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The Spending Power after NFIB: New Direction, or Medicaid Exception?

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THE SPENDING POWER AFTER *NFIB*: NEW DIRECTION, OR MEDICAID EXCEPTION?

*Elizabeth G. Patterson**

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I. INTRODUCTION

THE Supreme Court's 2012 decision in *National Federation of Independent Business v. Sebelius (NFIB)*,¹ which paved the way for implementation of the Patient Protection and Affordable Care Act (Affordable Care Act, or ACA),² is best known for rejecting a constitutional challenge to the Act's mandate that all persons obtain health insurance coverage.³ However, *NFIB* also decided a second, equally important issue: a Spending Clause challenge to the ACA's expansion of the Medicaid program.⁴ In an opinion that had far-reaching implications both for the health care reform initiative and for Spending Clause jurisprudence, the Court upheld the Medicaid Expansion itself, but struck down a key portion of the inducement for states to participate in the expansion.⁵

The ACA was enacted in 2010,⁶ with a primary objective of assuring "near-universal" health insurance coverage for the American public.⁷ The ACA sought to accomplish this objective through a combination of measures by which most Americans would have insurance coverage for a package of "essential health benefits."⁸ Coverage for low-income individuals would be assured through an expansion of the Medicaid program to cover all adults under the age of sixty-five with incomes below 138%⁹ of the federal poverty guidelines (the Medicaid Expansion).¹⁰ Adults not covered by Medicaid or another benefit program¹¹ would be required to purchase the "essential health benefits" package from a private insurer (the Individual Mandate), with or without federal subsidies.¹²

1. 132 S. Ct. 2566 (2012).

2. Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010).

3. *NFIB*, 132 S. Ct. at 2601.

4. *Id.* at 2608.

5. *Id.*

6. 124 Stat. 119.

7. *NFIB*, 132 S. Ct. at 2664 (joint dissent).

8. See 42 U.S.C. §§ 1396a(k)(1), 1396u-7(b)(5), 18022(b) (2012).

9. Under the ACA, the eligibility threshold is 133% of the federal poverty level, but 5% of an individual's income is disregarded, raising the effective limit to 138%. *Estimates for the Insurance Coverage Provisions of the Affordable Care Act Updated for the Recent Supreme Court Decision*, CONG. BUDGET OFF. 6-7, n.13 (July 2012), www.cbo.gov/sites/default/files/cbofiles/attachments/43472-07-24-2012-CoverageEstimates.pdf.

10. 42 U.S.C. § 1396a(m)(1)(A) (2012). Children at this level of poverty had been covered since the enactment of the State Children's Health Insurance Program in 1997. *Chapter I: Early Implementation of the Child Health Insurance Program*, U.S. DEP'T OF HEALTH & HUM. SERVICES, <http://aspe.hhs.gov/health/reports/earlychip/intro.htm> (last visited Feb. 19, 2015). The use of a figure higher than the federal poverty level to define eligibility for federal benefit programs is common, since the poverty guidelines are based on an outdated formula and are generally regarded as under-measuring actual poverty. See, e.g., Rebecca M. Blank, *Why the United States Needs an Improved Measure of Poverty*, BROOKINGS (July 17, 2008), www.brookings.edu/research/testimony/2008/07/17-poverty-blank.

11. Other benefit programs that satisfy the "minimum essential coverage" requirement include Medicare, CHIP, TRICARE for Life, and specified federal health care programs for veterans and Peace Corps volunteers. *Minimum Essential Coverage*, OBAMACARE FACTS, <http://obamacarefacts.com/minimum-essential-coverage/> (last visited Feb. 19, 2015).

12. 26 U.S.C. § 5000A (2012); see *Minimum Essential Coverage*, *supra* note 11.

The portion of the ACA providing for the Medicaid Expansion was enacted pursuant to the Constitution's Spending Clause, which authorizes Congress to spend federal revenues to "provide for the . . . general Welfare of the United States."¹³ Under this power, Congress can expend federal revenues for any purpose related to the "general welfare," including matters over which it has no regulatory authority.¹⁴ Congress has used the Spending Clause to assume a regulatory role in numerous matters outside its enumerated legislative authority by offering federal funds to the states conditioned on the states' taking actions to further federal policy choices.¹⁵ Implementation of the federal policy choices occurs only in states that agree to accept the conditioned federal funds,¹⁶ but state rejection of proffered federal funds is not common.¹⁷

The Medicaid program, enacted in 1965 to provide health insurance coverage for certain categories of needy persons,¹⁸ has been implemented in every state.¹⁹ It is among the largest and most costly programs administered by the states.²⁰ Federal Medicaid funds received by the states make up over 10% of most states' budgets.²¹ These federal funds cover between 50% and 83% of the program's cost, with the remainder being

13. U.S. CONST. art. I, § 8, cl. 1; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601 (2012).

14. See *infra* notes 52–54 and accompanying text.

15. See *NFIB*, 132 S. Ct. at 2601–02.

16. See *id.* at 2601–03.

17. See generally U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, FEDERAL AID TO STATES FOR FISCAL YEAR 2010 (Sept. 2011), available at <http://www.census.gov/prod/2011pubs/fas-10.pdf> (showing federal aid to each state by program, with few gaps that would indicate a lack of funding for any state in education, health, human services, transportation, and other key federal grant programs). For discussion of the limited situations in which states have turned down conditioned federal funds, see *infra* text & notes 166–69. For discussion of objectionable conditions that have nevertheless been accepted by states in order to receive federal grants funds, see *infra* text & notes 122–30.

18. As originally designed, Medicaid supplemented four existing programs that provided cash assistance to needy persons, providing those same individuals with coverage for certain medical expenses. The four programs were Aid to Families with Dependent Children, Old Age Assistance, Aid to the Blind, and Aid to the Permanently and Totally Disabled. Medicaid was eventually delinked from these four programs, though it continued to focus on the categories of needy persons that they served: families with dependent children, the elderly, blind, and disabled. See 42 U.S.C. § 1396a(a)(10)(A)(i)(III)–(VIII) (2012). Beginning in 1988, coverage of children and pregnant women was expanded by raising the income eligibility threshold for these groups. Further modifications of eligibility, coverage, and other requirements have been made from time to time. See *NFIB*, 132 S. Ct. at 2631 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

19. The only holdout, Arizona, had declined to accept the Medicaid program when originally offered in 1965. In 1982, the state finally capitulated to pressure from county governments, which were having to shoulder the cost of providing health care to the poor, and agreed to accept federal Medicaid dollars. Suzy Khimm, *Will states really turn down federal money? They've done it before*, WASH. POST (June 29, 2012, 2:03 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/06/29/will-states-really-turn-down-federal-money-theyve-done-it-before/>.

20. *State Expenditure Report*, NASBO 46 (2014), <http://www.nasbo.org/sites/default/files/state%20Expenditure%20Report%20%28Fiscal%202012-2014%29S.pdf>.

21. *NFIB*, 132 S. Ct. at 2581.

borne by the state.²²

The ACA dramatically expanded the population of needy persons who were eligible for Medicaid.²³ Although the share of the costs to be provided by the federal government was unusually generous,²⁴ the costs to be borne by states were not insignificant.²⁵ States' freedom to reject this federal offer was limited by the fact that implementation of the Medicaid Expansion had been made a condition for receipt of the Medicaid grant as a whole;²⁶ hence, failure to participate in the expansion could result in forfeiture of funding for the entire Medicaid program.²⁷

A lawsuit challenging the Medicaid Expansion was filed by twenty-six states that objected to the burdens imposed on states by the legislation, but felt compelled to accept the expansion if failure to do so would result in loss of all Medicaid funding.²⁸ They argued that the choice they were given—expand the Medicaid program or forfeit all Medicaid funding—was coercive and in excess of Congress's authority under the Spending Clause.²⁹

Ruling on the case in *NFIB*, a divided Supreme Court found no constitutional infirmity with the ACA provisions creating, defining, and providing funds for the Medicaid Expansion.³⁰ However, the Court struck down

22. See 42 U.S.C. § 1396d(b) (2012). The amount of the federal share is calculated using a formula that is based on the state's per capita income.

23. *NFIB*, 132 S. Ct. at 2581–82; see 42 U.S.C. § 1396a(a)(10)(A)(i)(VII) (2012); Kaiser Family Found., *Where Are States Today? Medicaid and CHIP Eligibility Levels for Children and Non-Disabled Adults*, KFF.ORG (Mar. 2013), <http://kaiserfamilyfoundation.files.wordpress.com/2013/04/7993-03.pdf>. The package of benefits that this group could receive through Medicaid was different from the package provided to other Medicaid recipients, tracking instead the “essential health benefits” package that the ACA established as its health insurance benchmark. See 42 U.S.C. §§ 1396a(k)(1), 1396u-7(b) (2012).

24. For the first three years, the federal government would pay 100% of the cost of medical assistance for the newly eligible group, with the federal share gradually decreasing to 90% by 2020. 42 U.S.C. § 1396d(y)(1) (2012). The federal government pays 50% of administrative costs in both the original and expanded Medicaid programs. 42 U.S.C. § 1396b(a) (2012). It will, however, pay 90% of certain expenses related to upgrading information systems for making eligibility determinations. See Federal Funding for Medicaid Eligibility Determination and Enrollment Activities, 76 Fed. Reg. 21,950-01, 21,950 (Apr. 19, 2011) (to be codified at 42 C.F.R. pt. 433).

25. Brief for Respondents at 10, *Florida v. U.S. Dep't. of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (No. 11-400), 2012 WL 441267, at *10. Some analyses demonstrated that all costs to the states would be offset by savings elsewhere in the program, *id.* at *11, though the existence and amount of such savings were subject to dispute. See, e.g., Edwin Park, *CBO Finds Health Reform's Medicaid Expansion Is an Even Better Deal for States*, CENTER ON BUDGET & POL'Y PRIORITIES (Apr. 22, 2014), <http://www.cbpp.org/cms/index.cfm?fa=view&id=4131>.

26. See 42 U.S.C. § 1396c (2012).

27. If the Secretary of the Department of Health & Human Services finds, after notice and a hearing, that a state is not in substantial compliance with any requirement, the Secretary may withhold from the state all further payments or, at his discretion, may withhold payments in regard to portions of the state plan that are affected by the noncompliance. 42 U.S.C. § 1396c (2012). By regulation, the Secretary will make reasonable efforts to resolve issues of noncompliance with the state before initiating a hearing. 42 C.F.R. § 430.35 (2009).

28. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580, 2601 (2012).

29. *Id.* at 2601.

30. *Id.* at 2608.

guidelines who fail to qualify for traditional Medicaid⁴⁰ are eligible neither for publicly funded insurance nor for the federal subsidies that assist persons with somewhat higher incomes in purchasing private insurance.⁴¹

The *NFIB* ruling is notable also for signaling a potentially dramatic shift in the principles under which the Court determines the constitutionality of Spending Clause enactments. Prior to *NFIB*, there was considerable doubt as to whether the Court accepted coerciveness as a basis for invalidating congressional grant programs.⁴² Certainly no federal law had ever been struck down, or even seriously questioned, on this basis.⁴³ After *NFIB*, uncertainty no longer exists on this point.⁴⁴ In opinions that emphasized the importance of state sovereignty to our constitutional system, seven of the nine Justices used a coerciveness analysis as the basis for invalidating the Medicaid Expansion condition⁴⁵ as in excess of Congress's spending authority.⁴⁶

However, beyond these basic points, there was little agreement between the two groups of Justices comprising the majority.⁴⁷ The opinions contained several useful forms of analysis that have not played a prominent role in recent Spending Clause jurisprudence, including a more stringent examination of both the germaneness of the condition and the voluntariness of the states' acceptance thereof.⁴⁸ However, no particular form of analysis received support from a majority of the Justices.⁴⁹ Moreover, the significance of any of the factors discussed by the Justices to an overall assessment of the constitutionality of spending conditions was not clear.⁵⁰ Consequently, although the *NFIB* opinions seemed to signal a

40. The income levels at which a person is eligible for Medicaid are set by each state, and often fall far short of the federal poverty guidelines. For parents, the eligibility cutoff is less than the federal poverty level in thirty-three states, and is less than half of the poverty level in sixteen states. Non-disabled adults without dependent children are not covered by Medicaid in the majority of states. See *NFIB*, 132 S. Ct. at 2601; Kaiser Family Found., *supra* note 23.

41. Under the ACA, substantial federal subsidies are available to persons with family incomes below 400% of the federal poverty guidelines who purchase private insurance on the new health care exchanges. These subsidies are not available to persons eligible for traditional or expanded Medicaid. See Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 § 1401 (2010). One analysis of census data concludes that this gap in coverage will encompass two-thirds of the poor blacks and single mothers in the United States and more than half of the nation's uninsured, low-wage workers. Tavernise & Gebeloff, *supra* note 38.

42. See *infra* notes 79–86 and accompanying text.

43. E.g., *NFIB*, 132 S. Ct. at 2634 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (regarding U.S. Supreme Court).

44. See *id.* at 2608 (majority opinion).

45. The "Medicaid Expansion condition" refers to the condition requiring all states receiving Medicaid funds to participate in the expansion.

46. Kaiser Family Found., *A Guide to the Supreme's Court's Decision on the ACA's Medicaid Expansion*, KFF.ORG 1, 4 (Aug. 2012), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8347.pdf>.

