous grant conditions were generally related to the policy goals of the program to which they were attached.

As discussed by Justice Ginsburg in her dissent, since 1965, Congress has amended the Medicaid program on more than 50 occasions.[73] The most dramatic expansion occurred between 1988 and 1990, when Congress required participating states to include among their beneficiaries pregnant women with family incomes up to 133 percent of the federal poverty level; children up to age six at the same income levels; and children ages six to eighteen with family incomes up to 100 percent of the poverty level.[74] According to Justice Ginsburg, these amendments added millions of people to the Medicaid-eligible population.[75]

Justice Roberts, however, makes clear in his opinion that the 1988-1990 Medicaid expansion was not of such a degree as to raise concerns about coercion under *Dole.* In *NFIB*, Justice Roberts argues that this previous modification should not be considered a major change in the Medicaid program, because Medicaid had always provided health care for "families with dependent children." Justice Roberts also suggested that none of the other 50 amendments would fall into the same category as the ACA expansion.[76]

Although not an explicit holding of the Court, Justice Roberts' opinion would suggest that most changes to federal spending programs will not raise significant constitutional concerns. Many of the amendments to Medicaid imposed grant conditions that, if not met, would result in the loss of all Medicaid funding.[77] And, as will be discussed later, Medicaid funding represents one of the largest federal programs providing money to the states. The suggestion of the Roberts' opinion is that even as significant a loss of federal funds as would occur with the withdrawal of federal Medicaid funding would pass constitutional muster, as long as the grant condition fell into the category of indirectly related conditions.

[72] *NFIB,* slip op. at 47-48 (Ginsburg, J., dissenting).

[73] *NFIB,* slip op. at 41-42 (Ginsburg, J., dissenting).

[74] See 42 U. S. C. §§1396a(a)(10)(A)(i), 1396a(l).

[75] *NFIB*, slip op. at 42 (Ginsburg, J., dissenting), *citing* DUBAY & KENNEY, Lessons from the Medicaid Expansions for Children and Pregnant Women 5 (Apr. 1997).

[76] *NFIB,* slip op. at 55.

[77] *NFIB,* slip op. at 53. Congress has sometimes conditione only new Medicaid funding, while at other time it has conditioned both old and new. *See, e.g.*, Social Security Amendments of 1972, 86 Stat. 1381–1382, 1465 (extending Medicaid eligibility, but partly conditioning only the new funding); Omnibus Budget Reconciliation Act of 1990, §4601, 104 Stat. 1388–166 (extending eligibility, and conditioning old and new funds).

Independent Conditions: Requirement to Implement New Program

In *NFIB*, seven Justices held that the requirement that states either comply with the requirements of the Medicaid expansion under the ACA or lose all Medicaid funds violated the Tenth Amendment. However, these seven Justices either wrote or joined one of two separate opinions on this issue, and did not join in either the reasoning or judgment of the other opinion. The opinion of Chief Justice Roberts, which was joined by Justices Breyer and Kagan, appears to be significantly narrower than the dissenting opinion authored Justices Scalia, Kennedy, Thomas and Alito.[78] Thus, it would appear that for purposes of the Tenth Amendment challenge to the ACA, that the opinion by Chief Justice Roberts is the controlling opinion.[79]

The core of Justice Roberts' opinion is that the ACA Medicaid expansion creates a "new and independent" program, and that failure to comply with this new program will result in the withdrawal of funds for the existing Medicaid program. There were several aspects of the Medicaid expansion under the ACA that were deemed important in reaching this conclusion. It is unclear, however, whether all these factors needed to be present, or whether a challenge to a Spending Clause condition could be successful even if there had been less differentiation between Medicaid and this expansion. It does appear that the factors that were important in this case are unlikely to occur in other legislative contexts. Thus, if these factors mark the outer limits of Congress's power, then the case may have minimal impact on existing or future funding grant conditions.

Justice Roberts' opinion notes that Congress's power under the Spending Clause has been repeatedly characterized as "much in the nature of a contract,"[80] meaning that the states voluntarily and knowingly enter into an agreement with the federal government in order to receive federal funds. Previously, the significance of this theory has gone to the issue of statutory interpretation, so that conditions imposed on the states generally need to be explicit, and that the Supreme Court will presume against the creation of "implicit" conditions under the Spending Clause.

