

CONSTITUTIONAL LAW—BREAKING DOWN THE SUPREME COURT’S
SPENDING CLAUSE RULING IN *NFIB v. SEBELIUS*: A HUGE BLOW TO THE
FEDERAL GOVERNMENT OR A MERE BUMP IN THE ROAD?

I. INTRODUCTION

June 28, 2012—it was the moment everyone had been waiting for. It was the day that the world would finally know whether the Supreme Court of the United States upheld the highly controversial Patient Protection and Affordable Care Act (“Affordable Care Act”).¹ The ruling was a great victory for President Barack Obama and the rest of the Democratic Party—with one exception. The Supreme Court in *National Federation of Independent Business v. Sebelius*² (“*NFIB v. Sebelius*”) struck down one part of the over 900-page Affordable Care Act: the Medicaid expansion provision.³ The provision required all states “to expand their Medicaid programs by 2014 to cover *all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line.”⁴ If a state chose to decline the expansion, it faced losing all of its pre-Affordable Care Act federal Medicaid funding in the future.⁵

Article I, Section 8 of the U.S. Constitution—otherwise known as the Spending Clause—gives Congress the power “to pay the Debts and provide for the . . . general Welfare of the United States.”⁶ The Supreme Court “ha[s] long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States’ ‘taking certain actions that Congress could not require them to take.’”⁷ Conditional grants are an extremely important use of Congress’s spending power. This power generally “allows Congress to adopt policies beyond its enumerated powers in such areas as education, law enforcement, community development and social services.”⁸ Conditional spending enables Congress to enlist

1. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119, *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 2019.

2. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

3. *See generally id.*

4. *Id.* at 2601 (citation omitted).

5. *Id.* at 2604.

6. U.S. CONST. art. I, § 8, cl. 1.

7. *NFIB*, 132 S. Ct. at 2601 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999)).

8. Paul L. Posner, *The Supreme Court and the Remaking of Federalism*, GOVERNING (July 18, 2012), <http://www.governing.com/columns/mgmt-insights/col-supreme-court-health-care-ruling-coercion-states-federalism.html>.

the states in the implementation of programs designed to achieve federal goals in these arenas. To illustrate, Congress currently distributes “more than 950 federal grants [to the states in exchange for their agreements to adopt] . . . federal mandates, rules[,] and regulations.”⁹ By accepting so many federal grants, the states have developed somewhat of an addiction to federal money.¹⁰ As with most addictions, problems can arise for all parties involved, which was the case with the Medicaid expansion in *NFIB v. Sebelius*.

In the decades leading up to the Affordable Care Act, the states had become more dependent on federal Medicaid grants than any other federal money.¹¹ Thus, while many of the states did not want to expand their Medicaid programs as contemplated by the Affordable Care Act, they felt compelled to do so because they knew that they could not afford to lose all future federal Medicaid funding.¹² Accordingly, many of these states challenged the constitutionality of the Medicaid expansion condition and took their case all the way to the Supreme Court in *NFIB v. Sebelius*.¹³

Although Congress generally has the power under the spending clause to incentivize the states to accept its conditional grants, it may not coerce them into doing so.¹⁴ As long as Congress merely encourages or induces the states to enact its federal programs, Congress’s condition will not run afoul of the Constitution.¹⁵ In *NFIB v. Sebelius*, the states argued that Congress was using coercion, rather than encouragement, to force them to adopt the Affordable Care Act’s Medicaid expansion provision.¹⁶ The Court agreed with the states and held, for the first time ever,¹⁷ that the terms of a conditional spending program crossed the constitutional line from encouragement to coercion.¹⁸

The Court arrived at this conclusion by adopting a new understanding of what constitutes coercion: “When . . . conditions take the form of threats to terminate other significant independent grants, the conditions are properly

9. *Id.*

10. See Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 903 (2013) (using the word “addiction” to explain why one might question whether the ACA’s Medicaid expansion was coercive to the states).

11. See *NFIB*, 132 S. Ct. at 2663 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

12. *Id.* at 2601 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

13. *Id.*

14. See *id.* at 2602.

15. See *New York v. United States*, 505 U.S. 144, 166 (1992).

16. *Sebelius*, 132 S. Ct. at 2601 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

17. *Id.* at 2630 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (joined by Sotomayor, J.).

18. *Id.* at 2603 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.), 2662 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

viewed as a means of pressuring the States to accept policy changes.”¹⁹ The two key elements of this coercion test are “significance” and “independence.”²⁰ Because the original Medicaid funds were so *significant* in size, and because Congress used those funds to leverage the states acceptance of an *independent* Medicaid program, Congress engaged in coercion.²¹ While Congress is still free to “offer[] funds under the Affordable Care Act . . . and requir[e] that States accepting such funds comply with the conditions on their use[,] . . . Congress is not free to . . . penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”²²

Since *NFIB v. Sebelius*, many commentators have wondered what implications the Medicaid ruling will have on Congress’s ability to use its spending power to create new programs and alter existing programs for the states.²³ Despite the difficulty in determining exactly what impacts *NFIB v. Sebelius* will have, the likely outcome is that the vast majority of Congress’s conditions on federal grant programs will be upheld as constitutional. This note attempts to demonstrate why this is the case by applying the two coercion elements of *NFIB v. Sebelius*—significance and independence—to three federal laws that could be at issue after the ruling: the No Child Left Behind Act (NCLB),²⁴ the Clean Air Act (CAA),²⁵ and “Megan’s Law.”²⁶

This note will proceed as follows. Part II discusses the holding of *NFIB v. Sebelius*, the plurality and joint dissent’s reasoning underlying that holding, and the opinion that lower courts are likely to follow. Next, Part III applies the plurality’s coercion test to NCLB, the CAA, and “Megan’s Law.” Finally, Part IV concludes that, while *NFIB v. Sebelius* at least gives the states a plausible basis to challenge conditional spending programs, their chance of successfully invalidating the programs on constitutional grounds remains slim.

19. *Id.* at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

20. *See id.* at 2604–06.

21. *See id.*

22. *NFIB*, 132 S. Ct. at 2607 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

23. *See generally, e.g.*, Carrie Johnson, *How the Health Care Ruling Might Affect Civil Rights*, NPR.ORG (July 6, 2012, 2:39 PM), <http://www.npr.org/2012/07/06/156378347/how-the-health-care-ruling-might-affect-civil-rights>; Laura Ofobike, *Making Waves Beyond Health Care*, OHIO.COM (July 23, 2012, 10:29 PM), <http://www.ohio.com/editorial/making-waves-beyond-health-care-1.322169>; Jordan Weissmann, *The Most Important Part of Today’s Health Care Ruling You Haven’t Heard About*, THE ATLANTIC (June 28, 2012, 3:33 PM), <http://www.theatlantic.com/business/archive/2012/06/the-most-important-part-of-todays-health-care-ruling-you-havent-heard-about/259134/>.

24. No Child Left Behind Act, 20 U.S.C. §§ 6301–7941 (2006 & Supp. V 2011).

25. Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006 & Supp. V 2011).

26. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

II. *NFIB v. SEBELIUS*: THE OPINION

In *National Federation of Independent Business v. Sebelius*,²⁷ seven out of the nine Supreme Court Justices found the Medicaid expansion coercive, and, thus, an unconstitutional use of Congress's spending power.²⁸ Those seven Justices, however, split into two separate groups—the plurality and the joint dissenters.²⁹ Chief Justice Roberts wrote the plurality opinion and was joined by Justice Breyer and Justice Kagan.³⁰ The four remaining Justices that found the Medicaid expansion coercive—Justices Scalia, Kennedy, Thomas, and Alito—signed on to the joint dissent.³¹ While those four Justices would have held the expansion provision unconstitutional based on the plurality's analysis, they actually took the coercion analysis a step further.³² As such, *NFIB v. Sebelius* contains two different tests for establishing unconstitutional coercion.³³ Critically, however, the last part of this section will demonstrate why lower courts are more likely to follow the plurality opinion than the joint dissent.³⁴ Nevertheless, it is necessary to discuss both the plurality opinion and the joint dissent because they each highlight spending clause principles and limits that will be informative for future analysis.