47. See *id.* at 4–5. In re the "two groups," see *supra* note 31.

48. See *id.* at 5–7.

49. See *id.* at 8.

50. See *id.*

new direction in Spending Clause jurisprudence, it is uncertain what that new direction is. Indeed, the Court's repeated emphasis on the unusual size of the Medicaid grant as the source of its coerciveness invites characterization of *NFIB* as being *sui generis*.⁵¹

By examining the strains of constitutional jurisprudence upon which the *NFIB* analyses were constructed, this article will attempt to create a better understanding of their meaning and the opportunities they present for a more nuanced and constitutionally sound approach to congressional authority under the Spending Clause. An initial examination of the Supreme Court's Spending Clause jurisprudence will reveal the evolution of a highly deferential, contract-based approach that provided the context for the *NFIB* decision. The theoretical and practical flaws in this approach will be explored, demonstrating its deleterious effect on the core constitutional values of federalism and liberty and leading to the conclusion that loosely conceived contract principles are inadequate to safeguard these fundamental constitutional values. The heightened concern of the Roberts Court for these values, and their impact on the *NFIB* Court's partial break with prior Spending Clause jurisprudence, will be examined in detail. It will be shown that *NFIB*, despite its talk of liberty and federalism, fails to embrace the type of analysis necessary to preserve these values. Proposals will be advanced for further development of the doctrinal innovations suggested or implied by *NFIB* to create clear, coherent, and constitutionally based analyses capable of meaningfully differentiating permissible conditions from those that intrude too deeply upon state prerogatives.

II. SPENDING CLAUSE ANALYSIS IN THE SUPREME COURT

A. SPENDING CONDITIONS AND THE EXPANSION OF CONGRESSIONAL POWER

The Spending Clause of the Constitution gives Congress the power to collect taxes and to expend revenues "for the common Defence and general Welfare of the United States."⁵² After 150 years of debate on the issue,⁵³ the Supreme Court held in *United States v. Butler* that the Spending Clause authorizes expenditures for any aspect of the general welfare, whether or not it falls within the areas of federal regulatory authority enumerated elsewhere in the Constitution.⁵⁴ The Court has since recognized that congressional expenditures may take the form of grants to the states and that Congress has the power to attach conditions to those

51. *See id.* at 4.

52. U.S. CONST. art. I, § 8, cl. 1.

53. The debate went back to a dispute between James Madison, who advocated the narrower position that Congress could tax and spend only in furtherance of its enumerated powers, and Alexander Hamilton, who argued for the broader federal power. *See United States v. Butler*, 297 U.S. 1, 65–66 (1936).

54. *Id.* at 66.

grants.⁵⁵ Thus, as summarized in *South Dakota v. Dole*, “objectives not thought to be within Article I’s ‘enumerated legislative fields,’ may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.”⁵⁶ These rulings, together with the dramatic increase in federal revenues made possible by the Sixteenth Amendment’s authorization of a federal income tax⁵⁷ and the activist political philosophy prevalent during much of the twentieth century, have paved the way for enactment of a broad array of federal grant programs that use conditions to control state laws and practices in areas over which Congress would not otherwise have authority.⁵⁸

The *Butler* case, decided in 1936, held in check the potentially vast authority of Congress under the Spending Power by counterposing against it a robust Tenth Amendment limitation.⁵⁹ Although recognizing the breadth of a congressional power to spend federal revenues in furtherance of the general welfare, the Court held that this authority did not encompass a power to regulate in areas of reserved state authority.⁶⁰ Consequently, conditions that intruded too far upon powers reserved to the states could be struck down as contravening the structural federalism represented by the Tenth Amendment.⁶¹

Subsequent to *Butler*, however, judicial deference to congressional exercise of the Spending Power expanded, and the strength of the Tenth Amendment limitation diminished. Cases decided between 1937 and 1987 allowed wide latitude for congressional grant conditions, so long as the conditions were reasonably related to the general welfare.⁶² As predicted by the *Butler* Court and reiterated by various Justices since that time, the absence of substantive limits on congressional legislation under the Spending Clause, such as those provided by the Tenth Amendment, has

55. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 593–98 (1937). A parallel development was a dramatic decline in the Court’s discussion of whether the “welfare” sought to be furthered through a federal spending program must be national rather than local, as deference to Congress in this area had become virtually conclusive. Compare *Davis*, 301 U.S. at 586–87, with *South Dakota v. Dole*, 483 U.S. 203, 208 (1987).

56. *Dole*, 483 U.S. at 207 (citations omitted).

57. U.S. CONST. amend. XVI.

58. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2658 (2012) (joint dissent).

59. *United States v. Butler*, 297 U.S. 1, 68–70 (1936).

60. *Id.* at 69–70. The Court distinguished between permitted means (the broad power to spend in furtherance of the general welfare) and prohibited ends (intrusion upon areas reserved to the states), quoting the classic language from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819): “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” *Butler*, 297 U.S. at 69. Because the Court found the ends not to be legitimate, Congress was barred from attempting to achieve those ends regardless of whether the means fell within its powers. *Id.*

61. *Id.* at 69–70.

62. See, e.g., *Oklahoma v. Schweiker*, 655 F.2d 401, 405 (1981); *id.* at 414 (listing cases that approved onerous financial penalties for noncompliance with conditions); *id.* at 413 (listing cases that approved conditions that could be said to interfere with state sovereignty).

created the potential for Congress to transcend the bounds of its delegated powers “to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.”⁶³

B. VOLUNTARINESS AS THE TOUCHSTONE OF SPENDING CLAUSE ANALYSIS

Under the legal regime used by the Court after 1937, federal spending measures came to be treated as quasi-contractual in nature, subject only to such limits as might arise under contract law.⁶⁴ Conditions that intruded upon the states’ reserved authority were deemed acceptable because they were not imposed on the states as mandates, but instead were voluntarily assumed by states when those states accepted the federal grant funds.⁶⁵ Theoretically, a state could avoid the federal requirements simply by declining the federal funds to which they were attached as conditions.⁶⁶

This approach to Spending Clause analysis was solidified in the leading case of *South Dakota v. Dole*, decided by the Supreme Court in 1987.⁶⁷ Although the *Dole* Court gave lip service to a diverse list of limits on the spending power, its interpretations of these limits effectively neutered all but those related to the voluntariness of the state’s acceptance of the conditioned funds.⁶⁸

Limitations going to the substance of permissible conditions were interpreted so narrowly as to be essentially irrelevant. For instance, while identifying “other constitutional provisions ” as a limitation on spending measures,⁶⁹ the Court rejected any notion that these limits included provisions related to federalism, such as the Tenth Amendment’s reservation to the states of undelegated powers⁷⁰ and the Twenty-first Amendment’s limits on federal regulation of alcohol.⁷¹ As to the textual requirement that spending measures be in pursuit of the “general welfare,” the Court stated that determining the general welfare is so far within the discretion of Congress that it is questionable whether it is a judicially enforceable

63. *Butler*, 297 U.S. at 78, *quoted in, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 216 (1987) (O’Connor, J., dissenting); *NFIB*, 132 S. Ct. at 2659 (joint dissent); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 655 (1999) (Kennedy, J., dissenting); *accord NFIB*, 132 S. Ct. at 2578 (stating that powers granted to the Federal Government “must be read carefully to avoid creating a general federal authority akin to the police power”).

64. *NFIB*, 132 S. Ct. at 2602; *id.* at 2659–60 (joint dissent).

65. *Id.* at 2602 (majority opinion).

66. *See, e.g., id.* at 2603.

67. *Dole*, 483 U.S. at 207 (majority opinion).

68. *See id.* at 210–12.

69. *Id.* at 208.

70. *Id.* at 210.

71. *Id.* at 209. The Court held that the “independent constitutional bar” criterion was applicable only where a condition would require states to engage in unconstitutional activity, such as invidious discrimination or the infliction of cruel and unusual punishment. *Id.* at 209–11.

restriction at all.⁷²

Finally, the Court referenced a requirement that spending conditions must be related to the federal interest in the project for which funds are granted and its overall objectives.⁷³ Because Congress's conditioning authority derives from its need to assure that funds granted to states are spent as intended, permitted conditions had traditionally been limited to those directing how the funds were to be managed and spent.⁷⁴ The *Dole* Court, however, transformed this limitation into a requirement merely that the condition be related to the purpose of the federal grant.⁷⁵ In *Dole*, a condition requiring states to adopt a minimum drinking age of twenty-one had been attached to federal highway construction grants to the states.⁷⁶ The Court found a sufficient relationship between the condition and the funded activity in the fact that both the highway construction program and the uniform drinking age were at least partly intended to promote safe interstate travel.⁷⁷ As pointed out by Justice O'Connor in her dissent, this view of the relationship requirement is sufficiently broad that it would allow Congress to "effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced."⁷⁸

After *Dole*, any limitations on the substance of federal spending conditions had been marginalized, along with the federalism concerns that underlie them. The only viable limitations that remained were those related to assuring that states' acceptance of the conditions was voluntary: a requirement that conditions be clearly stated and a requirement that the inducement to accept the conditions not be coercive.⁷⁹

Even the coercion limitation was viewed narrowly by the *Dole* Court.⁸⁰ The Court characterized the fiscal inducement to enact the uniform drinking age as "relatively mild encouragement"⁸¹ rather than coercion, since "all South Dakota would lose if she [declines to adopt the federally preferred drinking age] is 5% of the funds otherwise obtainable under specified highway grant programs,"⁸² an amount in the area of \$3.5 million annually.⁸³ Cases subsequent to *Dole* have been similarly unrecep-

72. *Id.* at 207 n.2 & 208. Early authorities, including Alexander Hamilton, had drawn a distinction between the national welfare and the local welfare, limiting federal spending authority to the former. *See, e.g.,* *United States v. Butler*, 297 U.S. 1, 66-67 (1936).

73. *Dole*, 483 U.S. at 207.

74. *See id.* at 213-14.

75. *See id.* at 207.

76. *See* National Minimum Drinking Age Amendment, 23 U.S.C. § 158 (2012).

77. *Dole*, 483 U.S. at 208-09.

78. *Id.* at 215 (O'Connor, J., dissenting).

79. *Id.* at 207-08 (majority opinion) ("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.

80. *See id.* at 211-12.

81. *Id.* at 211.

82. *Id.*

83. Reply Brief for Petitioner at 5-6, *South Dakota v. Dole*, 483 U.S. 203 (1987), 1987 WL 880327 at *4.

tive to arguments that a federal grant program operates coercively,⁸⁴ and it was widely believed prior to *NFIB* that coercion was not in fact an independent limitation on the spending power.⁸⁵ Indeed, no federal statute had ever been struck down on this ground.⁸⁶

To the extent that any limitations on spending conditions survived *Dole*, then, they related only to a loosely perceived concept of voluntariness.⁸⁷ The notion of conditioned federal grants as contractual in nature, thus, came to dominate Spending Clause jurisprudence.⁸⁸

III. CONSTITUTIONAL VALUES AND SPENDING CLAUSE ANALYSIS: FEDERALISM, LIBERTY, AND STATE SOVEREIGNTY

Although the contract analogy has a superficial appeal, it fails to capture principles that should play a central role in defining the parameters of Congress's authority under the Spending Clause. The relationships between the federal government, the states, and the citizenry implicate constitutional values far more fundamental to our system of government than the policies that underlie contract law and cannot adequately be addressed by appeal to contract principles. Unlike the typical contracting party, a state is a sovereign entity under our Constitution, possessing attributes and responsibilities that cannot be simply traded away.⁸⁹ There must necessarily be limitations on state contracting activity that arise from this status. Yet, the prevailing approach to Spending Clause analysis allows all concerns about federalism, state sovereignty, and liberty to be subsumed into an inquiry into whether states' acceptance of the federal spending conditions is voluntary.⁹⁰

The federalism inherent in the U.S. Constitution was not simply a structural innovation necessitated by the politics of the post-revolutionary era; rather, it was seen as a fundamental guarantor of the liberty that was and is central to American political thought.⁹¹ Believing that concentrated power is a breeding ground for tyranny,⁹² the Framers dispersed

84. *E.g.*, *Kansas v. United States*, 214 F.3d 1196, 1201–02 (10th Cir. 2000); *see Connecticut v. Spellings*, 453 F. Supp. 2d 459, 492 n.19 (D. Conn. 2006) (listing circuits that have rejected the coercion analysis and those that have “been reluctant to dismiss coercion claims out of hand”).

85. Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 588 (2013).

86. *E.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2634 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

87. *See id.*

88. *See id.* at 2659–60 (joint dissent).

89. *See* U.S. CONST. amend. X.

90. *See, e.g.*, *NFIB*, 132 S. Ct. 2566, 2602–03 (2012) (“The legitimacy of Congress’s exercise of the spending power ‘thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’ Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system.”); *accord id.* at 2659–60 (joint dissent).

91. U.S. CONST. pmb. (clarifying that the Constitution was adopted to “secure the Blessings of Liberty to ourselves and our posterity”).

92. *See, e.g.*, THE FEDERALIST NO. 48 (James Madison).

power and placed checks on its exercise.⁹³ The federalist system that they devised envisioned two distinct sovereign entities, the states and the national government, each directly representative of, accountable to, and with regulatory power over persons within their respective jurisdictions.⁹⁴ Division of power between the state and national governments, like dispersion of power among the different branches of government, was a manifestation of this strategy of dispersing power to protect the liberty of the people.⁹⁵ Federalism and state sovereignty thus stand beside “separation of powers” and “checks and balances” as foundational principles integral to the government structure of the Union.⁹⁶ The relationship between federalism and liberty appears repeatedly in the opinions of the Supreme Court,⁹⁷ including Chief Justice Roberts’s opinion in *NFIB*.⁹⁸

Preventing concentrations of power is not the only way that federalism promotes liberty. Allocating power over most domestic issues⁹⁹ to a sovereign entity that is smaller and closer to the people promotes responsiveness, accountability, and citizen involvement¹⁰⁰—all hallmarks of the republican form of government that is the cornerstone of American liberty. The remoteness of the central government distances federal lawmakers from local problems and limits opportunities for public participation in federal lawmaking processes.¹⁰¹ Consequently, laws enacted at this level often bypass local priorities, generate unintended and undesirable consequences, impose one-size-fits-all approaches on a diverse nation, and favor nationally active interest groups rather than local publics.¹⁰² It was in recognition of such concerns that Madison noted in *The Federalist Papers*: “[I]t is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered.”¹⁰³

93. *See id.*

94. U.S. CONST. amend. X.

95. After explaining in *The Federalist No. 51* how separation of powers places a check on usurpation of power by any official or branch of government and is thus “essential to the preservation of liberty,” Madison described how this salutary effect was magnified by the federalism embodied in the Constitution. “In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.” THE FEDERALIST NO. 51 (James Madison).