In Justice Roberts' opinion, however, the "contract" analogy serves a different purpose. In arguing that the Medicaid expansion should be viewed as a modification of an existing program, the United States noted that the original Medicaid program, found in the Social Security Act, contained a clause expressly reserving "[t]he right to alter, amend, or repeal any provision" of that statute.[81] However, Justice Roberts' opinion found that under the "contract" theory, the changes imposed by the Medicaid expansion were not of the type that were contemplated by the statute. Specifically, Justice Roberts' opinion indicated that the Medicaid expansion "accomplishes a shift in kind, not merely degree."[82]

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[78] While Justice Roberts, as discussed below, finds a constitutional violation based on the presence of both a "new and independent" program and a coercive loss of funds, the dissenting opinion would find the loss of federal funds a sufficient basis to strike down the ACA Medicaid expansion. *NFIB*, slip op. at 38-42 (Justices Scalia, Kennedy, Thomas and Alito dissenting).

[79] Marks v. United States, 430 U.S. 188, 193 (1977)("[w]hen 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'") (citation omitted).

[80] Barnes v. Gorman, 536 U. S. 181, 186 (2002); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981).

[81] 42 U.S.C. § 1304.

[82] *NFIB*, slip op. at 53.

The opinion noted that the original program had required states to cover medical services for four categories of persons in financial need: the disabled, the blind, the elderly, and needy families with dependent children.[83] Although previous amendments to Medicaid had altered the scope of these categories, the Medicaid expansion arguably changed the nature of the program by requiring recipient states to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. According to the opinion, this change meant the program was no longer to provide care for the neediest, but rather was an element of a comprehensive national plan to provide universal health care.[84]

Justice Roberts also wrote that the way this new Medicaid population is treated is different from how the existing Medicaid program works. For instance, under the ACA, Congress created a separate funding provision to cover the costs of providing services to any person made newly eligible by the expansion. While Congress pays 50 – 83 percent of the costs of covering individuals currently enrolled in Medicaid, once the expansion is fully implemented, Congress will pay 90 percent of the costs for newly eligible persons. Congress also mandated, however, that newly eligible persons would receive a level of coverage that is less comprehensive than the traditional Medicaid benefit package.[85]

In essence, Justice Roberts seems to have found that the states received insufficient notice upon their commitment to Medicaid that they might be required, as a condition of continuing in that program, to include significant new populations in their Medicaid coverage.[86] Despite the language in the Social Security Act regarding possible future alterations, the opinion found that this language did not confer on Congress the authority to transform the program so dramatically.

Unrelated Conditions: Does Not Address Similar Policy Goals

Justice Roberts indicated that, under *Dole*, if a Court finds that a policy goal is unrelated to the underlying grant condition, then that grant condition will not survive constitutional scrutiny under the Spending Clause.[87] After *Dole*, however, those lower courts that have considered relatedness challenges to grant conditions[88] do not appear to have engaged in particularly close scrutiny of this requirement.[89] In fact, some courts have even expressed a reluctance to engage in such an inquiry at all, suggesting that the difficulty of the analysis and the ability of states to seek relief through the political process precluded meaningful review.[90]

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[83] 42 U.S.C. §1396a(a)(10).

[84] *NIFB, s*lip op. at 53-54.

[85] *NFIB*, slip op. at 54.

[86] *Pennhurst*, 451 U. S at 25 ("[t]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or 'retroactive' conditions.").

[87] *NFIB*, slip op. at 50.

[88] *See, e.g.,* Jim C. v. United States, 235 F.3d 1079, 1084 (8th Cir. 2000) (Bowman, J, dissenting) (arguing that waiver of sovereign immunity was not related to purpose of education grants).

[89] *See, e.g*., Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 287 (5th Cir. 2005) (en banc) (threatened loss of $800 million not coercive because state could have declined federal funds); A.W. v. Jersey City Pub. Sch., 341 F.3d 234, 255 (3d Cir. 2003) ("state's powers as a political sovereign, especially its authority to tax, appear more than capable of preventing undue coercion"); Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc) (threatened loss of $250 million "politically painful," not coercive); California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997) (coercion "not reflected" by threatened loss of all Medicaid funding).