A. The Plurality Opinion

In a novel opinion, Chief Justice Roberts created a new standard for assessing whether Congress has improperly coerced the states via conditional spending: “When, for example, such conditions take the form of threats to terminate other *significant independent* grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.”³⁵ This framework contains a two-part test. The Court must determine (1) whether the existing federal grant that Congress is threatening to terminate in the future is *significant*, and (2) whether that grant is *independent* from Congress's new condition that the states must adopt in order to keep receiving the original grant.³⁶ The first element focuses on the amount of money at

27. 132 S. Ct. 2566.

28. *Id.* at 2607 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan JJ.), 2666–68 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

29. *See* sources cited *supra* note 28.

30. *NFIB*, 132 S. Ct. at 2576–77 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

31. *Id.* at 2642, 2656–57 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

32. *See* discussion *infra* Part II.B.

33. *See generally infra* Parts II.A–C.

34. *See infra* Part II.C.

35. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.) (emphasis added).

36. *See id.* at 2604–06.

stake and the degree of reliance the states have on that money.³⁷ The larger the amount of money and the higher the degree of reliance, the more likely Congress's new condition is to be coercive on the states.³⁸ The second element requires a court to decide whether Congress's new condition is its own independent program, and whether Congress is using the threatened program as leverage to force states into accepting the new condition.³⁹ The more the new condition looks like an independent program, the more likely Congress is using its spending power to coerce the states into accepting the condition.⁴⁰

Applying this two-part test, the plurality found Congress's Medicaid expansion coercive, and thus, held that Congress exceeded its power under the Constitution.⁴¹ In order to fully understand the test and its application, it is first necessary to demonstrate how the plurality arrived at this test and what prompts a coercion analysis.

1. *Prompting a Coercion Analysis*

Under the Spending Clause of the U.S. Constitution, Congress has the power "to pay the Debts and provide for the . . . general Welfare of the United States."⁴² The Supreme Court has held that Congress's power to provide for the general welfare necessarily includes its power to spend for the general welfare.⁴³ Congress's power to spend for the "general welfare" has consistently been interpreted by the Supreme Court to be a very broad power.⁴⁴ Critically, it is not confined to only the enumerated powers laid out in Article 1, Section 8 of the Constitution.⁴⁵ Rather, Congress, through the spending power alone, has been able to implement numerous spending programs such as, Social Security, Medicare, Medicaid, and even the Affordable Care Act. Congress's rationale behind instituting programs like these is

37. *See id.* at 2604–05.

38. *See id.*

39. *Id.* at 2605–06. These two elements combined have often been referred to as the "anti-leveraging principle." *See e.g.*, Bagenstos, *supra* note 10, at 866.

40. *See NFIB*, 132 S. Ct. at 2605–06 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

41. *Id.* at 2606–07.

42. U.S. CONST. art. I, § 8, cl. 1.

43. *See NFIB*, 132 S. Ct. at 2657–58 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (citing *United States v. Butler*, 297 U.S. 1 (1936)).

44. *Id.* at 2658 (citing *Helvering v. Davis*, 301 U.S. 619, 640 (1937)). Justice Scalia, writing for the joint dissent, explained that "[t]he discretion belongs to Congress," and "unless the choice is clearly wrong," Congress's expenditure will qualify as spending for the "general welfare." *Id.* (quoting *Helvering*, 301 U.S. at 640).

45. *See id.* (citing *Helvering*, 301 U.S. at 640; *Steward Machine Co. v. Davis*, 301 U.S. 548, 586–87 (1937)).

that they are good for the “general welfare” of the nation, and Congress usually has some specific purpose it would like to achieve as a result.

Spending Clause legislation has also consistently been regarded “as ‘much in the nature of a *contract*.’”⁴⁶ Thus, when Congress, through its spending power, contracts with the states to implement one of its spending programs, Congress must adhere to the usual rules of contract, such as offer, acceptance, and consideration.⁴⁷ One limitation on Congress’s spending power, and in contract law, is coercion.⁴⁸ If Congress intends to offer federal money in exchange for state compliance with new conditions, the states must “voluntarily and knowingly accept[] the terms of the ‘contract.’”⁴⁹ To ensure that state acceptance is voluntary and knowing, rather than coerced, Congress must provide the states with a “legitimate choice whether to accept the federal conditions in exchange for federal funds.”⁵⁰ In order for the states’ choice to be legitimate, that choice must be *real*, not merely theoretical.⁵¹ Otherwise, coercion will result.⁵²

Many of the spending programs that Congress contracts with the states to implement are heavily funded by federal money.⁵³ Many of these programs are also implemented mainly by the states.⁵⁴ Regardless of the significant role the states play in implementing these federal programs, the Supreme Court has consistently held that Congress may not compel the states to enact such legislation.⁵⁵ States are their own separate and independent sovereigns, and they must be able to govern that way without undue interference from the federal government.⁵⁶

However, neither the state sovereignty principle nor Congress’s coercion limitation necessarily means that Congress is prohibited from using its

46. *Id.* at 2602 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

47. *See id.* at 2602–03; *see also, e.g., Zemke v. City of Chi.*, 100 F.3d 511, 513 (7th Cir. 1996) (“The elements of a contract, taught like the ABC’s to first-year law students, are offer, acceptance, and consideration.”).

48. *See id.* at 2602.

49. *NFIB*, 132 S. Ct. at 2602 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.) (quoting *Pennhurst*, 451 U.S. at 17).

50. *Id.* at 2602–03.

51. *See id.*

52. *See id.*

53. *See* Chris Edwards, *Fiscal Federalism*, DOWNSIZING THE FED. GOV’T 1 (Feb. 2009), <http://www.downsizinggovernment.org/sites/downsizinggovernment.org/files/fiscal-federalism.pdf>. The Downsizing the Federal Government website is a project of the CATO Institute. *See generally* DOWNSIZING THE FED. GOV’T, <http://www.downsizinggovernment.org/> (last visited Mar. 20, 2013).

54. *See* Edwards, *supra* note 53, at 1.

55. *NFIB*, 132 S. Ct. at 2602 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.) (citing *New York v. United States*, 505 U.S. 144, 178 (1992)).

56. *Id.*

spending power to encourage or induce states to implement and oversee any federal programs that it thinks are beneficial to the general welfare of the nation. The Supreme Court has “long recognized that Congress may . . . grant federal funds to the States, and may condition such . . . grant[s] upon the States’ ‘taking certain actions that Congress could not [directly] require them to take.’”⁵⁷ One of the most common ways Congress induces the states to implement and oversee programs like Medicaid, for example, is by offering them federal money in exchange for compliance with the terms of the federal program it wants carried out.⁵⁸ For example, suppose Congress writes a bill that says to the states, “[H]ere is some money, but [you can only have it if you implement these policies] we think [are important].”⁵⁹ Based on those facts alone, this would be a clear case of mere constitutional inducement or encouragement because the states could simply decline the offer without losing anything.⁶⁰ However, Congress can create an issue when, in exchange for new conditions to a federal program, Congress not only offers states additional money but also *threatens* to stop providing the funding it currently distributes for that program. A condition like this would prompt further coercion analysis to test its constitutionality because that condition could possibly violate the basic principle that the “Federal Government may not compel the States to enact or administer a federal regulatory program.”⁶¹ This was one of the primary issues that the Supreme Court faced in *National Federation of Independent Business v. Sebelius*.⁶²

In *NFIB v. Sebelius*, Congress included a Medicaid expansion provision in the newly enacted Affordable Care Act.⁶³ This provision required states to dramatically increase their Medicaid obligations by expanding the number of needy individuals the original program covered.⁶⁴ However, Congress did more than say to the states, “If you expand your Medicaid programs to cover these new groups, then you can have all of this extra federal money.” Congress also said that, if the states refuse to cover the new groups, then “not only will we not give you any additional Medicaid money,

57. *Id.* at 2601 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999)).