96. *See, e.g., Bond v. United States*, 131 S. Ct. 2355, 2365 (2011); *Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991).

97. *See, e.g., Bond*, 131 S. Ct. at 2364; *New York v. United States*, 505 U.S. 144, 181 (1992); *Gregory*, 501 U.S. at 457–59.

98. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (citing *New York*, 505 U.S. 144).

99. THE FEDERALIST NO. 45 (James Madison).

100. *NFIB*, 132 S. Ct. at 2578.

101. *See Gregory*, 501 U.S. at 458. For a detailed comparison of the opportunities for citizen involvement in state and federal legislative processes, *see* Elizabeth G. Patterson, *Unintended Consequences: Why Congress Should Tread Lightly When Entering the Field of Family Law*, 25 GA. ST. U. L. REV. 397, 399 (2008).

102. Patterson, *supra* note 101, at 410–24.

103. THE FEDERALIST NO. 46 (James Madison).

Conditioned grants and other federal measures that utilize state instrumentalities to effectuate federal policy have a particularly deleterious effect on accountability because they result in actions by state governments that appear to the public to be the policy choices of state officials when in fact those choices were made by Congress.¹⁰⁴ The accountability of both state and federal officials is thus diminished by public misdirection of the credit or blame for particular decisions,¹⁰⁵ and by state officials' inability to respond to the preferences of the local electorate.¹⁰⁶

Another way in which liberty is enhanced by federalism is the legal diversity that results from state control of laws affecting individuals. In a heterogeneous society such as ours, locally enacted laws reflect the cultural and economic differences among the states and their citizens.¹⁰⁷ The resulting diversity of state laws on particular subjects enables citizens to promote their own liberty through choice of residence.¹⁰⁸ Current issues illustrative of this phenomenon include same-sex marriage and marijuana use.¹⁰⁹

These advantages have been recognized by the Supreme Court, which has summarized them thusly:

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.¹¹⁰

Maintaining a robust federalism capable of safeguarding these values requires that state sovereignty be respected, and that analysis of federal encroachments be meaningful and attentive to their effects on important aspects of state sovereignty.¹¹¹

104. See *NFIB*, 132 S. Ct. at 2602–03.

105. *Id.* at 2602; *id.* at 2660–61 (joint dissent); *New York v. United States*, 505 U.S. 144, 168–69 (1992).

106. See *NFIB*, 132 S. Ct. at 2660 (joint dissent).

107. See generally Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 70–73 (2001).

108. See, e.g., Kreimer, *supra* note 107, at 72; Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 155 (1992).

109. Cf. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (discussing California's pioneering medical marijuana statute as an example of the benefits of federalism). Both same-sex marriage and marijuana use have recently been authorized in some states following years of nationwide bans; as a result, Americans with differing views concerning these divisive issues have an increased freedom to reside within a compatible socio-legal environment. See generally Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014).

110. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *accord Bond v. United States*, 131 S. Ct. 2355, 2364 (2011); *Wyeth v. Levine*, 555 U.S. 555, 584 (2009) (Thomas, J., concurring).

111. See, e.g., *Gregory*, 501 U.S. at 459 (“These twin powers [the state and federal governments] will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.”).

IV. VOLUNTARY CHOICE AS THE GUARANTOR OF STATE SOVEREIGNTY

The Court's standard answer to concerns about Spending Clause encroachments on state sovereignty has been that the state's choice to accept a federal grant with its attached conditions is itself an exercise of sovereignty.¹¹² So long as the state's acceptance is knowing and voluntary, the argument goes, its sovereignty remains intact.¹¹³ Though possessed of a logical neatness, this statement ignores not only the frailty of the criteria used by the Court to determine voluntariness, but also the nature of state sovereignty in our system of government, and the corrosive effects on that sovereignty that are inherent in the current system of federal hegemony by condition.

A. ATTRIBUTES OF SOVEREIGNTY

The sovereignty of a state is primarily encompassed in its power of independent self-government. When they ratified the Constitution, the American states ceded authority in certain areas to the national government and declared that exercise of those powers superseded inconsistent state laws.¹¹⁴ However, this delegation of authority affected only the scope of the states' sovereignty, not its essential nature.¹¹⁵ The Court has repeatedly underscored the states' continued sovereign status, identifying—as essential attributes of that sovereignty—control of the structure and operation of state governmental institutions,¹¹⁶ and the power to set policy within the spheres of traditionally recognized authority.¹¹⁷

112. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602–03 (2012).

113. The voluntariness of the state's choice is also put forward as a response to concerns about accountability. E.g., *id.* at 2602 (“Spending Clause programs don’t pose this danger [to accountability] when a state has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In this situation state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer.”); *id.* at 2660–61 (joint dissent); Erwin Chemerinsky, *The Rehnquist Revolution*, 2 *PIERCE L. REV.* 1, 15 (2004) (“Voters . . . can surely understand that the state is acting because it is required to by federal law.”). This argument assumes a detailed and sophisticated public awareness of the origins of particular state laws, including the fiscal constraints that lead the state to accept undesired conditions. This assumption is patently unrealistic—all the more so when it is considered that each state administers not just one, but numerous, conditioned federal grant programs. Cf. *NFIB*, 132 S. Ct. at 2658 (joint dissent) (noting that in 2010 federal grant funds constituted 37.5% of state and local government expenditures).

114. U.S. CONST. art. VI, cl. 2.

115. See *Printz v. United States*, 521 U.S. 898, 928 (1997).

116. See generally *Gregory*, 501 U.S. 452 (1991). In *Gregory*, a state constitutional provision prescribing a mandatory retirement age for state judges was challenged under the federal Age Discrimination in Employment Act. The Court held that Congress could preempt state choices concerning the qualifications of constitutional officers only by making its intent to do so “unmistakably clear in the language of the statute,” which it had not done in regard to the application of ADEA to state judges. *Id.* at 460–61. Other matters that the *Gregory* Court explicitly recognized as fundamental to self-government included the structure and operation of the state's government, the qualifications of those who exercise government authority and the manner in which they shall be chosen, the qualifications of voters, and the manner of conducting elections. *Id.* at 464–67.

117. *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 779 (1982).

Even in areas of unquestioned federal authority, the Court has not allowed federal enactments to displace state regulation in core areas of state sovereignty unless congressional intent to do so is clearly manifested.¹¹⁸ Where the scope of federal power is less clear, the fact that essential attributes of state sovereignty would be compromised by an assertion of federal power should be taken as a sign that the permissible scope of the delegated power has been exceeded.¹¹⁹ The Spending Power is of the latter sort; indeed, the constitutional language on which it is based says nothing about controlling, limiting, or regulating the states or matters over which the states have authority.¹²⁰

B. EROSION OF STATE SOVEREIGNTY BY EXISTING CONDITIONS

An examination of conditions that have been accepted by the states in exchange for federal dollars demonstrates the erosion of state sovereignty that can occur under a laissez-faire approach to conditioned federal funding. Although the validity of federal spending conditions is grounded in Congress's authority to determine how federal funds will be spent and to instruct grantees accordingly,¹²¹ conditions currently in effect in every state range far beyond instructions on the use of conditioned funds. It is common for federal funding conditions to demand widespread changes in state policy, sometimes on matters only tangentially related to the expenditure of the federal funds.¹²² When a state accepts funds conditioned in this manner, state regulatory authority becomes a mere conduit for federal commands.¹²³

Furthermore, the mandates embodied in conditions often conflict with state policy preferences. For instance, the requirement in the federal Sex Offender Registration and Notification Act (SORNA) that certain juveniles be included in the sex offender registry conflicts with the poli-

118. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484–85 (1996) (discussing the Supremacy Clause and preemption); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544–45 (1994) (interpreting the Bankruptcy Code).

119. *United States v. Comstock*, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring) (discussing the scope of federal power under the Necessary & Proper Clause).

120. See *id.* at 152–53 (“It should be remembered . . . that the spending power is not designated as such in the Constitution but rather is implied from the power to lay and collect taxes and other specified exactions in order, among other purposes, ‘to pay the Debts and provide for the common Defence and general Welfare of the United States.’”).

121. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602–03; *United States v. Butler*, 297 U.S. 1, 73–74 (1936); see *Steward Mach. Co. v. Davis*, 301 U.S. 548, 577, 590–94 (1937).

122. See, e.g., U.S. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, *FEDERALLY INDUCED COSTS AFFECTING STATE AND LOCAL GOVERNMENTS* 20–22, 26–27 (Sept. 1994), available at <http://www.library.unt.edu/gpo/acir/Reports/information/m-193.pdf> [hereinafter, ACIR, *FEDERALLY INDUCED COSTS*]; Scott G. Crowley, *The Effects of the Sixteenth and Seventeenth Amendments in Changing the Role of the States in the Federal System*, 1989 *BYU L. REV.* 145, 154–56 (1989).

123. In her dissent in *Dole*, Justice O’Connor argued that many of the requirements attached to federal spending measures are nothing short of federal regulations mislabeled as spending conditions. See *South Dakota v. Dole*, 483 U.S. 203, 216 (1987) (O’Connor, J., dissenting). O’Connor would allow such regulatory conditions only if they fell within Congress’s delegated regulatory powers. See *id.*

cies of some states concerning juvenile rehabilitation and confidentiality.¹²⁴ Likewise, the structure of the federal work requirement in the Temporary Assistance for Needy Families (TANF) program makes it difficult for many states to use what they believe to be the most effective mechanisms for moving welfare recipients into the workforce.¹²⁵

Compliance with grant conditions may require changes in state statutes, constitutions, and governmental structures. The federal child support enforcement grant, for instance, required changes in states' laws concerning, among other things, the confidentiality of records held by financial institutions,¹²⁶ the rules of evidence to be followed in paternity proceedings,¹²⁷ suspension of occupational, hunting, and drivers' licenses,¹²⁸ and the circumstances under which an unmarried father's name could appear on a birth certificate.¹²⁹ Other conditions of this grant program required that certain functions previously allocated by states to the judicial branch be performed instead by a state executive branch agency.¹³⁰

Viewing sovereignty in terms of its essential attributes, it can hardly be gainsaid that federal funding conditions such as these have made substantial incursions upon state sovereignty.

C. PRACTICAL LIMITS ON STATES' FREEDOM TO REJECT CONDITIONED FUNDS

The extent of the incursions on sovereignty inherent in so many funding conditions undermines the assertion that the federal policy choices embodied in these conditions have been voluntarily accepted by the states. A more searching examination of state voluntariness than that put forward in *Dole* and its progeny is essential if the voluntariness inquiry is to serve as a meaningful safeguard for the state sovereignty envisioned by the Constitution.¹³¹

A meaningful examination of the voluntariness of state acceptance of federal funding conditions must begin with a realistic conception of the fiscal world within which state governments function, shaped by the nature and scope of the responsibilities allocated to the states in the constitutional scheme. As explained by James Madison in *The Federalist*:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. . . . The powers re-

124. Donna Lyons, *Down to the Wire*, ST. LEGISLATURES, June 2011, at 26–29 available at <http://www.ncsl.org/LinkClick.aspx?fileticket=j9v-XfmR8Wg%3D&tabid>.

125. See Elizabeth G. Patterson, *Mission Dissonance in the TANF Program: Of Work, Self-Sufficiency, Reciprocity, and the Work Participation Rate*, 6 HARV. L. & POL'Y REV. 369, 383–402 (2012).

126. 42 U.S.C. §§ 666(a)(17), (c)(1)(D)(ii)(I) (2012).

127. *Id.* §§ 666(a)(5)(F), (G), & (K).

128. *Id.* § 666(a)(16).

129. *Id.* § 666(a)(5)(D)(i).

130. *Id.* § 666(c)(1).

131. See generally *South Dakota v. Dole*, 483 U.S. 203 (1987).

served to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and property of the people¹³²

In accordance with this design, the states traditionally have been responsible for matters most directly concerned with the people who live within their borders, including domestic relations,¹³³ education,¹³⁴ crime and corrections,¹³⁵ and poverty relief.¹³⁶ State activity in these areas grew exponentially throughout the twentieth century as the role of government expanded to include new areas such as universal public education,¹³⁷ protection and rehabilitation of dependent and delinquent children, and new forms of public assistance.¹³⁸

The role of the federal government also expanded during this period.¹³⁹ The Great Depression of 1929 through 1939 gave rise to widespread federal involvement in the national economy.¹⁴⁰ Thereafter, other issues with interstate implications, such as environmental protection and enforcement of the Civil War Amendments' equality guarantees, further broadened the scope of federal government activity.¹⁴¹

Growth of government at the federal level was financed through the newly authorized federal income tax.¹⁴² Although state governments also

132. THE FEDERALIST NO. 45 (James Madison).

133. See, e.g., *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979). Regarding specific functional responsibilities of state and local governments, see NAT'L ASS'N OF STATE BUDGET OFFICERS STATE EXPENDITURE REPORT 4 (2013), available at <http://www.nasbo.org/sites/default/files/State%20Expenditure%20Report%20%28Fiscal%202011-2013%20Data%29.pdf>.

134. *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974).

135. *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993).

136. See Note, *Depression Migrants and the States*, 53 HARV. L. REV. 1031, 1034 (1940). See generally *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495 (1937).

137. The advent of universal public education in the first half of the twentieth century placed fiscal demands on state and local governments that came to be their single greatest area of expenditure. See 12.b *Financing State and Local Government*, USHISTORY.ORG, www.ushistory.org/gov/12b.asp (last visited Mar. 2, 2015).

138. John Joseph Wallis & Wallace E. Oates, *Decentralization in the Public Sector: An Empirical Study of State and Local Government*, in FISCAL FEDERALISM: QUANTITATIVE STUDIES 5, 8 (Harvey S. Rosen ed., 1988), available at <http://www.nber.org/chapters/c7882>.