[90] *See, e.g.,* Nevada v. Skinner, 884 F.2d 445, 448-49 (9th Cir. 1989) (coercion doctrine presents "questions of policy (continued...)

The question arises as to whether *NFIB* significantly affects this prong of the *Dole* analysis, so that lower courts would be likely to increase scrutiny of the relatedness requirement. It might be argued that the Roberts' opinion, with its emphasis on "new and independent" programs, is implicitly addressing the "relatedness" inquiry of *Dole*. Justice Roberts' opinion, however, does not explicitly discuss whether the "new and independent" grant condition analysis was intended to be considered separately from a relatedness inquiry; whether this analysis is a variant of the relatedness inquiry; or whether it was intended to supplant it.

An argument can be made, however, that there is a significant difference between the *Dole* "relatedness" inquiry and the *NFIB* "new and independent" program inquiry. First, as noted, the "relatedness inquiry" in *Dole* was identified as a limitation on the Spending Clause, while the *NFIB* discussion of "new and independent programs" emphasized the concerns of the Tenth Amendment. Second, under *Dole,* the "relatedness" and "coercion" inquiries appear to be disjunctive, in that failure to comply with either of these factors would mean that the statute was unconstitutional. Under *NFIB,* however (as is discussed below), the "new and independent program" inquiry and the "coercion" inquiry are conjunctive, so that a grant condition must apparently fail both tests to be found unconstitutional. If the *NFIB* analysis were either a supplement to or a replacement for the *Dole* "relatedness" doctrine, that doctrine would be significantly narrowed.

It would seem premature, without further clarification by the Court, for a lower court to apply such a limiting rule of construction to *Dole* (requiring challenges to successfully challenge both "relatedness" and "coercion"). Thus, arguably, the *Dole* "relatedness" test was not directly at issue in *NFIB*, and it is still the case that an unrelated grant condition will be found unconstitutional under the Spending Clause without the further requirement that such a condition be coercive. However, as noted previously, no federal statute has every been found by any court to fail under this requirement.

Coercion

When Coercion Analysis is Important

As suggested above, there are four types of grant conditions recognized by the Court: "Directly Related Conditions," "Indirectly Related Conditions," "Independent Program Conditions," and "Unrelated Program Conditions." And, as discussed above, a coercion analysis may not be particularly important for three of them. "Directly Related Conditions" are likely to be upheld and "Unrelated Conditions" conditions are likely to fail regardless of the level of funds withheld. Since, under *Dole* and *NFIB*, a coercion analysis still exists for "Indirectly Related" conditions, the implicit approval of Justice Roberts' opinion to the withholding of all Medicaid funding for the many amendments to Medicaid prior to the ACA makes it unlikely that past or future "Indirectly Related Conditions" will be constitutionally infirm. Thus, it would appear that only when a court ascertains that a grant condition associated with an "Independent Program Condition" is used to withhold existing funds that coercion analysis is likely to be relevant.

(...continued)

and politics that range beyond [the judiciary's] normal expertise" and should be discarded because states are "adequately protected by the national political process"); Kansas v. United States, 214 F.3d 1196, 1202 (10th Cir. 2000) (declaring doctrine "unclear" and "suspect").

How Much Federal Funding Can be Withheld

Prior to *NFIB*, the Supreme Court had noted the inherent difficulty in determining when a state was being "coerced." In *Steward Machine Co. v. Davis*,[91] a corporation challenged a provision of the then newly enacted Social Security Act, arguing that the federal government had improperly coerced states into participation in the Social Security program. The Supreme Court rejected this argument, stating that:

> [T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.... Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact.[92]

Thus, in *Steward*, the Court declined to establish a bright line test, instead just finding that the law in question did not fall outside of an acceptable level of persuasion.[93]