58. Edwards, *supra* note 53, at 1.

59. Erin Ryan, *Spending Power Bargaining After Sebelius*, OUPBLOG (July 3, 2012, 10:30 AM), <http://blog.oup.com/2012/07/spending-power-bargaining-after-obamacare/> (essay commenting on the spending power implications of the plurality’s opinion).

60. The joint dissent might disagree with this conclusion. Depending on the size of the federal grant being offered, this example could constitute coercion under the joint dissent’s analysis. See discussion *infra* Part II.B.2.

61. *NFIB*, 132 S. Ct. at 2601 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

62. See *id.*

63. *Id.*

64. *Id.*

we will take away *all* of your original Medicaid funds in the future.”⁶⁵ The states argued that this was no longer mere encouragement or inducement but was actual coercion such that they essentially had no choice but to accept the Medicaid expansion in order to continue their original Medicaid programs.⁶⁶ Although the plurality emphasized that conditions that threaten other funds are not always coercive, it believed that the states had a point in their argument and that a situation like this prompted a coercion analysis.⁶⁷

To begin its discussion in *NFIB v. Sebelius*, the plurality first reiterated the contract and Spending Clause principles⁶⁸ discussed above.⁶⁹ Then, the plurality presented a new way for Congress’s offer to not be legitimate, and, thus, for coercion to result: “When, for example, [Congress’s new] conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.”⁷⁰ This version of coercion contains a two-part test: (1) whether the federal grant being threatened is *significant*, and (2) whether the new condition is *independent* from the current federal program.⁷¹

2. *Significance: The Amount of Money at Stake and the Amount of Reliance Involved*

The significance element of the two-part coercion test requires inquiry into the size of the threatened federal grant and the degree of reliance the states have on that grant.⁷² To explain what this means, the plurality reviewed the holding in the seminal case, *South Dakota v. Dole*.⁷³ In *Dole*, Congress passed a law that threatened to withhold five percent of state fed-

65. *See id.*

66. *Id.*

67. *NFIB*, 132 S. Ct. at 2603 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.). *See also* Bagenstos, *supra* note 10, at 869. As Professor Bagenstos explained, the Chief Justice “made clear that the determination that Congress has threatened to ‘terminate significant independent grants’ is the *trigger* for conducting a coercion analysis, not the *conclusion* of that analysis.” *Id.*

68. *NFIB*, 132 S. Ct. at 2602 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

69. *See* discussion *supra* Part II.A.1.

70. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.). This is not the only way Congress can engage in coercion. The words “for example” in the quote signify that there are other ways in which Congress could engage in coercion. However, the plurality did not elaborate on what those other ways could be. Rather, it was enough for the plurality to conclude that Congress’s use of the Medicaid expansion met at least one method of coercion, and, thus, was unconstitutional. *See id.*

71. *See id.* at 2604–06.

72. *See id.* at 2604.

73. 483 U.S. 203 (1987).

eral highway funding if the states did not raise their drinking age to twenty-one.⁷⁴ This was a type of situation that prompted a further coercion analysis because not only did Congress decline to offer additional money under the law, it threatened the states' future federal funds under the current highway program.⁷⁵ The Court made clear in *Dole* that for this type of financial inducement to be constitutional, it must give states a real choice, "not merely in theory but in fact."⁷⁶ The Court found that the states had a legitimate choice in whether to accept or reject the drinking age requirement because Congress threatened only five percent of state highway funding.⁷⁷ Because Congress was only threatening to revoke a small amount of federal funding paid to the states, this threat was merely "mild encouragement" to raise the drinking age.⁷⁸ In other words, while Congress clearly wanted the states to raise their drinking age and not relinquish any federal money, this was not coercion because, at the end of the day, the ultimate choice was still up to the states.⁷⁹ What mattered to the Court was the size of the federal grant at stake.⁸⁰ It found that five percent was simply not a significant enough amount of money to amount to coercion.⁸¹ In fact, if South Dakota chose to not raise its drinking age and lose five percent of its federal highway funds, it only stood to lose less than one half of one percent of its state budget at that time.⁸² Thus, the choice of "[w]hether to accept the drinking age change 'remain[ed] the prerogative of the States not merely in theory but in fact.'"⁸³

Although Congress provided the states with a real choice in *Dole*, it did not provide that same choice in *NFIB v. Sebelius*.⁸⁴ In fact, the plurality went so far as to call the Medicaid expansion provision "a gun to the head."⁸⁵ This analogy helped further explain what was meant all along by choice in *theory* versus choice in *fact*. In reality, you almost always have the free will to make a choice—even in a situation where you are robbed at gunpoint.⁸⁶ In

74. *Id.* at 205.

75. See discussion *supra* Part II.A.1.

76. *NFIB*, 132 S. Ct. at 2604–05 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.) (quoting *Dole*, 483 U.S. at 211–12).

77. *Id.* at 2604 (citing *Dole*, 483 U.S. at 211).

78. *Id.* (citing *Dole*, 483 U.S. at 211).

79. See *id.*

80. *Id.*

81. *Id.*

82. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.) (citing *South Dakota v. Dole*, 791 F.2d 628, 630, (8th Cir. 1986), *aff'd*, 483 U.S. 203 (1987)).

83. *Id.* (quoting *Dole*, 483 U.S. at 211–12).

84. *Id.*

85. *Id.*

86. See *id.* at 2605 n.12 ("Your money or your life' is a coercive proposition whether you have a single dollar in your pocket or \$500."). See also Richard Epstein, *Derailing the Medicaid Expansion: Chief Justice Roberts Gets This One Right*, *ADVANCING A FREE SOC'Y*

that situation, you could choose to either give up your money and save your life, or you could tell the robber no and potentially lose both your life and your money; however, at least in *theory*, the choice is still yours. Despite the fact that there is a choice in theory, the plurality still concluded that “‘your money or your life’” is in fact “a coercive proposition, whether you have a single dollar in your pocket or \$500.”⁸⁷ With either option, the chooser remains in a lose/lose situation, which raises the question: while you may have a choice in *theory*, is it really one in *fact*?

Like *Dole, NFIB v. Sebelius* answered this “real choice” question by inquiring into the size of the federal grant at stake.⁸⁸ Unlike in *Dole*, where South Dakota stood to lose only less than half of one percent of its state budget, any state that chose to opt out of the Medicaid expansion stood to lose *all* of its future federal Medicaid funding, which accounted for over twenty percent of the average state’s total budget.⁸⁹ Moreover, the federal government contributed a significant amount of money to each state’s Medicaid program.⁹⁰ One report revealed that federal funds covered fifty to eighty-three percent of the average state’s entire Medicaid budget.⁹¹ With this much of the states’ Medicaid programs being funded by the federal government, if Congress took *all* of the funding away, what would even be left of Medicaid? The fact that the states stood to lose such a large amount of money from their overall budgets and Medicaid programs did not sit well with the plurality. To the plurality, Congress’s threat to terminate *all* of the states’ Medicaid funds for failure to comply with the expansion amounted to “economic dragooning,” such that the states essentially had no real choice in fact.⁹²

(June 28, 2012, 10:22 PM), <http://www.advancingafreesociety.org/exclusive/topics/health-care/derailing-the-medicaid-expansion-chief-justice-roberts-gets-this-one-right/>; Mario Loyola, *The Supreme Court’s Ruling on Medicaid*, NAT’L REV. ONLINE (June 29, 2012, 5:08 PM), <http://www.nationalreview.com/corner/304474/supreme-courts-ruling-medicaid-mario-loyola>. Although both Mr. Loyola and Professor Epstein believe that the coercion line was once again drawn in the wrong place, they still found that the plurality ultimately made the right decision. Professor Epstein explained that there is a more sensible way to draw the line between inducement and coercion: “[I]f I promise you something that I own to get you to do what I would like, it is an inducement. If I threaten to take away something that you own, it is a threat.” Epstein, *supra*. According to Professor Epstein, it is the “initial allocation of property rights [that] matters[.]” and “it makes no sense to say that the robber who wants only 5 percent of your money for car fare has not coerced you.” *Id.*

87. *NFIB*, 132 S. Ct. at 2605 n.12 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

88. *See id.* at 2604.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 2604–05.