139. For its first 100-plus years, the activities of the federal government were quite limited in scope, focusing on national priorities such as defense and the national mail service. Michael Schuyler, *A Short History of Government Taxing and Spending in the United States*, *Fiscal Fact*, TAX FOUND. 4–5 (Feb. 19, 2014), <http://taxfoundation.org/sites/taxfoundation.org/files/docs/ff415.pdf>. The original division of responsibilities between state and federal governments was such that, until the 1930s, state and local government revenues and outlays were significantly greater than those of the federal government. *Id.* at 7–8.

140. *Id.* Even so, state and local government revenues and outlays continued to exceed those of the federal government until 1940. *Id.* at 8.

141. Lewis B. Kaden, *Politics, Money, and State Sovereignty: the Judicial Role*, 79 COLUM. L. REV. 847, 847–50, 869–70 (1979).

142. See, e.g., GEORGE E. MOWRY, *THE ERA OF THEODORE ROOSEVELT 1900-1912* 263 (1958). Until 1917, the federal government was financed almost entirely by customs duties and excise taxes. Schuyler, *supra* note 139, at 4–5. Until the adoption of the Sixteenth Amendment in 1913, doubts about the constitutionality of a federal income tax limited its use in generating revenue at the federal level. See generally *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). Unquestioned access to this potentially lucrative revenue

had access to the income tax, its revenue potential for states was limited by competition with the federal government for funds from this source.¹⁴³ Therefore, in most states, income tax plays second fiddle to sales tax as a source of revenue, with the sales tax being the primary source of tax revenue.¹⁴⁴ Revenue reasonably obtainable through the sales tax, however, is subject to inherent social and economic constraints that do not similarly affect the income tax.¹⁴⁵ Moreover, the transactions on which states can levy a sales tax, and the manner in which they collect it, have been limited by federal legislation¹⁴⁶ and judicial rulings¹⁴⁷ that have substantially re-

source after 1913 provided financial support for increasingly higher levels of federal activity in response to the challenges of the twentieth century. See Schuyler, *supra* note 139, at 4–6.

143. ACIR, *FEDERALLY INDUCED COSTS*, *supra* note 122, at 24. Individual and corporate income taxes provide approximately 60% of total federal revenues. This figure would be closer to 90% if payroll taxes intended to support Social Security and Medicare were not included in the total. In 2010 federal income taxes consumed an amount equal to 9.3% of GDP. TAX POLICY CENTER, *THE TAX POLICY BRIEFING BOOK*, I-1-1 (2009), available at http://www.taxpolicycenter.org/briefing-book/TPC_briefingbook_full.pdf. States, in contrast, derive 17% of their total revenues from income taxes, or approximately 40% if transfers from the federal government are excluded from total revenues. *Id.* In 2010, the total amount of state income tax revenues was approximately \$277 billion. *Id.* at IV-1-1. This amount is just under 2% of GDP.

The joint dissent in *NFIB* acknowledged that the practical ability of states to levy their own taxes is diminished by the heavy federal taxation that dominates the nation's major revenue sources. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2662 n.13 (2012) (joint dissent); *accord James v. Strange*, 407 U.S. 128, 141 (1972); see also Crowley, *supra* note 122, at 152–54 (Since passage of the Sixteenth Amendment in 1913, the federal income tax has absorbed the bulk of the revenue that is reasonably available from income taxation.).

144. See TAX POLICY CENTER, *supra* note 143, at IV-1-1. Nationwide, sales taxes provide 24% of state general revenues. *Id.* State income taxes are a secondary source of revenue in most states, providing, cumulatively, 18% of state general revenues. *Id.* The fact that 28% of state general revenues are derived from federal transfers demonstrates how dependent states are on federal grant funds. See *id.* For a state-by-state listing of the proportion of tax revenues generated by each type of taxation, see Elizabeth Malm & Ellen Kant, *The Sources of State and Local Tax Revenues, Fiscal Fact*, TAX FOUND. (Jan. 28, 2013), <http://taxfoundation.org/sites/taxfoundation.org/files/docs/ff354.pdf>.

145. The rates at which sales can be taxed are subject to more constraints than income tax rates. For one thing, it is more difficult to build progressive features into a sales tax system, and thus considerations related to avoiding over-burdening taxpayers must generally be measured against a single, and lower-income, threshold. Further, because sales taxes directly affect the prices of taxable goods and services, the production of tax revenues must be balanced against the economic health of the state's retail and service sectors. Not only will higher prices resulting from high sales tax rates negatively affect demand, but they may place in-state vendors at a competitive disadvantage with vendors in other states and online. See TAX POLICY CENTER *supra* note 143, at IV-1-1 to III-4-22.

146. The Internet Tax Freedom Amendments Act of 2007, which imposes a moratorium on taxation of internet access and communication services through 2014, has been estimated to cost the states \$23.3 billion annually in sales tax revenue. ROBERT JAY DILGER & RICHARD S. BETH, CONG. RESEARCH SERV., R40957, *UNFUNDED MANDATES REFORM ACT: HISTORY, IMPACT, AND ISSUES* 10 (2013). Congress is currently considering making this moratorium permanent. At various times, other federal laws have also prohibited specific forms of taxation by state and local governments, ACIR, *FEDERALLY INDUCED COSTS*, *supra* note 122, at 23, or penalized state and local government issuance of certain types of revenue bonds. *Id.* at 24.

147. *Quill Corp. v. North Dakota*, 504 U.S. 298, 318–19 (1992) (prohibiting states from requiring out-of-state vendors to collect and remit sales taxes on internet sales to state residents).

duced the revenue recoverable from this source.¹⁴⁸

These limitations on state revenue sources become particularly critical in times of economic downturn, when the need for public services increases as revenues from both sales and income taxes decrease.¹⁴⁹ Unlike the federal government, most states have statutes or constitutional provisions that prohibit deficit spending;¹⁵⁰ therefore they are unable to weather revenue shortfalls by borrowing.

The fiscal pressures on states are exacerbated by congressional measures that force state and local governments to use their limited revenues to implement federal, rather than state, policy priorities.¹⁵¹ It is common for federal statutes to impose “unfunded mandates” that require state or local governments to take costly actions for which there is little to no federal funding.¹⁵² These may take the form of direct mandates, such as the 1974 Amendments to the Fair Labor Standards Act, which extended overtime and minimum wage requirements to public sector employees.¹⁵³ Alternatively, they may take the form of changes in federal grant programs that increase program costs without a corresponding increase in

148. According to the National Governors Association (NGA), “Congress has increasingly restricted the rights of states to determine their own tax structure,” by statutorily limiting the permissible objects of state taxation. Governor Jim Douglas, Testimony before The National Governors Association Economic Development and Commerce Committee, NAT’L GOVERNORS ASS’N (Apr. 15, 2010), <http://www.nga.org/cms/home/federal-relations/nga-testimony/edc-testimony-1/col2-content/main-content-list/april-15-2010-testimony---govern.html>. The NGA adopted congressional non-interference with state revenue systems as one of its policy priorities in 2012. *Permanent Policy Principles for State-Federal Relations*, NAT’L GOVERNORS ASS’N (Feb. 28, 2012), <http://www.nga.org/cms/home/federal-relations/nga-policy-positions/page-ec-policies/col2-content/main-content-list/principles-for-state-federal-rel.html>. Examples of additional federal restrictions on state revenue-generating authority can be found in Governor Douglas’s testimony, and in ACIR, *FEDERALLY INDUCED COSTS*, *supra* note 122, at 23–24.

149. ACIR, *FEDERALLY INDUCED COSTS*, *supra* note 122, at 19; TAX POLICY CENTER, *supra* note 143 at IV-1-19; U.S. DEP’T. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL BRIEF 93-11, *RECESSIONS MATTER FOR STATE TAX COLLECTIONS* (1993).

150. ACIR, *FEDERALLY INDUCED COSTS*, *supra* note 122, at 16, 18.

151. DILGER & BETH, *supra* note 146, at 9.

152. In addition, Congress routinely requires as a condition of federal grants that receiving states match the federal funds with funds from state coffers. Although state acceptance of the federal grant signals general agreement with the policy objectives of the federal program, the specific activities and expenditures required by the federal legislation may not reflect state priorities for efficiently or effectively achieving those objectives. *See, e.g.*, DILGER & BETH, *supra* note 146, at 6–7; ACIR, *FEDERALLY FUNDED COSTS*, *supra* note 122, at 5–7. Two-thirds of federal grant programs contain match or MOE (maintenance of effort) requirements. Chris Edwards, *Fiscal Federalism*, CATO INST., (June 2013), <http://www.downsizinggovernment.org/sites/downsizinggovernment.org/files/fiscal-federalism.pdf>.

153. *See* Fair Labor Standards Amendments of 1974, Pub. L. 93-259, 88 Stat. 55 (1974). For instance, the International City Management Association estimated the annual costs at over \$1 billion to cities with a population of greater than 10,000. Supplemental Brief for Appellants on Reargument at 5, *Nat’l League of Cities v. Usery*, 96 S. Ct. 2456 (1976) (NOS. 74-878, 74-879). Partial lists of unfunded mandates can be found in U.S. ADVISORY COMM’N. ON INTERGOVERNMENTAL RELATIONS, *THE ROLE OF FEDERAL MANDATES IN INTERGOVERNMENTAL RELATIONS: A PRELIMINARY ACIR REPORT FOR PUBLIC REVIEW AND COMMENT* (Jan. 1996), *available at* www.library.unt.edu/gpo/acir/mandates.html, and NAT’L CONF. STATE LEG., *MANDATE MONITOR*, *available at* <http://www.ncsl.org/ncsl-in-dc/standing-committees/budgets-and-revenue/mandate-monitor-overview.aspx>.

the federal grant.¹⁵⁴

Because of the limitations on their ability to raise revenue and apply it to self-identified priorities, states face constant pressure to find the revenue necessary to meet their important and escalating expenses.¹⁵⁵ Thus, they are highly susceptible to federal offers of funds that can be used to meet needs falling within the realm of state authority and on which the states place high priority.¹⁵⁶ This pressure is particularly strong for poor states, which have greater incidences of problems and a smaller tax base with which to address those problems.¹⁵⁷

The federal government, on the other hand, has access to vast resources with which to purchase state cooperation with federal policy initiatives. Of all taxes paid to American governments, the federal government collects over 60%, compared to the 22% collected by the fifty states.¹⁵⁸ Federal revenues generated by income tax alone average nearly 10% of the annual gross domestic product (GDP).¹⁵⁹ The amount of tax revenue collected by the federal government appears sufficiently in excess of federal needs¹⁶⁰ that the federal government is able to transfer over one-fifth of its revenue to state and local governments,¹⁶¹ much of this in the form of conditioned grants pursuant to the spending power.¹⁶²

As recognized by the joint dissenters in *NFIB*, federal taxation at this level lessens the ability of states to raise sufficient tax revenue to fund the activities for which state governments are responsible.¹⁶³ The states' comparative disadvantage in generating tax revenue underlies their susceptibility to federal offers of conditioned funding. Faced with a federal offer of conditioned funding for, e.g., a low-income housing program, a state has three basic choices. First, it can forego creation of a program of this type. On the other hand, the state can accept the offer and will then be able to provide low-income housing to its residents—although at the cost of ceding certain aspects of its governing authority to the federal government. Lastly, if the state wishes to provide low-income housing for its residents, but is unwilling to submit to the federal controls embodied in the grant conditions, it will have to derive funding for the program by

154. See ACIR, *FEDERALLY INDUCED COSTS*, *supra* note 122, at 20.

155. See *id.* at 30.

156. See *id.* at 33.

157. See *id.*

158. TAX POLICY CENTER, *supra* note 143, at I-1-1. The remaining 17% of tax revenue goes to local governments. *Id.*

159. *Id.* Income taxes generate between 50% and 60% of federal revenues. *Id.* at I-1-2. If payroll taxes (comprising approximately 40% of federal revenues) and other taxes are included, federal revenues will have averaged 17.9% of GDP over the past five decades. *Id.* at I-1-1.

160. The term “federal needs” is used to refer to functions falling within Congress’s enumerated legislative powers.

161. TAX POLICY CENTER, *supra* note 143, at I-1-1.

162. See generally U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU, *FEDERAL AID TO STATES FOR FISCAL YEAR 2010* (Sept. 2011), available at <http://www.census.gov/prod/2011pubs/fas-10.pdf>.

163. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2641 n.26 (2012) (joint dissent).

either increasing taxes or shifting funds from other state-funded activity.¹⁶⁴ In either of the latter scenarios the burden on state taxpayers would be magnified by the fact that their taxes are concomitantly paying for both federal and state programs. The joint dissenters in *NFIB* described the dilemma faced by states:

When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative. Even if a State believes that the federal program is ineffective and inefficient, withdrawal would likely force the State to impose a huge tax increase on its residents, and this new state tax would come on top of the federal taxes already paid by residents to support subsidies to participating States.¹⁶⁵

These fiscal realities help explain why there are so few examples of states choosing to reject federal moneys,¹⁶⁶ even when they view the conditions and match requirements attached to the federal grant as onerous or even counterproductive.¹⁶⁷ Rejection of federal funds generally involves programs with policy objectives on which states place low priority, or approaches that are viewed as ineffective or contrary to other important state policies.¹⁶⁸ Conversely, any substantial amount of funds that will help states meet a compelling need related to core areas of state responsibility is very difficult to turn down. Thus, the loss of all Medicaid funds, as posited by the ACA, is a powerful threat not only because of the amount of funds involved, but also because of the critical needs met by

164. Much of the funding for increased Medicaid costs caused by federally mandated program expansions has come at the expense of funding for higher education. ACIR, *FEDERALLY INDUCED COSTS*, *supra* note 122, at v.

165. *NFIB*, 132 S. Ct. at 2661–62 & n.13 (2012) (joint dissent).