In *NFIB*, Justice Roberts took a similar approach. Rather than establishing a standard by which future coercion cases are to be judged against, the opinion merely concluded that the economic burden imposed by the withdrawal of all federal Medicaid funds would cross the line into coercion. Although the level of Medicaid expenditures in relationship to particular state budgets may vary, Justice Roberts characterized such levels as "the threatened loss of over 10 percent of a State's overall budget." Justice Roberts contrasted this amount with the amount of federal transportation funds threatened to be withheld in *Dole*, which Justice Roberts characterized as "less than half of one percent" of South Dakota's budget. Justice Roberts noted that the level of withdrawal of funds in *Dole* left that state with the "prerogative" to reject Congress's desired policy, "not merely in theory but in fact."[94] The loss of ten percent of a state's budget, on the other hand, represents a "gun to the head"[95] and a form of "economic dragooning"[96] which leaves the state no real option but to agree to the Medicaid expansion. How courts are to consider grant withdrawals between ten percent and one half of one percent, however, is not addressed by the Roberts' opinion, and Justice Roberts declined to speculate where such a line would be drawn.[97]

Justice Roberts' failure to "draw a line" in *NFIB* would seem, on its face, to make future predictions regarding grants conditions problematic. Medicaid is one of the largest federal programs currently in existence, and consequently, withdrawal of all Medicaid funds for failure to meet the Medicaid expansion requirements under the ACA would be disruptive to state finances. It is not clear, however, how the court might compare the levels of withdrawal threatened under the ACA from a variety of other large federal programs. It should be noted that, prior to the

[91] 301 U.S. 548 (1937).

[92] 301 U.S. at 589-90, 892 (quotation marks, citation omitted).

[93] 301 U.S. at 591.

[94] *NFIB*, slip op. at 51-52 (quoting *Dole*, 483 U. S. at 211–212.).

[95] *NFIB*, slip op. at 51.

[96] *NFIB*, slip op. at 52.

[97] *NFIB,* slip op. at 55.

Court's decision in *NFIB*, various federal courts of appeals had considered and rejected coercion claims with respect to grants for state prisons,[98] education,[99] welfare,[100] and transportation.[101]

Whether Cost of Complying with Conditions is Relevant

One additional question that may be asked is whether a court should analyze the burden of compliance imposed by a federal grant condition as part of a coercion analysis. This question was considered an important part of the challenge to the Medicaid expansion – whether the grant condition in question was financially "onerous." In general, analysis under *Dole* has focused on the amount of federal funds withheld. In *NFIB*, however, the states argued that the Court should also consider the additional amounts of money that the states would have to expend to comply with the ACA Medicaid requirements.

The Court in *Dole* did not indicate that a coercion analysis varied based on the existence of a high burden of compliance (financially "onerous" or otherwise) imposed on the states by a grant condition. Instead, the Court appeared to focus its analysis on whether the grant condition in question threatened South Dakota's sovereignty and its ability to make its own policy decisions.[102] Arguably, the Court's decision in *Dole* would suggest that any grant condition that was "coercive" and intruded on a state's sovereignty would be unconstitutional, regardless of whether the financial or other burden of compliance was substantial or insignificant.[103] In either instance, the withdrawal of too much federal funding could have a coercive effect.[104]

In *NFIB,* Justice Roberts appears to have confirmed the implication of *Dole* – that the burdens of compliance are not a factor to be considered in a Tenth Amendment challenge to a federal spending condition. In a footnote, Justice Roberts summarily adopts this reasoning, noting that:

[98] *See, e.g.*, Van Wyhe v. Reisch, 581 F.3d 639, 652 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 3323 (2010), and 131 S. Ct. 2149 (2011).

[99] *See, e.g.*, Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000).

[100] *See, e.g.,* Kansas v. United States, 214 F.3d 1196, 1198, 1201-1202 (10th Cir. 2000).

[101] *See, e.g.,* Nevada v. Skinner, 884 F.2d 445, 448-449 (9th Cir. 1989).

[102] *Dole*, 483 U.S. at 211-212 (upholding the grant condition because "the enactment of such laws remains the prerogative of the States not merely in theory but in fact").

[103] This reasoning is bolstered by the Court's Tenth Amendment analysis, in which the Court rejected an argument that the level of the financial burden imposed by compliance with a federal directive was relevant to a finding of commandeering. In *Printz*, the federal government argued that the requirements imposed on state and local officials by the Brady Act were a "minimal [and] temporary burden." *Printz*, 521 U.S. at 932. The Court responded:

> But where, as here, it is the whole object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate. It is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.