Additionally, implicit in the discussion of the significance element was the concept of reliance. For years now, the states had heavily relied on this large federal grant to fund their Medicaid programs.⁹³ Through the use of their federal money, “the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid.”⁹⁴ Thus, if a state chose to opt out of the expansion and lose all federal funds, efforts to structure a well-functioning Medicaid program would be futile.⁹⁵

The states’ heavy reliance coupled with their potential loss of significant federal funding assisted the plurality in concluding that Congress gave the states no real choice in fact.⁹⁶ Like the gun to the head analogy, the states could, against their will, expand their Medicaid programs as the Affordable Care Act provided or they could decline to do so and face losing what would essentially be their lives—a substantial amount of money that they relied on for years. They had a choice—at least in *theory*; however, either of these options leaves the chooser with no real choice in *fact*, and Congress cannot use its spending power to coerce the states into making such a choice.⁹⁷

The plurality wanted to make clear, however, that it was not taking the role of the states’ protective mother. It explained that the Court will always “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.”⁹⁸ In other words, the states are not children; they are adults and should be able to tell Congress no if they do not want to adopt a certain policy—large amount of money or not. After all, “States are separate and independent sovereigns. Sometimes they have to act like it.”⁹⁹ But here, there was more going on than the states just running to the Court for help because they could not possibly resist Congress’s dangling carrot.¹⁰⁰ This particular federal grant was so significant not only because of its size, but because the states had heavily relied on it.¹⁰¹ To take

93. See *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.); see also Bagenstos, *supra* note 10, at 870 (“But as the Chief Justice’s reference to the ‘loss’ of funds suggests, the amount of money at stake was not important in and of itself; it was important because states had come to rely upon federal Medicaid funds to provide a major portion of their revenues.”).

94. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

95. See *id.*

96. *Id.* at 2604–05.

97. *Id.*

98. *Id.* at 2603 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923)).

99. *NFIB*, 132 S. Ct. at 2603 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

100. See *id.*

101. See *id.* at 2604.

that grant away from the states now, if they did not accept Congress's terms, would be near Armageddon for most state budgets. To the states, that was no real choice—it was literally their money or their life. Thus, while the threat of withholding *all* of a state's funding in a heavily entrenched federal program will not always amount to coercion in and of itself, when coupled with significant reliance, Congress's condition is more likely coercive.¹⁰²

The significance of the threatened program is only one element of the new coercion test adopted by the plurality. The second element concerns the “independence” of that program from the new conditions being offered.¹⁰³

3. *Independence: Additional Condition or Completely Different Program?*

In determining whether the Medicaid expansion was coercive, the plurality ruled it was necessary to analyze whether the expansion was an independent program apart from the original Medicaid program.¹⁰⁴ This independence element is met when Congress creates a new condition that is independent and distinct from the original program Congress is purporting to modify, and Congress uses that program's grant as leverage to force the states to accept the new condition.¹⁰⁵

To better understand independence, it is first necessary to explain what is commonly referred to as the “germaneness test.”¹⁰⁶ This test is not an element of coercion.¹⁰⁷ Rather, it is a wholly separate limitation on Congress's spending power.¹⁰⁸ Under the germaneness test, any condition that Congress places on a federal grant must be reasonably related to the purpose of that expenditure.¹⁰⁹ In *Dole*, for example, Congress's condition met the germaneness test because the drinking age was “directly related to . . . safe interstate travel.”¹¹⁰ This additional limitation on Congress's spending power should not be confused with whether a condition is independent enough to constitute coercion. A condition may be germane or related to the purpose of a federal grant and simultaneously be independent of that grant as well, which was the case in *NFIB v. Sebelius*.¹¹¹ In *NFIB v. Sebelius*, the Medicaid

102. *See id.*

103. *See id.* at 2605–06.

104. *Id.*

105. *See NFIB*, 132 S. Ct. at 2605–06 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

106. *South Dakota v. Dole*, 483 U.S. 203, 208 n.3 (1987).

107. *Id.* at 207.

108. *Id.* at 208 n.3.

109. *See id.*

110. *Id.* at 208.

111. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2605–06 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.); *see also* Bagenstos *supra* note 10, at 918.

expansion was germane to the purpose of the original Medicaid program—healthcare coverage for the nation’s poor.¹¹²

At the same time, however, the plurality concluded that, in reality, the title of “expansion” was a mere label, and Congress created an entirely new program independent of the original Medicaid program.¹¹³ The original Medicaid program required states to provide medical assistance to “needy persons.”¹¹⁴ Specifically, the program targeted “four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children.”¹¹⁵ Through the expansion, Congress sought to expand these categories of needy people to include “*all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line.”¹¹⁶ The government argued that Congress reserved its right to make this change because the original Medicaid agreement with the states provided that Congress would have the power to “alter” or “amend” the Medicaid program as it developed.¹¹⁷ According to the government, “alter” or “amend” is exactly what Congress did.¹¹⁸

Justice Ginsburg, one of the two dissenting Justices on the spending clause issue, agreed with the government’s position.¹¹⁹ She explained that the Medicaid expansion was not an independent program but was simply a mere alteration of the original Medicaid agreement.¹²⁰ Thus, although Congress originally determined that only four particular categories of individuals qualified as “needy persons” eligible for Medicaid, now Congress

Chief Justice Roberts did not expressly state that the expansion was germane to the purpose of Medicaid. However, he implied that the expansion met the germaneness test when he analogized it to the facts of *Dole*. See *NFIB*, 132 S. Ct. at 2604–06 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.). Despite the Chief Justice’s lack of mention, Justice Ginsburg confirmed that the expansion was germane to Medicaid in the dissent. *Id.* at 2634–35 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (joined by Sotomayor, J.).

112. See *NFIB*, 132 S. Ct. at 2634–35 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (joined by Sotomayor, J.) (“The ACA, in contrast, relates solely to the federally funded Medicaid program . . . [F]ederal funds will be spent on health care for the poor in furtherance of Congress’ present perception of the general welfare.”).

113. *Id.* at 2606 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

114. *Id.* at 2605.

115. *Id.* at 2605–06.

116. *Id.* at 2601.