166. A primary exception is Arizona's refusal to accept Medicaid for the first seventeen years of the program's existence. During this time, Arizona's counties were expected to fund health care for the poor. Khimm, *supra* note 19.

167. *NFIB*, 132 S. Ct. at 2661–62 & n.13 (joint dissent).

168. Funds may be rejected, even for a compelling need, if the required approach to meeting that need is viewed as ineffective or contrary to important state policies. A number of states rejected federal funding for sex education after studies found that programs using the required abstinence-only approach did not have a statistically significant effect on teen sexual behavior. Marissa Raymond et al., *State Refusal of Federal Funding for Abstinence-Only Programs*, 5 *SEXUALITY RES. & SOC. POL'Y* 44, 46 (2008), available at <http://www.cfw.org/Document.Doc?id=285>. Additionally, thirty-three states declined to implement the federal Sex Offender Registration and Notification Act (SORNA) because of policy differences with the federal approach. Lyons, *supra* note 124. As a consequence, they lost 10% of certain federal law enforcement assistance grants. Despite the priority level of law enforcement for the states, both the amount and the potential uses of these grant funds were extremely limited. In fact, some states estimated that the cost of compliance would substantially exceed the loss occasioned by noncompliance. *Id.* See generally Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §§ 16901–16929 (2006).

In contrast, serious state concerns about conditions attached to large grants for high-priority programs generally are expressed through means other than rejection of funds, such as resolutions, congressional testimony, or other forms of communication. For instance, thirty state legislatures passed resolutions attacking the federal No Child Left Behind legislation for undermining states' rights. Edwards, *supra* note 152.

those funds and the shortage of state dollars to meet those needs.¹⁶⁹ These fiscal realities cast a long shadow over assertions that states' acceptance of federal grants conditioned in ways that encroach upon reserved state authority constitute voluntary cessions of power. The *NFIB* opinions acknowledged these limitations on state voluntariness, but gave them effect only in regard to the heavily funded Medicaid program.¹⁷⁰ The analyses used were limited in scope and would not necessarily reach far beyond the Medicaid context.¹⁷¹ Granted, federal Medicaid funds represent by far the largest dollar amount of any federal grant program.¹⁷² However, that does not mean that Medicaid is *uniquely* coercive, just that it is particularly so. The factors that disable states from rejecting federal mandates tied to the Medicaid grant also apply to many other federally funded programs—including education, welfare, child support enforcement, foster care, food assistance, and public health—which involve central state responsibilities, the cost of which is difficult for states to sustain on their own.

V. LIMITATIONS ON THE CONSTITUTIONAL RELEVANCE OF VOLUNTARINESS

The viability of the voluntariness analysis currently used by the Court to determine the constitutionality of federal spending conditions¹⁷³ is seriously undercut by its failure to give credence to the constraints that limit state volition in making these decisions. Even if the Court were to rectify the shortcomings in the voluntariness analysis, however, that approach would remain inadequate for resolving the constitutional issues raised when spending conditions impinge upon key elements of state sovereignty.

Indeed, the voluntariness of a state's choice to accept conditions that erode its sovereignty is really beside the point. Whether voluntary or not, a unit of government created by the Constitution cannot, by agreement, transfer to another such unit powers allocated to it by the Constitution.¹⁷⁴ In *New York v. United States*, the Court elaborated on this principle, noting that it applied equally to transfers of power among the branches of the federal government or between the state and federal governments.¹⁷⁵

169. For example, Florida Governor Rick Scott, a strong opponent of health care reform, stated in regard to the Medicaid Expansion: "While the federal government is committed to pay 100 percent of the cost, I cannot, in good conscience, deny Floridians the needed access to health care." Tia Mitchell & Steve Bousquet, *Florida Gov. Rick Scott Supports Medicaid Expansion*, MIAMI HERALD (Feb. 21, 2013, 8:15 AM), <http://www.miamiherald.com/2013/02/20/3244176/fla-medicaid-privatization-plans.html>.

170. See *Nat'l Fed'n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603–04 (2012).

171. See *id.* at 2606–07.

172. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2014 303 (2013).

173. See *NFIB*, 132 S. Ct. at 2601.

174. See, e.g., *Steward Mach. Co. v. Davis*, 301 U.S. 548, 597 (1937) (holding that states may enter into agreements with Congress "if the essence of their statehood is maintained without impairment").

175. *New York v. United States*, 505 U.S. 144, 182 (1992).

The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment. In *Buckley v. Valeo*, for instance, the Court held that Congress had infringed the President's appointment power, despite the fact that the President himself had manifested his consent to the statute that caused the infringement by signing it into law. In *INS v. Chadha*, we held that the legislative veto violated the constitutional requirement that legislation be presented to the President, despite Presidents' approval of hundreds of statutes containing a legislative veto provision. The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.¹⁷⁶

The Court went on to observe that the allocations of power in the Constitution were designed to benefit the people rather than the states or state officials.¹⁷⁷ Consequently, state officials have no right to authorize departures from these constitutional allocations.¹⁷⁸

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." . . . Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials.¹⁷⁹

This point was reinforced in the recent case of *Bond v. United States*,¹⁸⁰ where the Court held that individual citizens have standing to challenge federal statutes on grounds of conflict with the federalism principles of the Constitution.¹⁸¹ Because of the role played by federalism in protecting individual liberty, the Court held that the citizen litigant asserts his or her own rights and interests, not those of the states, when the litigant alleges that a federal enactment exceeds the powers granted to Congress.¹⁸² State officials have no more power to relinquish sovereignty than to waive any other protections of individual liberty embedded in the Constitution.¹⁸³

176. *Id.* (citations omitted).

177. *Id.*

178. *Id.*

179. *Id.* at 181 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

180. 131 S. Ct. 2355, 2365 (2011).

181. *See id.* The Court emphasized that the citizen litigant would have to meet other standing requirements as well, notably the requirement of a personal stake in the controversy. *Id.* at 2366.

182. *Id.* at 2363–64.

183. *See id.* at 2364.

What these principles tell us is that federal funding conditions that erode state sovereignty without specific constitutional authorization are suspect, and they cannot be validated merely by state acceptance or consent.¹⁸⁴ Thus, a Spending Clause analysis that focuses on state consent to, or acceptance of, intrusive spending conditions is incapable of protecting state sovereignty and the constitutional values dependent on such sovereignty.

VI. THE ROBERTS COURT REVISITS SPENDING CLAUSE ANALYSIS

The Roberts Court seems to take seriously the threat posed to state sovereignty by an unconstrained congressional spending authority.¹⁸⁵ The Court's opinions reflect an effort to give more bite to the requirement of voluntary state acceptance of federal funding conditions.¹⁸⁶ However, it has yet to move beyond voluntariness to place any kind of substantive limit on Congress's conditioning authority.

A. ARLINGTON CENTRAL AND THE CLEAR STATEMENT RULE

In 2006 the Court used the "clear statement" requirement to invalidate a condition Congress sought to impose on states that accepted funds under the Individuals with Disabilities Education Act (IDEA).¹⁸⁷ Seemingly a fairly straightforward statutory interpretation case, *Arlington Central* asked whether non-attorney expert fees are recoverable as "costs" in actions filed under IDEA.¹⁸⁸ The statutory text was silent on the issue, though there were indications in the legislative history and elsewhere that Congress had intended these expert fees to be recoverable.¹⁸⁹ The Court held that, contrary to general statutory interpretation practice, in Spending Clause cases the important factor is not what Congress intended, but rather "what the States are clearly told regarding the conditions that go along with the acceptance of [the federal grant] funds."¹⁹⁰ The statute must be viewed

from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the

184. Congress is, of course, empowered to take actions that impinge on state sovereignty through its enumerated powers, their effect enhanced by the Supremacy Clause. *See, e.g., Gonzales v. Raich*, 545 U.S. 1 (2005). This includes the power under the Spending Clause to direct the management and use of federal grant funds. *See South Dakota v. Dole*, 483 U.S. 203 (1987).

185. *See Kaiser Family Found., supra* note 46.

186. *See id.*

187. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

188. *Id.* at 293-94.

189. The Conference Committee Report contained a statement directly on point, stating the conference's intention that expert witness fees be recoverable. H.R. REP. NO. 99-687, at 5 (1986) (Conf. Rep.), *quoted in Murphy*, 548 U.S. at 304. Other aspects of the legislative history indicating that Congress had such an intent are discussed in Justice Souter's dissent. *Murphy*, 548 U.S. at 309-12 (Souter, J., dissenting).

190. *Id.* at 304 (majority opinion).

obligations that go with those funds. We must ask whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees.¹⁹¹

The Court concluded that a state official would not receive clear notice of this obligation,¹⁹² and thus the Spending Clause provided no basis for imposing it.¹⁹³ This “clear statement” analysis had not been enunciated by the Court in previous cases interpreting provisions of the IDEA nor was it necessary to support the result desired by the Court.¹⁹⁴ Moreover, the question before the Court, liability for expert witness fees, was not one that was likely to have influenced a state’s decision of whether to accept or reject IDEA funds.¹⁹⁵

In *Arlington Central*, the Court signaled a new seriousness about limiting Congress’s spending power. This was the first case to break with the extremely deferential approach that was seen in *Dole*, and appeared to be a sign that the Roberts Court was contemplating a new direction in Spending Clause analysis.

B. *NFIB* AND THE NEW SIGNIFICANCE OF COERCION

NFIB presented a further departure from *Dole* and its progeny when it unconditionally embraced the coercion principle. Prior to *NFIB*, the commonly held view was that despite its mention in *Dole*,¹⁹⁶ a “coercion” inquiry was not part of the Spending Clause analysis established by that case.¹⁹⁷ In *NFIB*, however, both those who joined the Chief Justice’s opinion and the joint dissenters—a total of seven Justices—held that absence of coercion is an essential feature of a valid spending condition.¹⁹⁸ The seven *NFIB* Justices held that coercion renders consent illusory, thus vitiating the basis for the constitutional legitimacy of the condition.¹⁹⁹ Any uncertainty about whether the “coercion” language in *Dole* stated a viable rule of decision was thus firmly resolved in the affirmative.²⁰⁰

191. *Id.* at 296.

192. *Id.* at 300.

193. *See id.* at 305 (Ginsburg, J., concurring in part and concurring in the judgment).

194. *See id.* at 304–08.

195. *Id.* at 303 (majority opinion).

196. After articulating its four-part Spending Clause test, the Court stated that “[o]ur 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.’” *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

197. *See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2634, 2641 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); *Missouri v. United States*, 918 F. Supp. 1320, 1329–30 (E.D. Mo. 1996); *Nevada v. Skinner*, 884 F.2d 445 (1989).

198. *See NFIB*, 132 S. Ct. 2566 (2012).

199. *NFIB*, 132 S. Ct. at 2602–03; *id.* at 2660 (joint dissent).

200. *Id.* at 2604–05 (majority opinion). The Chief Justice and the joint dissent also rejected the federal government’s position that acceptance was voluntary so long as the states were legally free to accept or reject the conditions. Both opinions endorsed and applied the concept of fiscal coercion implicit in *Dole*’s statement that “the *financial in-*

C. *NFIB*'S TWO COERCION ANALYSES AND THE UNCERTAIN FUTURE

Both the Chief Justice's opinion and the joint dissenters concluded that penalizing a state's rejection of the Medicaid Expansion by withdrawing its Medicaid grant was unconstitutionally coercive.²⁰¹ However, the two opinions used different analytical routes to arrive at this conclusion, neither of which provide clear guidance on how broadly it might reach in future cases.²⁰²

1. *The Joint Dissenters' "Sheer Size" Approach*

The joint dissent's holding that the Medicaid Expansion package offered to the states by Congress was coercive was based on the "sheer size" of the federal Medicaid grant,²⁰³ the entirety of which would be placed in jeopardy by a state's rejection of the Medicaid Expansion.²⁰⁴

ducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion'." *Dole*, 483 U.S. at 211 (emphasis added).

201. See Kaiser Family Found., *supra* note 46, at 8.

202. See *id.*

203. *NFIB*, 132 S. Ct. at 2663–64 (joint dissent). The dissenters argued that further evidence of coerciveness could be found in Congress's apparent assumption that every state would have no choice but to implement the Medicaid Expansion. *Id.* at 2664–66. The ACA sought to approximate a system of universal insurance coverage for a specified package of "essential health benefits," with coverage for low-income persons—those with incomes below 138% of the federal poverty guidelines who did not qualify for existing federal health insurance programs—to be accomplished through the Medicaid Expansion. *Id.* at 2601 (majority opinion); see also CONG. BUDGET OFF., *supra* note 9 (noting that the eligibility threshold of 133% is effectively raised to 138%). Because the ACA contained no other mechanism for providing coverage to this population, the dissenters inferred that Congress must have believed the offer of conditioned funding for Medicaid Expansion to be one that "no State could refuse." *NFIB*, 132 S. Ct. at 2657 (joint dissent). Congressional beliefs and expectations are odd criteria on which to base a finding of coercion, as coerciveness reflects the mental state not of Congress, but of the state that is purportedly coerced. Moreover, a congressional desire that states be unable to reject a grant program, and its intent that this will be the case, is not uncommon, particularly with major federal program initiatives. State fiscal realities are understood by Congress, which rarely if ever discusses the possibility that one of its significant spending programs might be rejected by one or more states. Hence, a congressional expectation that all states would accept the Medicaid Expansion fails to single out this offer as exceptional, with a coercive nature that is "unmistakably clear." *Contra id.* at 2662.