521 U.S. at 932-33.

[104] To the extent that the Court did decide to introduce an evaluation of the financial burden of compliance to its Dole analysis, one could argue that, rather than finding that a high or "onerous" level of burden is necessary to a finding of coercion, the Court might conclude that states' were more likely to be coerced when the burden of compliance was relatively insubstantial. See Virginia Department of Education v. Riley, 106 F.3d 559 (4th Cir. 1997) (en banc) (per curiam) (incorporating Judge Luttig's dissent from prior panel decision).

> [t]the size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden. "Your money or your life" is a coercive proposition, whether you have a single dollar in your pocket or $500.[105]

Thus, arguably, relatively minor grant conditions which involve the expenditure of some state funds (either directly or as administrative costs),[106] would still be subject to a coercion analysis.

Conclusion

The successful federalism challenge to Medicaid expansion under the ACA in the case of *NFIB* required the Supreme Court to address whether states are being "coerced" into compliance with the expanded state requirements by the threat of withholding existing Medicaid reimbursements. This "coercion" test, articulated in *South Dakota v. Dole* in 1987, had never been applied by the Supreme Court or the lower federal courts to strike down a federal statute, and had been so little developed by the Court that most federal courts of appeals had simply rejected similar challenges with little analysis. It is unclear, however, whether *NFIB* has significantly changed the *Dole* analysis, or whether the combination of factors that led to the Court's decision to limit how the ACA Medicaid expansion would be enforced is likely to be repeated.

As noted, Justice Roberts' decision in *NFIB* seems to contemplate the existence of several types of grant conditions: 1) conditions directly related to the expenditure of federal funds; 2) conditions related to the policy goals underlying grant; 3) conditions related to the goals of a "new and independent" grant program; and 4) grant conditions not related to the policy goals of the underlying grant.

Categories 1, 2 and 4 (direct, indirect, and unrelated conditions) are derived principally from prior case law, while category 3 (new and independent programs) appears to be the principal focus of *NFIB*. Prior case law holds (and *NFIB* confirms) that if a grant condition is directly related to the expenditure of federal funds in a state program or activity, then the condition is constitutional under the Spending Clause. Second, if the grant condition is generally related to the policy goals of the underlying grant, then, under *Dole* and *NFIB,* withdrawal of all program funds would, in most foreseeable cases, be constitutional under the Spending Clause and the Tenth Amendment. However, if the grant condition is attached to 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 that condition may be unconstitutionally coercive under the Tenth Amendment. Finally, if a grant condition is unrelated to the general policy goals of the underlying grant, then it is most likely unconstitutional under the Spending Clause.

Thus, to the extent that a coercion remains relevant after *NFIB*, it would appear to apply principally where there is an existing program, and states are mandated to adopt a new and independent program at the risk of the state losing the existing funds. In this case, a court will need to consider whether the loss of funds for failure to adopt this new and independent program is coercive. Justice Roberts did not identify a standard to determine what level of funding withholding would be coercive, although he did conclude that withdrawal of federal program funds which represents ten percent of an average state's budget constituted a "gun to the head"

[105] *NFIB*, slip op. at 52 n 12.

[106] Id.

and was a form of "economic dragooning." How courts are to consider grant withdrawals below ten percent, however, is not addressed by the Roberts opinion, and Justice Roberts declined to speculate where such a line would be drawn.

Finally, to the extent that such a new and independent program is found to be coercively mandated, then a court would need to fashion a remedy. In Justice Roberts' opinion, the Tenth Amendment remedy was not to strike down the "new and independent programs" (the ACA Medicaid expansion), but to disallow the threat of withholding existing funds (Medicaid). Based on both an explicit statutory severability clause and on discernment of congressional intent, the Court held that Congress would have wanted to preserve the authority to withhold funds from the expanded Medicaid population for failure to comply with its conditions. This ultimately had the effect of allowing the ACA Medicaid expansion to go forward, but effectively made state participation voluntary.

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