117. See *id.* at 2605.

118. See *NFIB*, 132 S. Ct. at 2605 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

119. See *id.* at 2635–36 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (joined by Sotomayor, J.).

120. See *id.* at 2636–39. Justice Ginsburg argued that the states expressly agreed that Congress was allowed to “alter” or “amend” the Medicaid program, and, furthermore, the states are accustomed to Congress changing programs in this way. See *id.*

deemed “needy persons” should include those four groups *and* nonelderly people with incomes below 133% of the poverty level.¹²¹

Despite the dissent’s argument, the plurality found the Medicaid expansion met the independence element.¹²² Congress created a new condition, the Medicaid expansion, which was independent and distinct from the original Medicaid program; Congress used the original Medicaid grant as leverage to force the states to accept the expansion.¹²³ Rather than simply expanding the boundaries of the four original categories, the expansion turned Medicaid into “an element of a comprehensive national plan to provide universal health insurance coverage.”¹²⁴ To illustrate, the plurality referred to the manner in which Congress structured the expansion. In *Dole*, for example, the drinking age condition was independent of the highway program because it “was not a restriction on how [South Dakota’s] highway funds . . . were to be used.”¹²⁵ Similarly, the Medicaid expansion did not restrict how the states were allowed to use their original Medicaid funding. In fact, Congress provided that the new recipients under the expansion would not even

121. *Id.* The Chief Justice explained that he was not prepared to conclude that the Medicaid expansion was a real expansion simply because Congress deemed it so. *Id.* at 2605 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.). However, Justice Ginsburg noted that “Courts owe a large measure of respect to Congress’ characterization of the grant programs it establishes[,]” and “Congress has broad authority to construct or adjust spending programs to meet its contemporary understanding of “the general Welfare.” *Id.* at 2636 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (joined by Sotomayor, J.). After analyzing both the Chief Justice and Justice Ginsburg’s arguments, it appears that the independence element may be even more difficult to determine than the significance element. It seems this decision came down to hair splitting. On the one hand, the Medicaid expansion was simply a further expansion of what Congress considered “needy persons,” and, thus, Congress simply did what it has always been allowed to do—amend the law to include that new group. On the other hand, the expansion also looks like such a significant transformation of the original Medicaid program that it becomes a different healthcare program. The Chief Justice emphasized this point in the plurality opinion: “It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.” *Id.* at 2606 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.). In the end, however, it was the Chief Justice’s conclusion that carried the day.

122. *See id.* at 2606 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

123. *Id.*

124. *NFIB*, 132 S. Ct. at 2606 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

125. Bagenstos, *supra* note 10, at 918. The Court in *Dole* did not expressly conclude that the drinking age condition was independent of South Dakota’s highway funding. Chief Justice Roberts made this point about the facts of *Dole* for the first time in *NFIB v. Sebelius*. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan). The likely reason behind the Court’s lack of independence discussion in *Dole* is that the threatened highway funds were so obviously insignificant that it would be unnecessary to elaborate on the coercion requirement any further.

be funded with money from the original program.¹²⁶ Rather, “Congress created a separate funding provision to cover the costs” of the newly eligible recipients.¹²⁷ In addition to separate funds, the Medicaid expansion was independent of the original Medicaid program because “[t]he conditions on use of the different funds [were] also distinct.”¹²⁸ For example, persons that were newly eligible under the expansion would receive less comprehensive coverage than persons under the current Medicaid program.¹²⁹ According to the plurality, this was much more than a mere shift in degree—it was “a shift in kind”¹³⁰—and when Congress creates an independent program like this, it may not coerce acceptance by using the states’ participation in a separate program as leverage.¹³¹

Moreover, it was irrelevant that the original Medicaid agreement said Congress could “alter” or “amend” the program, because it was a completely different program.¹³² Allowing Congress to revoke all of a state’s original

126. *NFIB*, 132 S. Ct. at 2606 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 2605.

131. *Id.* at 2607.

132. *See NFIB*, 132 S. Ct. at 2606 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.). Chief Justice Roberts, writing for the plurality, took issue with the government’s argument that the states were put on notice with the language “alter” or “amend.” One of the limitations on Congress’s spending power is that all “conditions must be unambiguous so that a State at least knows what it is getting into” when it accepts federal conditions and money. *Id.* at 2659 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Although Congress’s “spending power is broad, it does not include surprising participating States with post-acceptance or “retroactive” conditions.” *Id.* at 2606 (Roberts, C.J.) (plurality opinion) (joined by Breyer and Kagan, JJ.) (quoting *Pennhurst*, 451 U.S. at 25.). According to the plurality, “[a] State could [have] hardly anticipate[d] that . . . ‘alter’ or ‘amend’ . . . included the power to transform [the Medicaid program] so dramatically.” *Id.* Justice Ginsburg, writing for the dissent, took issue with this conclusion. While she agreed that “Congress must provide clear notice of conditions it might later impose[,]” the plurality had gone too far with its understanding of notice. *Id.* at 2637 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (joined by Sotomayor, J.). Under the plurality’s understanding of notice, at the law’s inception in 1965, Congress should have warned the states of any and every possible future change it would make to Medicaid. *Id.* Not only is this impossible, but, as Justice Ginsburg explained, past “decisions do not support such a requirement.” *Id.* While some might feel strongly, one way or the other, about which opinion was correct in this instance, the notice requirement may be irrelevant. It is hard to imagine that the plurality would have reversed its conclusion on the independence element of coercion if Congress had simply written in the original Medicaid agreement, “We have the right to engage in coercion in the future.” The plurality held that Congress may not use a current spending program as leverage to force states to accept some other separate and independent program. Thus, it is unlikely that the plurality would have accepted an agreement between Congress and the states that allowed Congress to use this type of leveraging technique. With or without notice, the Medicaid ex-

Medicaid funds if it did not implement a new and independent Medicaid program, would be allowing Congress to engage in coercion—period.¹³³ Thus, based on the significant size of the original Medicaid program and Congress’s use of leveraging to force the states to implement a completely independent healthcare program, it was not hard for the plurality to conclude that Congress was engaging in coercion, and, therefore, exceeded its power under the spending clause.¹³⁴

B. The Joint Dissent

Justices Scalia, Thomas, Kennedy, and Alito were the remaining four Justices that voted in favor of holding that the Medicaid expansion exceeded Congress’s spending power under the constitution.¹³⁵ While the plurality found the expansion coercive based on the independence of the expansion and the significant size of the Medicaid grant, the joint dissenters primarily focused on the latter, and, in turn, created a much broader coercion analysis.¹³⁶ The joint dissenters expanded both ways Congress’s conditions could prompt a coercion analysis and the scope of what constitutes coercion.¹³⁷ Before doing this, however, there were three important limitations on Congress’s spending power that were first necessary to address.¹³⁸

1. *The Joint Dissent’s Setup for its Coercion Analysis*

The joint dissenters began their discussion of the structural limitations on Congress’s spending clause power by explaining three important requirements for Congress’s use of conditions: (1) the “conditions must be unambiguous so that a State at least knows what it is getting into”; (2) the “[c]onditions must . . . be related ‘to the federal interest in particular national projects or programs’”; and (3) “while Congress may seek to induce States to accept conditional grants, Congress may not cross the ‘point at which pressure turns into compulsion, and ceases to be inducement.’”¹³⁹ Of

pansion would still be coercive, and Congress cannot get away with violating the Constitution—even if it gives the proper advance notice that it plans to do so. My thanks to Professor Joshua Silverstein of UALR William H. Bowen School of Law for helping me develop this argument. Interview with Joshua M. Silverstein, Professor of Law, UALR William H. Bowen School of Law, in Little Rock, Ark. (Jan. 25, 2013).

133. *Id.* 2606–07 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

134. *See id.* at 2604–07.

135. *Id.* at 2666–68 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

136. *See infra* Part II.B.2.

137. *See infra* Part II.B.2.

138. *See infra* Part II.B.1.

139. *NFIB*, 132 S. Ct. at 2659 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (citations omitted).

these three limitations, only the third raised a serious concern.¹⁴⁰ Like the plurality, the joint dissent focused on the third requirement because it addressed the central question of whether Congress engaged in coercion with its use of the Medicaid expansion.¹⁴¹ Thus, the joint dissent's discussion of the first two requirements was brief.

The second requirement describes what this note previously referred to as the “the germaneness test.”¹⁴² This test requires that federal conditions be related to a particular purpose of their federal expenditure.¹⁴³ The joint dissent only briefly mentions the germaneness test.¹⁴⁴ Perhaps the reasoning behind this requirement's lack of discussion in both the plurality and joint dissent's opinions was that it was so obviously met. It would be hard to dispute that the Affordable Care Act's Medicaid expansion was not related to one of the main purposes for which Medicaid funds are expended—healthcare coverage for America's poor. Thus, while it may be necessary to address this point when considering how a post-*NFIB v. Sebelius* legal landscape applies to other federal spending programs, it is understandable why neither the plurality nor the joint dissent thought it was necessary to discuss germaneness any further than a mere mention.