204. See 42 U.S.C. § 1396c (2012). "[M]ost states receive[d] more than \$1 billion in federal Medicaid funding" prior to the ACA, with "a quarter receiv[ing] more than \$5 billion." *NFIB*, 132 S. Ct. at 2663 (joint dissent). The Chief Justice noted that pre-expansion federal Medicaid funds accounted for more than 10% of the average state's budget. *Id.* at 2604–05 (majority opinion). The total of federal Medicaid grants to the states was more than \$270 billion, far in excess of the \$37.6 billion spent on highway planning and construction, the second largest federal grant program. OFFICE OF MGMT. & BUDGET, *supra* note 172. Federal funds cover from 50% to 83% of a state's Medicaid costs. *NFIB*, 132 S. Ct. at 2604. The specific percentage is determined by a formula based largely on the state's per capita income. See Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, CHIP, and Aid to Needy Aged, Blind, or Disabled Persons, 76 Fed. Reg. 74,061-01 (Nov. 30, 2011). The Court compared the loss of funds that could be occasioned by rejection of the Medicaid Expansion with the penalty for noncompliance with the drinking age requirement that was upheld in *Dole*: 5% of the state's federal highway funds, less than one-half of one percent of the state's budget. *NFIB*, 132 S. Ct. at 2604. The penalty in *Dole* was characterized as a "relatively mild encouragement" to accept the change in drinking age, *id.*, leaving the state in *NFIB* with "the simple expedient of not yielding to [the] federal blandishments." *Id.* at 2603.

The joint dissenters did not purport to define the outer limit of an analysis based on “sheer size,” and their language is susceptible to the interpretation that it encompasses no existing program other than Medicaid, with its uniquely prodigious federal funding.²⁰⁵

2. *The Chief Justice’s “Separate Programs” Approach*

Like the dissenters, the Chief Justice placed parameters around the coercion analysis that raise questions about its applicability to subsequent cases. The Chief Justice’s conclusion that conditioning Medicaid funding on compliance with the Medicaid Expansion was coercive arose from and was dependent upon his characterization of Medicaid and of the Medicaid Expansion as two separate programs.²⁰⁶ This characterization was based on differences between the preexisting Medicaid program and the expansion regarding eligibility, funding, and other details,²⁰⁷ as well as the fact that the Medicaid Expansion was part of a separate, comprehensive set of interrelated health care reforms embodied in the ACA.²⁰⁸ In the Chief Justice’s view, the threat to withhold Medicaid funds was being used like a “gun to the head” to induce states to implement a new and separate program.²⁰⁹ Had the Medicaid Expansion been interpreted as a modification of the existing Medicaid program, it would not have been susceptible to this analysis.²¹⁰ Rather, the federal threat would amount to no more than a statement that states unwilling to implement the newly modified Medicaid program would not receive federal Medicaid funds—a statement that is not inherently coercive.²¹¹

The “separate programs” analysis is a clever way to justify a desired finding of coerciveness without radically changing existing Spending Clause jurisprudence. The idea that it is coercive to threaten to withhold funds from a strongly desired and heavily funded program in order to bring about acceptance of a second program is consistent with coercion

205. *Id.* at 2663 (joint dissent) (“The States are far less reliant on federal funding for any other program.”); *id.* at 2664 (“[T]he offer that the ACA makes to the States—go along with a dramatic expansion of Medicaid or potentially lose all federal Medicaid funding—is quite unlike anything that we have seen in a prior spending-power case.”). In one aspect, though, the dissenters’ analysis does expand on previous perceptions of the federal spending measures to which a coercion analysis could apply. The dissenters’ analysis, with its focus on the size of the conditioned grant, would appear to apply not only to a major modification of the Medicaid program such as ACA’s Medicaid Expansion, but to *any* modification of the program that is made a condition of the Medicaid grant, or to the original Medicaid program itself. That this was the dissenters’ intent is indicated by an example they give of constitutionally offensive spending: Congress offers an enormous education grant to the states, with conditions dictating a variety of minutiae relating to public education in the state. *See id.*

206. *Id.* at 2605–06 (majority opinion).

207. *Id.* at 2605–06. Differences mentioned by the Chief Justice included the level of federal match, coverage levels for recipients, and expansion of the program beyond specified categories of beneficiaries to the entire non-elderly, low-income population. *Id.*

208. *See id.*

209. *Id.* at 2640.

210. *See id.* at 2605.

211. *See id.*

analyses found elsewhere in law and ethics.²¹² An analysis of this sort could be productively employed in cases where it is clear that separate programs are in fact involved—e.g., the conditioning of funds for the TANF program on a state’s implementation of the federally legislated Child Support Enforcement program.²¹³

The Medicaid Expansion initiative, in contrast, was not designated or treated as a separate program by Congress.²¹⁴ Nor are there accepted criteria other than congressional intent for determining the boundaries of a “program.”²¹⁵ The Chief Justice’s attempt to separate into two programs that which Congress had labeled as one not only invaded congressional prerogatives, but also steered the Court into territory that it is singularly ill-equipped to navigate. Thus, although it is easy to see the “separate programs” concept being integrated into coercion analysis, an independent judicial assessment of what qualifies as a “program” should not form a part of that analysis. Moreover, the “separate programs” approach is of little utility in providing the needed constraints on congressional spending conditions. Even if the Chief Justice’s approach was accepted in its entirety, it would apply to only a small portion of the many federal programs using conditioned funding to control policy in areas of traditional state control.

D. A TRANSITIONAL CASE?

Although seven of the Supreme Court Justices expounded on the constitutional importance of federalism and state sovereignty in *NFIB*, they failed to put forward an analysis that would be of continuing utility in safeguarding those values against overly invasive spending conditions.

212. For instance, antitrust laws regard as suspect tying arrangements whereby a seller conditions sale of one product on the buyer’s agreement to purchase a second product as well. *See, e.g., Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 487 (1992).

213. Though not as heavily funded as Medicaid, TANF is nonetheless a “major federal funding source.” *NFIB*, 132 S. Ct. at 2664 (joint dissent); *see* OFFICE OF MGMT. & BUDGET, *supra* note 172 (showing federal obligations for major grant programs in FY2012 to FY2014). Unlike Medicaid and Medicaid Expansion, Child Support Enforcement and TANF were designated and treated as separate programs by Congress, as well as by the federal and state agencies charged with those programs’ administration. Indeed, in a number of states, the Child Support Enforcement and TANF programs are administered by different agencies. Also unlike Medicaid and the Medicaid Expansion, TANF and Child Support Enforcement employ vastly different tools to achieve distinct aims. Although motivated by the common purpose of providing economic support for low-income children, the programs use distinct mechanisms for assuring such support: in one program, a transfer of public funds to needy families; in the other, enforcement of an absent parent’s private obligation of support. Accomplishment of these distinct missions requires vastly different program activities. *Compare* What We Do, Office of Family Assistance, <http://www.acf.hhs.gov/programs/ofa/about/what-we-do>, with OCSE Fact Sheet, Office of Child Support Enforcement, <http://www.acf.hhs.gov/programs/css/resource/ocse-fact-sheet>.

The statutory scheme in *Missouri v. United States*, 918 F. Supp. 1320 (E.D. Mo. 1996), also presents a more legitimate case for a “separate programs” analysis. There, noncompliance with provisions of the Clean Air Act was penalized not only by requiring stricter permitting standards under that Act, but also by reducing the state’s federal highway funding. *Missouri*, 918 F. Supp. at 1324.

214. *See NFIB*, 132 S. Ct. at 2605–06 (majority opinion).

215. *See id.*

Not only did no single analysis command a majority, but the analyses in both opinions comprising the majority contained flaws and uncertainties that make application outside the immediate context difficult. The problems and limitations in the *NFIB* analyses could reflect either of two alternative futures for Spending Clause jurisprudence. The Justices may have been attempting to carve out an exception for the Medicaid program, either because of its unique size or because of the controversy surrounding the ACA. In that case, the analytical problems seen in the case would have arisen from the difficulty of reaching the desired conclusion with the analytical tools available through existing caselaw and would not signal a generally applicable shift in the Court's thinking. Alternatively, *NFIB* may be a transitional case in which the Justices' analytical struggles reflect the early stages of a shift in the paradigm under which the validity of congressional spending conditions is determined.

A transitional case is one that breaks with prior caselaw to initiate a significantly different approach to a certain area of jurisprudence, but without acknowledging that it is doing so. A narrow, and perhaps awkward, analysis may be used to minimize the extent of the break with prior precedent; later cases then abandon the constraints inherent in that analysis as the new paradigm is embraced. Examples of transitional cases are *Brown v. Board of Education*²¹⁶ in regard to the constitutionality of racial segregation and *Griswold v. Connecticut*²¹⁷ in regard to the constitutional right to privacy. *Brown v. Board of Education* took the momentous step of striking down school segregation without abandoning prior law that upheld "separate but equal" facilities for blacks and whites.²¹⁸ The Court accomplished this by focusing on educational institutions and finding that, in that context, "separate [was] inherently unequal."²¹⁹ Thereafter, this focus on context disappeared as the Court struck down without comment racial segregation in a variety of other settings and erased all vestiges of the "separate but equal" doctrine.²²⁰

Similarly, the constitutional right to privacy, when initially recognized in *Griswold v. Connecticut*, was strictly limited to the privacy of married couples, a limitation that was deemed necessary to avoid reviving a discredited line of cases that had given heightened constitutional protection to certain aspects of liberty not explicitly enumerated in the Constitution.²²¹ As in *NFIB*, the Justices comprising the *Griswold* majority used different analyses as the basis for recognizing an unenumerated constitu-

216. 347 U.S. 482 (1954).

217. 381 U.S. 479 (1965).

218. *Brown*, 347 U.S. at 495.

219. *Id.* at 493–95.

220. See, e.g., *Schiro v. Bynum*, 375 U.S. 395 (1964) (per curiam) (municipal auditorium); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (municipal golf course and parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (city buses); *Mayor & City Council of Balt. City v. Dawson*, 350 U.S. 877 (1955) (per curiam) (public bathhouses and beaches).

221. *Griswold*, 381 U.S. at 499.

tional right to privacy.²²² However, all stressed that the protected right was one of marital privacy.²²³ Shortly thereafter, the Court used an equal protection theory to abandon the marital focus and recognize privacy as a right possessed by all individuals.²²⁴

There is a reasonable likelihood that *NFIB* could also prove to be transitional. Certainly a substantial majority of the Court appears dissatisfied with the pre-existing approach and ready to embrace an analysis that is more jurisprudentially sound. The emphasis on state sovereignty and the dangers of an overbroad federal spending power suggests an inclination to fashion more meaningful limits on congressional discretion to use spending conditions to control state governance. If that is the case, there are two primary directions that the Court might take. One would be a re-envisioning of the coercion analysis to better capture the practical realities of state decision-making. Although this would be an improvement on the parsimonious approach to coercion in *Dole*²²⁵ and, to a somewhat lesser extent, *NFIB*,²²⁶ it would still rest upon the flawed premise that states have power to alter contractually the Constitution's allocation of governing authority. To address the most serious problems with the *Dole*-era analysis—those that arise from the structure and language of the Constitution itself—it will be necessary to substantively limit funding conditions in a way that reflects the limited nature of federal power.

E. ALTERNATIVE APPROACHES TO FISCAL COERCION

Although the opinions making up the *NFIB* majority are silent on the potential breadth of their coercion analyses, they both suggest that the spending measures to which those analyses might apply are few.²²⁷ This view does not appear to be a reflection of analysis or ideology, but rather a caution born of concerns related to justiciability.²²⁸ Courts are understandably hesitant to undertake a fiscal coercion inquiry that involves an assessment of state fiscal capacities and choices, and several federal circuits have expressly questioned the justiciability of the coercion issue in

222. *Id.* at 484–86 (penumbras of the Bill of Rights); *id.* at 486–93 (Goldberg, J., concurring) (Ninth Amendment); *id.* at 500–01 (Harlan, J., concurring in the judgment) (Due Process Clause: “implicit in the concept of ordered liberty”); *id.* at 502–03 (White, J., concurring in the judgment) (Due Process Clause: fundamental liberties).

223. *Id.* at 486 (majority opinion); *id.* at 497–99 (Goldberg, J., concurring); *id.* at 502–03 (White, J., concurring in the judgment).

224. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The Court stated, “It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Id.* at 453. Both the *Griswold* and *Eisenstadt* cases dealt with access to contraceptives.

225. *See South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

226. *See Nat'l Fed'n of Indep. Bus v. Sebelius*, 132 S. Ct. 2566, 2604–05 (2012).

227. *See id.* at 2603, 2634–35.

228. *See id.* at 2634–35.

Spending Clause jurisprudence for this reason.²²⁹ The Ninth Circuit detailed some of these concerns as follows:

Does the relevant inquiry turn on how high a percentage of the total programmatic funds is lost when federal aid is cut-off? Or does it turn, as Nevada claims in this case, on what percentage of the federal share is withheld? Or on what percentage of the state's total income would be required to replace those funds? Or on the extent to which alternative private, state, or federal sources of highway funding are available? [S]hould the fact that Nevada, unlike most states, fails to impose a state income tax on its residents play a part in our analysis? Or, to put the question more basically, can a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds—or is the state merely presented with hard political choices?²³⁰

The Ninth Circuit concluded, “[t]he 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.”²³¹

Concerns of this sort pose a major obstacle to development of a meaningful fiscal coercion analysis. The *NFIB* dissenters expressly rejected the argument that a fiscal coerciveness inquiry is nonjusticiable,²³² arguing that the importance of the federalism issues in Spending Clause cases demands that the judiciary provide meaningful oversight.²³³ However neither the joint dissent nor the Chief Justice’s opinion, which combined to control the outcome on the Spending Clause issue, provides any but the most minimal guidance on how a judicially manageable assessment of fiscal coercion might be carried out.²³⁴

If the Court intends to use a coercion analysis as the mechanism for providing meaningful oversight of congressional spending measures, it needs to formulate a conception of coercion that is capable of realistically capturing the dynamic of federal-state fiscal interactions in a broad range

229. See, e.g., *Kansas v. United States*, 214 F.3d 1196, 1201–02 (10th Cir. 2000); *Nevada v. Skinner*, 884 F.2d 445, 447–48 (9th Cir. 1989); *Oklahoma v. Schweiker*, 655 F.2d 401, 413–14 (D.C. Cir. 1981); see also *NFIB*, 132 S. Ct. at 2640–41 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

230. *Skinner*, 884 F.2d at 448; accord *Kansas*, 214 F.3d at 1202.