The first requirement, unambiguous conditions, was also not discussed much further than a mere mention. Unlike the plurality, which used this requirement to lead into a discussion of the third requirement's (coercion) independence element,¹⁴⁵ the joint dissent did not inquire into it at all. As established earlier, the only requirement that the plurality and joint dissent thought was relevant was the third requirement, coercion.¹⁴⁶

Although the plurality and joint dissent agreed that coercion was the only important requirement to fully address, the opinions differed in their analysis of that requirement. In particular, the joint dissent's coercion analysis differed both qualitatively and quantitatively from the plurality in many ways.¹⁴⁷ It broadened not only the ways Congress's conditions could prompt a coercion analysis, but also the scope of what constitutes coercion.¹⁴⁸

140. *See id.* at 2660.

141. *See id.*

142. *See supra* Part II.A.3.

143. *E.g.*, *South Dakota v. Dole*, 483 U.S. 203, 208 n.3 (1987).

144. *See NFIB*, 132 S. Ct. at 2659 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

145. *See id.* at 2605 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

146. *See id.* at 2660 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

147. *See infra* Part II.B.2.

148. *See infra* Part II.B.2.

2. *The Joint Dissent's Significantly Broader Coercion Analysis*

The joint dissent's coercion analysis differed from the plurality's in many ways. To illustrate their differences, the joint dissent offered the following hypothetical:

Suppose, for example, that Congress enacted legislation offering each State a grant equal to the State's entire annual expenditures for primary and secondary education. Suppose also that this funding came with conditions governing such things as school curriculum, the hiring and tenure of teachers, the drawing of school districts, the length and hours of the school day, the school calendar, a dress code for students, and rules for student discipline. *As a matter of law*, a State could turn down that offer, but if it did so, its residents would not only be required to pay the federal taxes needed to support this expensive new program, but they would also be forced to pay an equivalent amount in state taxes. And if the State gave in to the federal law, the State and its subdivisions would surrender their traditional authority in the field of education.¹⁴⁹

The joint dissent concluded that a situation like the hypothetical would constitute coercion.¹⁵⁰ This opinion demonstrates a much broader version of coercion than the plurality's version. Prior to the creation of the Medicaid expansion, all of the states had previously accepted, and were currently executing, the original Medicaid program.¹⁵¹ Furthermore, Congress's condition, the Medicaid expansion, contained both an offer and a threat: if the states choose to accept the expansion, they would gain additional funding, but if the states choose to decline the expansion, they would lose future funding under the original Medicaid program.¹⁵² None of these characteristics were present in the hypothetical.

First, the joint dissent extended the manner in which Congress's conditions could prompt a coercion analysis. Through this hypothetical, the dissent opened the door to the possibility that Congress's first-time offer of a new program could prompt a coercion analysis.¹⁵³ Notice that in this hypothetical, Congress is offering the states a completely new education program for the first time.¹⁵⁴ Additionally, a threat of withholding future funding is not required to prompt a coercion analysis under the joint dissent's hypo-

149. *NFIB*, 132 S. Ct. at 2662 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

150. *Id.* at 2661–62.

151. *See Medicaid Enrollment by State*, MEDICAID.GOV, <http://medicaid.gov/Medicaid-CHIP-Program-information/By-State/By-State.html> (last visited Mar. 14, 2013).

152. *NFIB*, 132 S. Ct. at 2601 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

153. *See id.* at 2662 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

154. *See id.*

thetical.¹⁵⁵ In the hypothetical, Congress is only offering education funding to the states and not threatening to take anything away.¹⁵⁶ Thus, under the joint dissent's reasoning, Congress's new condition could prompt a coercion analysis when it *either* threatens to revoke the states' significant future funding *or* when it merely offers the states a large amount of additional funding.¹⁵⁷ Once it is established that a fact pattern prompts a coercion analysis, an actual coercion test should be applied next. The joint dissent modified this too, and in two different ways.

The first way that the joint dissent modified the plurality's coercion test was by disregarding the plurality's "independence" element and focusing entirely on what the plurality called "significance."¹⁵⁸ Thus, it seemed unimportant to the joint dissent whether Congress was leveraging a state's participation in one program to force it to participate in another program.¹⁵⁹ Rather, the size—and *only* the size—of the federal grant was crucial.¹⁶⁰ In other words, the joint dissent found only what the plurality termed "significance" to be relevant.¹⁶¹

The second, and final, way that the joint dissent modified the plurality's coercion test was by developing a broader understanding of the plurality's notion of significance. The joint dissent's hypothetical shows that, unlike the plurality, it did not find the reliance factor important. In the hypo-

155. *See id.*

156. *See id.*

157. *See id.* at 2662. I separate the joint dissent's opinion in this manner in an attempt to clarify the differences between the joint dissenters and the plurality. A mere offer, in and of itself, will not prompt a coercion analysis. The offer would need to be coupled with a significant amount of funds for a coercion analysis to be necessary. *See infra* Part II.B.3.

158. *See NFIB*, 132 S. Ct. at 2661–64 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting). The joint dissent never specifically stated that it found the plurality's "independence" element irrelevant. Rather, the joint dissent simply never mentioned the element in its coercion analysis. Additionally, unlike the plurality, the joint dissent never flat-out referred to its coercion test as requiring a "significance" element. Nevertheless, the joint dissent's explanation of coercion is similar enough to the plurality's significance element that it is proper to analogize the two. *Compare id.*, with *id.* at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.) (both opinions discussing the coerciveness of a program in relation to the size of the federal grant at issue).

159. Although the joint dissent concluded that the Medicaid expansion was coercive without the plurality's "independence" element, this does not necessarily mean that the joint dissent would entirely disregard this element in future coercion analyses. It is quite possible that the joint dissent would use this element in the future to find another federal program coercive. Perhaps if a situation like *NFIB* arose again, but this time the program was not as significant as Medicaid, then the joint dissent might refer to the plurality's independence element for guidance. However, as I explain in Part II.C, while this might be the case for this element in the future, the joint dissent certainly does not require this element today.

160. *See NFIB*, 132 S. Ct. at 2661–64 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

161. *See id.*; *see also supra* text accompanying note 153.

thetical, Congress had never previously offered the program or money at issue.¹⁶² Rather, the hypothetical sets up a first time offer and acceptance situation between Congress and the states, and, therefore, reliance was not even an issue.¹⁶³ What the joint dissent centered its significance analysis on instead were the possible tax consequences the states would bear if they declined Congress's offer.¹⁶⁴ Like the plurality, the joint dissent reiterated that Congress must give states a legitimate choice in whether to accept or decline a federal program, and that choice must be "*not merely in theory but in fact.*"¹⁶⁵ In the hypothetical, at least in *theory*, the states could either decline or accept Congress's offer. If a state chose to decline the offer, that state's citizens would still bear the burden of paying federal taxes to support the education program for the other states that chose to accept the program.¹⁶⁶ However, if that state is still required to pay the heavy tax price for declining the program anyway, then what choice does it really have?¹⁶⁷ The other option would be to accept and implement a program it never wanted from the beginning.¹⁶⁸ Again, is that a *real* choice? Allowing the federal government to engage in a situation like this would essentially put the states in a "damned if you do, damned if you don't" situation—i.e., coercion. Using the plurality's terms, the joint dissent would call a similar hypothetical situation, "a gun to the head," which exceeds Congress's spending power in the Constitution.¹⁶⁹

As Justice Ginsburg pointed out, however, "[a] State . . . has no claim on the money its residents pay in federal taxes."¹⁷⁰ While the joint dissent acknowledged that her point was "true as a formal matter[.]" as a practical matter, her point falls flat.¹⁷¹ According to the joint dissent, "unless Justice Ginsburg thinks that there is no limit to the amount of money that can be squeezed out of taxpayers, heavy federal taxation diminishes the practical ability of States to collect their own taxes."¹⁷² In other words, where does

162. *NFIB*, 132 S. Ct. at 2662 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

163. *Id.*

164. *Id.* at 2662–64.

165. *Id.* at 2661 (alteration in original) (quoting *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987)).

166. *Id.* at 2661–62.

167. *Id.*

168. *NFIB*, 132 S. Ct. at 2661–62 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting). Justice Scalia, writing for the joint dissent, notes that it is also important for the Court to disallow a situation like the hypothetical because Congress would be coercing the states into accepting its policies in an area that has been traditionally left up to states. *Id.*

169. *Compare id.* (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting), *with id.* at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

170. *Id.* at 2640 n.26 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (joined by Sotomayor, J.).

171. *Id.* at 2662 n.13 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting),

172. *Id.*

Justice Ginsburg think the states are going to turn for money if their own citizens have already been tapped out?

Therefore, regardless of any leveraging by Congress, and regardless of any state reliance on a federal program, when the government offers or threatens to withhold a federal grant that is so large that a refusal of it would result in a huge tax increase, there is a strong case that coercion is present.¹⁷³ Once the joint dissent established its version of coercion, it then went on to explain why the Medicaid expansion clearly met this meaning.¹⁷⁴

3. *Why the Affordable Care Act's Medicaid Expansion is Coercive: Size*

Acknowledging the difficulty in determining when Congress has crossed the line from enticement to coercion, the joint dissent noted, “[C]ourts should not conclude that legislation is unconstitutional . . . unless the coercive nature of an offer is unmistakably clear.”¹⁷⁵ However, if it is not clear that Congress crossed the line into coercion in this case, “then there is no such [anticoercion] rule.”¹⁷⁶ Using its own coercion analysis, the joint dissent found the threatened Medicaid grant significant.¹⁷⁷ The reasoning behind this finding was the grant’s size and detrimental tax consequences.¹⁷⁸ Any state that declined the expansion and lost its original Medicaid grant would be unable to compensate its Medicaid program in state tax revenues.¹⁷⁹ Of course, the states could always raise additional revenue through taxation to fund their own Medicaid programs; however, this was not a *real* option.¹⁸⁰ The joint dissent explained that “Medicaid has long been the largest federal program of grants to the States[.]” and that “[t]he States devote a larger percentage of their budgets to Medicaid than to any other item.”¹⁸¹ For example, Arizona “commits 12% of its state expenditures to Medicaid, and relies on the Federal Government to provide the rest.”¹⁸² In fact, if Arizona lost its original federal Medicaid funding, it would “have to commit an additional 33% of all its state expenditures to fund an equivalent state pro-

173. *Id.* at 2661–62.

174. *See NFIB*, 132 S. Ct. at 2662–66 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

175. *Id.* at 2662.

176. *Id.*

177. *Id.* at 2662–64.

178. *Id.*

179. *Id.*

180. *See NFIB*, 132 S. Ct. at 2662 n.13 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

181. *Id.* at 2662–63.

182. *Id.* at 2663.

gram[,]” which would result in Arizona having “to allocate 45% of its annual expenditures for that one purpose.”¹⁸³

Moreover, not only would a state have to pick up the slack with its own revenues to cover its significantly depleted Medicaid program, the state would still be required to follow other federal laws and fund those laws entirely on its own.¹⁸⁴ One example of this that the joint dissent thought was significant was the Emergency Medical Treatment and Active Labor Act (EMTALA).¹⁸⁵ This law requires hospitals to treat any indigent patient that comes into their emergency room needing assistance.¹⁸⁶ With many of these indigent patients being covered by Medicaid, how could the government realistically expect a state to comply with EMTALA without any federal funding?

With such a large amount of money at stake, the states could not seriously refuse the expansion.¹⁸⁷ They were simply not given a real choice in the matter.¹⁸⁸ Rather, Congress put the states in a “damned if you do, damned if you don’t” situation with the Medicaid expansion, which according to the joint dissent, constituted coercion.

Additionally, the joint dissent found the Medicaid expansion coercive because Congress *knew* of the threatened Medicaid grant’s significance.¹⁸⁹ According to the joint dissent, Congress really showed its hand when it wrote the expansion because it crafted it in a way that practically admitted the states had no choice.¹⁹⁰

4. *Why the Affordable Care Act’s Medicaid Expansion is Coercive: Congress Admitted there was No Choice*

The original Medicaid grant that Congress threatened to terminate was significant not only because it would result in an enormous loss to the states, but also because there was evidence that Congress *knew* how significant the potential loss of funding was.¹⁹¹ Although this was not a separate factor in and of itself, the joint dissent explained that the way Congress structured the Medicaid expansion was further evidence of significance.¹⁹² “The stated goal of the [Affordable Care Act] is near-universal health care coverage.”¹⁹³

183. *Id.*

184. *Id.* at 2664.

185. *Id.*; see generally 42 U.S.C. § 1395dd (2006 & Supp. V 2011).

186. 42 U.S.C. § 1395dd.

187. *NFIB*, 132 S. Ct. at 2661–64 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

188. *Id.*

189. *See id.* at 2664–66.

190. *Id.*

191. *See id.*

192. *Id.*

193. *NFIB*, 132 S. Ct. at 2664 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

However, if a state actually chose to opt out of the expansion, where would persons whose income is below the federal poverty line and who could not afford private insurance go for health care coverage?¹⁹⁴ Moreover, where would those groups who were eligible for the original Medicaid program go if the states that opted out of the expansion could not afford to keep the original program running on their own?¹⁹⁵ There was simply no legitimate back-up plan for these vulnerable groups to turn to for health care coverage.¹⁹⁶ True, none of those people would be required to pay the penalty for not having health insurance; however, that still would not change the fact that those individuals would be uninsured.¹⁹⁷ Thus, why would Congress ever allow the primary goal of its legislation to be frustrated so easily? According to the joint dissent, there was no way Congress would seriously allow this to happen, and, in fact, that is precisely why Congress chose to write the Affordable Care Act the way that it did—a way in which states had no real choice.¹⁹⁸

The government attempted to defend itself by asserting that Congress was merely offering states an “exceedingly generous” gift with the expansion; however, the joint dissent did not buy that explanation.¹⁹⁹ To the contrary, if Congress was being so generous, then why the need for the threatening statutory language providing that the states would lose *all* of their Medicaid funds if they refused the expansion?²⁰⁰ Rather than threatening the states, Congress could have simply offered them new funding and conditioned their acceptance of it on compliance with the Medicaid expansion’s terms.²⁰¹ According to the joint dissent, the expansion was not tailored in that way because Congress never wanted to give the states a choice.²⁰²

Furthermore, the joint dissenters found the expansion was not a generous gift at all. According to the joint dissent, there were many logical reasons why a state would want to reject this so-called “exceedingly generous” gift.²⁰³ For example, although the government agreed that it would pay 100% of the expansion’s costs, after 2019, that percentage would drop to 90%.²⁰⁴ While this ten percent drop would still require the government to

194. *See id.* at 2665.

195. *See id.*

196. *Id.*

197. *Id.*

198. *Id.* (“These features of the [Affordable Care Act] convey an unmistakable message: Congress never dreamed that any State would refuse to go along with the expansion of Medicaid. Congress well understood that refusal was not a practical option.”).