231. *Skinner*, 884 F.2d at 448.

232. *NFIB*, 132 S. Ct. at 2661 (joint dissent) (citing *New York v. United States*, 505 U.S. 144, 175 (1992)). Cf. *supra* notes 163–69 and accompanying text.

233. *NFIB*, 132 S. Ct. at 2661 (citing *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring)).

234. The *NFIB* opinions were able to resolve the case using rudimentary concepts of and approaches to fiscal coercion because of facts peculiar to the Medicaid context. The Chief Justice, by manipulating the facts, was able to cast the Medicaid Expansion proposal as a true threat, see *supra* notes 206–14 and accompanying text, a prototypical form of coercion that obviates the need for a detailed examination of a state’s fiscal choices and constraints. The joint dissent was able to avoid a detailed examination of state fiscal issues by holding that the size of the grant, standing alone, was sufficient to establish coerciveness. Because the Medicaid grant is so much larger than any other federal grant, the utility of this criterion outside the Medicaid context is uncertain. *NFIB*, 132 S. Ct. at 2662 (joint dissent).

of contexts. Moreover, this conception must utilize criteria that are susceptible to judicial application.

It may be possible to formulate an analysis of this sort. Models can be found in the extensive literature exploring the idea of coercion in other contexts such as medical ethics. The debate among medical ethicists concerning the propriety of paying individuals to participate in medical research raises coerciveness issues quite similar to those presented in Spending Clause cases.²³⁵ In both the Spending Clause and medical research contexts, an offer of money is used to induce the offeree to engage in actions desired by the offeror, actions which may be detrimental to the interests of the offeree.²³⁶ A conditioned offer of this sort can be seen as coercive if the nature of the offer, or the circumstances in which it is made, seriously undermine the voluntariness of the offeree's choice to accept the offer.²³⁷

In determining whether payment of research participants constitutes coercion,²³⁸ medical ethicists, like the *NFIB* Justices,²³⁹ give substantial weight to the size of the payment.²⁴⁰ It is recognized that the magnitude of the payment alone may be sufficient to distort the offeree's judgment²⁴¹ and induce him to disregard significant risks of harm or to sacrifice other important interests.²⁴² A second factor considered in tandem with the size of the offer is the neediness of the offeree.²⁴³ These two

235. See generally Ruth Macklin, 'Due' and 'Undue' Inducements: On Paying Money to Research Subjects, 3(5) *IRB: ETHICS & HUM. RES.* 1 (May 1981), available at <http://www.jstor.org/stable/3564136?seq=1>.

236. See generally *id.*

237. At least since the Nuremberg war crimes trials of 1945–1946, it has been an unquestioned principle of medical ethics that participation in medical research must be voluntary and not induced by force or coercion. Macklin, *supra* note 235. One of the Nazi war crimes was the forced use of prisoners in harmful medical experiments. Hence, coercion of research subjects, which is commonly referred to as “undue inducement,” is prohibited by federal regulations, 45 C.F.R. § 46.116 (2014), and by all leading codes of research ethics. A. Wertheimer & F.G. Miller, *Payment for Research Participation: A Coercive Offer?*, 34 *J. MED. ETHICS* 389, 389 (2008).

238. In the medical ethics literature, the term “undue inducement” rather than “coercion” is used in regard to a coercive offer, with the term “coercion” being used only when the inducement takes the form of a threat of harm. Whether a proposal takes the form of a threat (“Your money or your life”) or an offer (“I will pay for your daughter’s life-saving surgery if you will help me rob the bank”), it is coercive if it “generates pressure on the coercee’s will that, if not irresistible, is sufficiently strong to make the coercee’s choice unfree.” *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, “Coercion,” 17 (Oct. 27, 2011), available at plato.stanford.edu/entries/coercion/.

239. See *NFIB*, 132 S. Ct. at 2663 (joint dissent) (concluding that the “sheer size” of the Medicaid grant creates coercive pressure).

240. *E.g.*, Macklin, *supra* note 235, at 1–2.

241. Distortion of the offeree’s judgment is the measure of undue inducement that is endorsed in the handbook for Institutional Review Boards, the bodies charged with reviewing research proposals in each institution that conducts research. See Wertheimer & Miller, *supra* note 237, at 391.

242. *E.g.*, Jennifer S. Hawkins & Ezekiel J. Emanuel, *Clarifying Confusions About Coercion*, 35(5) *HASTINGS CENTER REP.* 16, 18 (Sep.–Oct. 2005). This idea is reflected in the *NFIB* joint dissent’s conclusion that the “sheer size” of the Medicaid grant creates coercive pressure. See *supra* notes 202–05 and accompanying text.

243. *E.g.*, Daniel Lyons, *Welcome Threats and Coercive Offers*, 50 *PHILOSOPHY* 425, 427 (1975); Jill A. Fisher, *Expanding the Frame of ‘Voluntariness’ in Informed Consent: Struc-*

criteria represent the extent of present judicial thinking about coercion in the Spending Clause context.²⁴⁴ However, analysis of voluntariness and coercion in medical ethics literature is not limited to the size and attractiveness of the offered payment. An equally important indicator of potential coerciveness is the nature of the action sought from the offeree.²⁴⁵ Typical is one ethicist's definition of coercive offers as "excessively attractive offers that lead people to do something to which they would normally have real objections based on risk or other fundamental values."²⁴⁶

The hallmark of coercion is the negation of voluntary choice.²⁴⁷ As a general rule, there is no reason to believe that a person, even a needy person, who accepts a large sum of money conditioned on performance of certain acts is acting other than voluntarily.²⁴⁸ Indeed, this description encompasses the majority of ordinary consensual contracts, including contracts of employment. An inference that the contract was anything other than voluntary would arise only if the required acts were of a sort to which a reasonable offeree would be unlikely to agree because they are, e.g., illegal, dangerous, or contrary to fundamental religious or other

tural Coercion and the Power of Social and Economic Context, 23(4) KENNEDY INST. OF ETHICS J. 355, 360 (Dec. 2013), available at http://muse.jhu.edu/journals/kennedy_institute_of_ethics_journal/v023/23.4.fisher.pdf. Connections between the offeror and the offeree's predicament may contribute to a conclusion that the offer is coercive. For instance, an offeror's knowing or intentional exploitation of an offeree's vulnerability in order to obtain assent not otherwise likely to be given may be classified as coercive. See, e.g., John McMillan, *Coercive Offers and Research Participation: A Comment on Wertheimer and Miller*, 36 J. MED. ETHICS 383, 383 (2010). Similarly, coercion is likely to be found if the offeror played a significant role in creating the circumstances that place pressure on an offeree to accept the unwelcome offer. See, e.g., STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 238, at 14–15. From these criteria an argument could be constructed that federal taxing policies have played a substantial role in creating states' fiscal vulnerability, which is now being exploited by the federal government to gain policy control in areas of state dominion.

244. It is the difficulty of assessing financial hardship that has caused courts to question the justiciability of the coercion issue in Spending Clause challenges. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2603–04, 2606 (2012).

245. E.g., Lisa Newton, *Inducement, Due and Otherwise*, 4(3) IRB: ETHICS & HUM. RES. 4, 4 (Mar. 1982).

246. Neal Dickert, *Coercion and Undue Inducement in Research: Money and Other Offers* (2006), available at ocw.jhsph.edu/courses/ethicshumansubjectresearch/PDFs/Coercion.pdf.

247. See Fisher, *supra* note 243.

248. In the context of research, see, for example, Wertheimer & Miller, *supra* note 237. Additionally, the original offer of Medicaid funding provides a useful example. The joint dissenters' analysis would appear to classify this offer as coercive because of the "sheer size" of the grant. However, though sizeable, this offer was not necessarily coercive because it provided funds for states to achieve goals that they shared with the federal government. It had a potential to be coercive because of the inducement created by the unprecedented amount of money offered and the importance to the states of the benefits on which it could be expended. However, even an irresistible offer is not coercive unless it induces, or is likely to induce, the offeree to take actions that would otherwise be resisted because of conflict with core values. Without this feature, a federal funding initiative is more like a gift to the states; the generosity of the gift does not change its character from gift to coercive imposition. *NFIB*, 132 S. Ct. at 2633 (Ginsberg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

values.²⁴⁹ Identification of coercive offers thus requires examination not only of the amount of money offered and its irresistibility to the targeted offerees, but also of the onerousness to the offerees of the conditions placed on receipt of the money. Accordingly, assessments of the coerciveness of payments to medical research subjects look closely at the risks of physical or psychological harm that may be caused by submitting to an untested treatment.²⁵⁰ The more significant these risks, the more likely that the offer will be seen as one that would not voluntarily be accepted by a reasonable person and which therefore should be viewed as coercive.²⁵¹ For states responding to an offer of federal funds, the fundamental value underlying resistance to the offer would normally be protection of their sovereignty against federal encroachment.²⁵² Thus, the coerciveness of an offer would be proportionate to the extent to which the state would be required to acquiesce in federal control of matters such as the structures and processes of state government or policy choices in areas of state authority.

Incorporating an “effect” criterion of this sort into our thinking about fiscal coercion in the Spending Clause context would lessen the analytical importance of the state fiscal issues that courts have found so troubling, which relate to the idea of the “excessively attractive offer.”²⁵³ Evidence of whether states lack volition in regard to particular conditioned funding would be derived not only from the size of the grant and the fiscal constraints and policy imperatives that increase the irresistibility of the grant to the states, but also from the extent to which acceptance of the grant would require states to cede fundamental aspects of their sovereignty.²⁵⁴

Not every condition affecting sovereignty would present strong evidence of coercion. Some incursions are fairly narrow, and some are so intertwined with the purpose of the grant that acceptance of funds for that purpose would necessarily imply voluntary acceptance of the condition. However, situations such as these can be ferretted out in the close scrutiny that should be triggered whenever spending conditions require states to relinquish aspects of their sovereignty. Examination of the extent to which federal conditions intrude upon state sovereignty is well

249. See Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1289–90 (2013).

250. See Fisher, *supra* note 243, at 363; Wertheimer & Miller, *supra* note 237, at 391.

251. See Wertheimer & Miller, *supra* note 237, at 391.

252. See Crowley, *supra* note 122.

253. See Dickert, *supra* note 246, at 37.

254. In general, states jealously guard their sovereignty and begrudge incursions by the federal government into matters seen as primarily state concerns. At the Constitutional Convention itself, decision-making regularly had to accommodate what one delegate called “the jealousy of the states with regard to their sovereignty.” See *Arizona v. United States*, 132 S. Ct. 2492, 2522 (2012) (Scalia, J., concurring in part and dissenting in part). Yet in numerous instances states have accepted federal grant funds conditioned on adherence to federal mandates concerning governmental structures and processes and federal policy choices in areas over which Congress was given no regulatory authority by the Constitution. See *supra* notes 121–130 and accompanying text.

within judicial competence, and addition of this factor to the determination of coerciveness should help to allay judicial concerns about justiciability.

An approach that considers the unpalatableness of the condition as well as the attractiveness of the offered funding when assessing coerciveness would enhance the validity and utility of the voluntariness analysis in Spending Clause cases. However, exclusive reliance on a voluntariness analysis of any sort would continue to misdirect Spending Clause analysis from constitutional to contractual issues and would place the responsibility for problems on the states for failing to refuse proffered funds,²⁵⁵ rather than on Congress for exceeding its constitutional authority. Particularly in light of the limited bargaining power of the states in the process of “contracting” for conditioned federal grants, the voluntariness analysis is simply an inadequate tool for assuring that such important constitutional values are safeguarded.

States’ voluntary acceptance is, of course, relevant to the validity of a spending measure, as the Spending Clause gives Congress no authority to force either funds or conditions upon the states.²⁵⁶ However, the role of this factor should be secondary. A constitutionally valid approach to Spending Clause jurisprudence must focus initially on the scope of the power delegated to Congress by the Constitution, rather than envisioning an extra-constitutional power of individual states to expand congressional power by agreement.

F. SUBSTANTIVE LIMITS ON SPENDING CONDITIONS

Analysis of the validity of congressional spending conditions should begin with the language of the Spending Clause itself, as did the Chief Justice’s opinion on this issue in *NFIB*.²⁵⁷ The Spending Clause does nothing more than authorize Congress to expend federal funds to provide for the general welfare of the United States.²⁵⁸ Congressional authority to impose substantive requirements on recipients of federal funds arises from its right and power to “ensure that the funds are used by the States to ‘provide for the . . . general welfare’ in the manner Congress intended.”²⁵⁹ Applying this principle to the condition requiring state recipi-

255. The Chief Justice, in his *NFIB* opinion, admonished the states for accepting conditions that they found objectionable: “In the typical case we look to the States to defend their prerogatives by adopting the simple expedient of not yielding to federal blandishments when they do not want to embrace the federal policies as their own. The States are separate and independent sovereigns. Sometimes they have to act like it.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2633 (2012) (citation omitted); *see also* *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 655 (1999) (treating the notice requirement as a mechanism by which States are enabled to “be vigilant in policing the boundaries of federal power”).

256. U.S. CONST. art. I, § 8, cl. 1.

257. *NFIB*, 132 S. Ct. at 2577.

258. *See* U.S. CONST. art. I, § 8, cl. 1; *NFIB*, 132 S. Ct. at 2578.

259. *NFIB*, 132 S. Ct. at 2603.

ents of Medicaid funds to participate in the Medicaid Expansion, the Chief Justice stated:

We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds because that is the means by which Congress ensures that the funds are spent according to its view of the "general Welfare." Conditions that do not here govern the use of the [Medicaid] funds, however, cannot be justified on that basis.²⁶⁰

The idea that the Spending Clause authorizes only conditions relating to the use and management of the federal funds to which the condition is attached was not newly minted by the Chief Justice in *NFIB*. It is implicit in the early cases,²⁶¹ and was at the center of Justice O'Connor's dissent in *Dole*.²⁶² Justice O'Connor distinguished legitimate "spending conditions" that relate to the use of grant funds from what she called "regulatory conditions" that establish requirements that are external to control of the grant funds and hence unauthorized by the Spending Clause.²⁶³ The drinking age condition challenged in *Dole* clearly fit into the category of regulatory conditions and thus, in Justice O'Connor's view, fell outside Congress's spending power and was invalid unless congressional authority to impose a uniform drinking age could be found elsewhere in the Constitution.²⁶⁴

A conditioning authority that is limited to directing the use and management of the federal grant funds would parallel Congress's power to control the administration of a spending program carried out by the federal government itself. Consider, for example, a federal highway construction initiative administered by the federal government rather than by the states. The federal government would have complete authority over the scope, design, and administrative structure for the program. It could establish criteria for selection of projects to be funded, construction specifications, fiscal controls, data gathering parameters, and requirements for public input. However, the fact that the federal government is conducting a highway construction program would not give rise to a federal authority to establish a uniform national drinking age.²⁶⁵ There is no basis for concluding that a congressional power to impose such a requirement materializes when Congress uses the states as the instruments for implementing the highway construction program rather than administering the program

260. *Id.* at 2604–05.

261. *See, e.g.,* *Fullilove v. Klutznick*, 448 U.S. 448 (1990); *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127 (1947); *United States v. Butler*, 297 U.S. 1 (1936).

262. *See* *South Dakota v. Dole*, 483 U.S. 203, 212–18 (1987) (O'Connor, J., dissenting).

263. *Id.*

264. *Id.* at 215–16 ("When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it 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. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of the State's social, political, or economic life. . . .").

265. *See* *Nat'l Fed'n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012).

itself.²⁶⁶

The *Dole* majority gave lip service to a limitation of this sort, stating that “conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’”²⁶⁷ As applied by the *Dole* Court, however, the requirement that the condition be germane to the federal funding program was transformed from a means of maintaining congressional control of the funds into a power to impose conditions that are extraneous to the funded program, but share a commonality of purpose with that program.²⁶⁸ The Court found the drinking age condition to be valid because it was related to highway safety, one of the purposes of the federal highway construction program.²⁶⁹ Stated the Court, “[B]y enacting § 158, Congress conditioned the receipt of federal funds in a way reasonably calculated to address [an] impediment to a purpose for which the funds are expended.”²⁷⁰

This expansive and deferential view of congressional authority to legislate in the form of spending conditions bears a marked resemblance to the “rational basis” test used to evaluate the constitutional validity of most social and economic legislation.²⁷¹ The rational basis test reflects the idea that the lawmaking function is constitutionally allocated to the legislature, and hence the courts should defer to legislative judgments regarding the necessity for, or wisdom of, a duly enacted law.²⁷² Under this test, a challenged law need only have a rational relation to a valid state interest in order to pass constitutional muster.²⁷³

Like the rational basis test, the *Dole* standard begins by identifying a legitimate purpose underlying the legislative enactment.²⁷⁴ In rational basis analysis, the impotence of the test is assured by the Court’s willingness to accept any conceivable purpose that might underlie the legislation; the *Dole* analysis similarly assures the impotence of its analysis by its willingness to view the congressional purpose of the funding and the challenged condition at an extremely broad level of generality.²⁷⁵ Both the rational

266. A requirement authorized by some other source of congressional authority, such as the Commerce Clause, can, of course, be imposed on the states in the form of a funding condition. See U.S. CONST. art I, § 8 cl. 3.

267. *Dole*, 483 U.S. at 207.

268. See *id.* at 208–09.

269. *Id.*

270. *Id.* at 209. This statement seems to imply the existence of an impediment that will prevent completion of the project on which funds were being expended—that is, highway construction. If so limited, the concept would be consistent with a congressional power to assure the implementation of the funded project. However, the application of the stated principle negates this interpretation, as the drinking age posed no obstacle to construction of highways in the manner desired by Congress.

271. See, e.g., *United States v. Comstock*, 560 U.S. 126, 151 (2010) (Kennedy, J., concurring).

272. *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 175–79 (1980).

273. E.g., *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting); *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955).

274. See *Dole*, 483 U.S. at 208.

275. See *id.*

basis test and the *Dole* Spending Clause analysis then require only that the challenged law bear a rational connection to achievement of that purpose.²⁷⁶

Dole's germaneness analysis thus is not an examination of whether the condition is sufficiently connected to the funding program to be justified within the unique parameters of the spending power. Rather, it is the familiar means-end analysis associated with determining whether a regulatory enactment is a legitimate use of the legislative power.²⁷⁷ As such, it is not an appropriate mechanism for determining whether Congress has exceeded the quite different type of authority granted by the Spending Clause.

In the cases that gave rise to the "rational basis" test, the Court was considering the constitutionality of a legislative policy choice of a sort that the legislature is constitutionally empowered to make, and which is therefore entitled to judicial deference under the principle of separation of powers.²⁷⁸ The analogous inquiry in the Spending Clause context is whether a given spending program furthers the general welfare—a question on which the Court should, and does, accord substantial deference to Congress.²⁷⁹

Determining whether a particular condition is sufficiently related to the expenditure of funds that Congress should be allowed to impose the condition even though it is not otherwise empowered to do so by the Constitution is a matter on which deference to Congress is neither demanded nor justified. Unlike determinations of regulatory policy, defining the scope of constitutional grants of power is an inherently judicial function.²⁸⁰ *Dole*'s deferential approach to the germaneness issue thus was unwarranted and opened the door to creation of a substantive federal power comparable to the police power, and capable of arrogating to Congress the areas of governance reserved to the states.²⁸¹ A reading of the germaneness requirement that more faithfully reflects both precedent and constitutional structure would require that a condition give effect to the programmatic purpose of the grant, not that it merely share its general policy objective.

The Chief Justice's opinion in *NFIB* appeared to acknowledge and ap-

276. *See id.* at 208–09.

277. *See id.* at 208–09, 207 n.3.

278. In a case involving the appropriate level of deference to Congress under the Necessary and Proper Clause, Justice Kennedy distinguished the highly deferential "rational basis" test, citing that test's use in "challenges to a state's exercise of its own powers, powers not confined by the principles that control the limited nature of our National Government." *United States v. Comstock*, 560 U.S. 126, 151 (2010) (Kennedy, J., concurring).

279. *See Dole*, 483 U.S. at 207 & n.2.

280. *See Nat'l Fed'n Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405–06 (1819)).

281. *NFIB*, 132 S. Ct. at 2579 ("Our deference in matters of policy cannot . . . become abdication in matters of law."); *see id.* at 2661 (joint dissent) (citing the importance of federal balance and its role in securing freedom as basis for refusing to abjure judicial scrutiny of difficult Spending Clause issues).

ply this concept of the germaneness requirement.²⁸² The Chief Justice reasoned that conditions relating to the Medicaid Expansion did not constitute instructions on use of funds for the (separate) Medicaid program; thus, conditioning the Medicaid grant on implementation of the Medicaid Expansion exceeded the power granted to Congress by the Spending Clause.²⁸³ Accordingly, the Chief Justice's opinion rejected the apparent holding of *Dole* that the drinking age condition, which did not instruct on the use of any federal grant funds, satisfied the germaneness requirement.²⁸⁴

If limited to this idea, the Chief Justice's opinion would have paved the way for a shift in the analysis of Spending Clause cases from a question of state volition to the more constitutionally appropriate question of congressional power. Instead, the opinion used an analytical sleight of hand to redirect what began as a power-based inquiry back to the issue of voluntariness.²⁸⁵ *Dole* was recast as holding that the effect of a lack of germaneness is merely to shift the analysis to the question of coercion.²⁸⁶ Implicit in this approach is the idea that a condition that Congress is not empowered to impose under the authority of the Spending Clause can nonetheless be imposed under a quasi-contract theory, so long as the offer of funds is not coercive and the state's acceptance is voluntary.²⁸⁷ Since failure to satisfy the germaneness requirement implicitly means that the power to impose the condition cannot be derived from the Spending Clause, the source of Congress's power to make such an offer and to enter into the resulting contract is not clear. The Chief Justice's opinion does not address this problem.

The Chief Justice was correct in perceiving that both voluntariness and germaneness have a role to play in determining the validity of a spending measure.²⁸⁸ However, they are not alternative bases for upholding a condition. The question of voluntary acceptance arises only if the condition is one that Congress is constitutionally authorized to impose.²⁸⁹ The Chief Justice's opinion thus can be seen as only a partial step toward rationalizing and clarifying Spending Clause analysis.

282. See *id.* at 2634 (majority opinion).

283. *Id.* at 2604–06.

284. *Id.* at 2604.

285. See *id.* at 2623 (Ginsburg, J., concurring in part, concurring in the judgment in part, dissenting in part).

286. See *id.* at 2604 (majority opinion). After noting that the condition in *Dole* was not a restriction on how the funds were to be used, the opinion states, “[w]e accordingly asked whether ‘the financial inducement offered by Congress’ was ‘so coercive as to pass the point at which ‘pressure turns into compulsion.’” *Id.* at 2604. The opinion then proceeds to apply a coerciveness analysis, and concludes that the condition requiring implementation of the Medicaid Expansion was coercive and hence invalid. *Id.* at 2604–05. In pursuing this questionable line of reasoning, the Chief Justice may have been attempting to avoid conflict with the *Dole* precedent. Further, the case had been argued on a coercion theory, and thus arguments about the independent significance of a negative ruling on the germaneness issue were not before the Court.

287. See *id.* at 2661 (joint dissent).

288. See *id.* at 2604–05 (majority opinion).

289. *South Dakota v. Dole*, 483 U.S., 203, 207 (1987).

VII. CONCLUSION

In *NFIB* the Roberts Court broke sharply with the laissez-faire Spending Clause jurisprudence that had continued even through the resurgence of federalism in the late twentieth century.²⁹⁰ The Court began a much-needed re-examination of how a broad and flexible spending power can function within a system of government that values state sovereignty and local control of individual and community life. Both the Chief Justice's opinion and the joint dissent struggled to articulate a coherent analysis that captured their sense that the Medicaid Expansion enacted by the ACA intruded too far upon state prerogatives. Much of the Justices' problem stemmed from attempting to fit their analyses within the parameters set by the misguided *Dole* precedent.²⁹¹ As noted, *Dole* treated federal spending measures as quasi-contractual in nature, such that constitutionality was dependent on the legitimacy of the state's acceptance of the contract terms rather than on the substance of those terms.²⁹² Under *Dole*, a state's voluntary acceptance of conditioned federal funds vitiated any concerns about federalism and state sovereignty.²⁹³ Thus the full responsibility for the erosion of federalism values was placed on the states for accepting the inappropriately conditioned funds rather than on Congress for exceeding its constitutional authority.

If the Court is, as it has repeatedly stated, concerned that an unlimited spending power creates the potential for Congress to become "a parliament of the whole,"²⁹⁴ it must adopt a form of analysis capable of averting that result. The power of the national government is without practical limits unless more demanding constraints are placed on Congress's ability to enact substantive mandates as conditions on the receipt of federal funds.²⁹⁵ Nor can the sovereignty of states and the liberty interests associated therewith be preserved if state governments—and the policy issues for which they have traditionally been responsible—are subject to congressional control through funding conditions.

290. That resurgence was marked by new limits on the scope of congressional powers under the Commerce Clause and Section 5 of the Fourteenth Amendment, new force to the Tenth Amendment as a limit on congressional power to compel state legislative or regulatory activity, expansion of state sovereign immunity under the Eleventh Amendment, and new limits on the availability of habeas corpus to question state criminal convictions. See, e.g., Chemerinsky, *supra* note 113, at 1. Commentators expected that the Court would inject greater balance into its Spending Clause jurisprudence as well. See, e.g., Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL'Y 95, 102 (1998); Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 488–89 (2002). However, the dominant Spending Clause case of this period, *South Dakota v. Dole*, 483 U.S. 203 (1987), offered only lip service to federalism values.

291. Of the present Justices, only Scalia was on the Court when *Dole* was decided. In *Dole* Scalia joined the majority. See *Dole*, 483 U.S. 203 (1987). In *NFIB* he was one of the authors of the joint dissent. See *NFIB*, 132 S. Ct. 2566 (2012).

292. See *Dole*, 483 U.S. at 211–12.

293. See *id.*

294. See authorities cited *supra* note 63.

295. *Dole*, 483 U.S. at 215 (O'Connor, J., dissenting).

The current weak voluntariness inquiry clearly is insufficient to protect these important values, particularly in light of the fiscal pressures faced by states. Broadening the coercion inquiry to include additional indicators of diminished state volition would give more legitimacy to judicial analysis of the contractual concepts of voluntariness and coercion. However, framing an analysis that captures the federalism values embedded in the constitution requires that Spending Clause doctrine be freed from the overly constricting *Dole* analysis.²⁹⁶

Although the *NFIB* opinions signal a new, more careful approach to Spending Clause analysis, they disappoint in failing to extricate the law in this area from the contractual parameters that dominated late twentieth century Spending Clause jurisprudence. Though they give lip service to the important constitutional values implicit in the concepts of federalism and state sovereignty,²⁹⁷ the *NFIB* opinions fail fully to explore the implications of these structural concerns. Perhaps the Court did not feel it was necessary to do so in order to decide the questions presented by the *NFIB* case. However, the need for this exploration remains, and it is hoped that the Court will take advantage of future opportunities to finish what was begun in *NFIB*.

296. Indeed, the Chief Justice's opinion may have been attempting to do just that. It does not use *Dole* as its starting point, relying instead on earlier cases in which the contract analogy is but one of several analytical touchstones. See *NFIB*, 1321 S. Ct. at 2601–02.

297. See, e.g., *NFIB*, 132 S. Ct. at 2602–03; *id.* at 2658–61 (joint dissent).