199. *NFIB*, 132 S. Ct. at 2666 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

pay the majority of the expansion's costs, the states would still financially suffer as a result. To illustrate, after this ten percent drop occurred, state spending would be "projected to increase by at least \$20 billion."²⁰⁵ Considering the fact that many states are already running at significant budget deficits, it was not difficult to see why an additional \$20 billion loss to those states would not be regarded as a "generous gift."²⁰⁶ Thus, because this serious downside for the states conflicted with Congress's strong desire to achieve its goal of near-universal health care coverage, Congress obviously wrote the expansion in a way that would give the states no real option but acceptance.²⁰⁷

All of this evidence of Congress's intent cemented the joint dissent's conclusion that the funding at stake was significant enough to constitute coercion.²⁰⁸ In the minds of the joint dissenters, Congress all but flat-out admitted it was coercing the states into expanding their Medicaid programs.²⁰⁹ Thus, this additional evidence of significance coupled with the size of the enormous loss in funding at stake led to the conclusion that the Medicaid expansion was an unconstitutional use of Congress's spending power.²¹⁰

Although the joint dissent and the plurality differ in their analysis, they both still contribute to the ultimate holding of *NFIB v. Sebelius*. However, when it comes to which opinion is binding, only one of the two opinions can control.

C. Choosing an Opinion that Controls

Although seven Justices concluded that the Medicaid expansion was coercive, those seven Justices were split between the two different coercion opinions—the plurality and the joint dissent.²¹¹ Chief Justice Roberts, Justice Breyer, and Justice Kagan signed on to the plurality,²¹² while Justices Scalia, Thomas, Alito, and Kennedy signed on to the joint dissent.²¹³ The final two remaining Justices that disagreed entirely with the other seven, and found

205. *NFIB*, 132 S. Ct. at 2666 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

206. *See id.*

207. *See id.*

208. *Id.*

209. *See id.* ("In sum, it is perfectly clear from the goal and structure of the ACA that the offer of the Medicaid Expansion was one that Congress understood no State could refuse.")

210. *See id.* at 2661–66.

211. *See NFIB*, 132 S. Ct. at 2642.

212. *Id.* at 2576 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

213. *See id.* at 2642, 2666–67 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

that the Medicaid expansion was not coercive, were Justice Ginsburg and Justice Sotomayor.²¹⁴

Out of the two possible controlling opinions, the lower courts will likely follow the plurality's opinion. Although Chief Justice Roberts, Justice Breyer, and Justice Kagan differed from Justices Ginsburg and Sotomayor by finding the Medicaid expansion coercive, all five of those Justices ultimately concluded that the expansion should remain in place and that the states should be provided with the opportunity to accept or reject the provision.²¹⁵ In contrast, the four joint dissenters would not have given the states this opportunity because they invalidated the entire Affordable Care Act.²¹⁶ Furthermore, because the joint dissent's opinion is much broader in scope than the plurality's opinion, it essentially encompasses the plurality's narrower opinion.²¹⁷ Thus, we can anticipate that those seven Justices would strike down any law that is unconstitutional under the plurality opinion, but only the four dissenters would strike down a law under the pure significance test for coercion articulated in the joint dissent.²¹⁸ Finally, because the other two dissenting Justices, Justices Ginsburg and Sotomayor, did not even find the expansion coercive, we can assume that if the three Justices of the plurality opinion upheld a law as constitutional under their analysis, then Justices Ginsburg and Sotomayor would also find that law constitutional.²¹⁹ Therefore, the better view is that the plurality opinion is the governing law, and going forward, lower courts that want to avoid reversal on a spending clause issue should apply the plurality's opinion in *NFIB v. Sebelius*.

III. IMPLICATIONS FROM *NFIB v. SEBELIUS*

Since the Supreme Court's holding in *National Federation of Independent Business v. Sebelius*,²²⁰ many have questioned whether its holding will remain limited to the uniquely large and entrenched Medicaid program or whether it will be looked back on as D-Day for Congress's spending power.²²¹ Because the plurality opinion should be the controlling opinion for lower courts, the more likely answer is the former. While the plurality did

214. See *id.* at 2609 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (joined by Sotomayor, J.).

215. See *id.* at 2607 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.); *id.* at 2641 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (joined by Sotomayor, J.); see also Bagenstos, *supra* note 10, at 866.

216. *NFIB*, 132 S. Ct. at 2667 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting); see also Bagenstos, *supra* note 10, at 866.

217. Bagenstos, *supra* note 10, at 866.

218. *Id.* at 867–68.

219. See *id.*

220. 132 S. Ct. 2566.

221. See sources cited *supra* note 23.

not give us the clearest of coercion tests, it at least gave us something to work with: If Congress threatens to withhold a *significant* amount of a state's federal funding in a heavily entrenched government program unless that state implements its new *independent* program, Congress has crossed the constitutional line from inducement to coercion.²²² To determine whether the threatened federal funding meets the significance element of *NFIB v. Sebelius*, it is necessary to examine the size of the federal grant at stake and how reliant the states are on that grant in relation to its size.²²³ To determine whether Congress's new condition is such a meaningful departure from the original program that it meets the independence element, it is necessary to analyze the kinds of changes Congress is making and how they govern the use of the federal funds at stake.²²⁴

This section of the note will apply the two coercion elements from the plurality opinion to three different laws under which Congress has threatened to withhold funding from the states if they do not comply with new conditions. The first law that this section will analyze is the No Child Left Behind Act (NCLB),²²⁵ which requires "[s]tates to implement statewide accountability systems [to] cover[] all public schools and students."²²⁶ The next law that this section will analyze is the Clean Air Act (CAA)²²⁷—a law that "requires states and local communities to implement programs that help them meet national pollution limits."²²⁸ The final law that this section will analyze is "Megan's Law," which requires states to report information about registered child sex offenders to certain agencies in order to receive federal law enforcement funding.²²⁹ Analysis of each of these laws using the plurality's opinion will show that although these three laws could potentially be vulnerable under any interpretation of the plurality's coercion test, a state's chance at successfully challenging any of these laws is still quite low.

222. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

223. *See id.*

224. *See id.* at 2605–06.

225. *See generally* No Child Left Behind Act, 20 U.S.C. §§ 6301–7941 (2006 & Supp. V 2011).

226. Allison Quick, Briefing Paper No. 19, *Legal Limits on Conditional Spending Including Recent Challenges to No Child Left Behind*, HARV. LAW SCH. 2 (May 2, 2006), http://www.law.harvard.edu/faculty/hjackson/NoChild_19.pdf (Harvard Law Sch. Fed. Budget Policy Seminar, Briefing Paper No. 19).

227. *See generally* Clean Air Act, 42 U.S.C. §§ 7401–7671a (2006 & Supp. V 2011).

228. J. Lester Feder & Darren Samuelsohn, *The Medicaid Ruling's Ripple Effect*, POLITICO (July 3, 2012, 11:59 AM), http://www.politico.com/news/stories/0712/78091_Page2.html.

229. *See* 42 U.S.C. §§ 16921, 16925 (2006).

A. The No Child Left Behind Act

The No Child Left Behind Act of 2001 (NCLB) was enacted “to increase the proficiency of students in underachieving school districts”²³⁰ by strengthening state accountability systems.²³¹ NCLB has been said to have “changed the traditional role of the federal government in education.”²³² The Supreme Court has even called NCLB “a dramatic shift in federal educational policy.”²³³ Due to the holding in *NFIB v. Sebelius*, NCLB is now more vulnerable to an attack under the spending clause than ever before.

Because of the ever-evolving role that the federal government has played in state primary and secondary education policies, it was only a matter of time before Congress enacted something like NCLB. In 1980, Congress and then-President Jimmy Carter converted the original 1867 Department of Education into a cabinet-level department.²³⁴ Since then, the role of the federal government in state education has continued to grow.²³⁵ During the Cold War in 1958, “[t]o help ensure that highly trained individuals would be available to help America compete with the Soviet Union in scientific and technical fields,” Congress passed its first comprehensive education legislation: The National Defense Education Act (NDEA).²³⁶ Then, in 1964, while still battling the Cold War, the United States chose to take on another war—“The War on Poverty.”²³⁷ To fight this War on Poverty, Congress enacted the Elementary and Secondary Education Act (ESEA).²³⁸ The largest funding program that Congress created under ESEA was Title I.²³⁹ Congress designed Title I with the purpose of “provid[ing] financial assistance . . . to local educational agencies [that] serv[ed] areas with concentrations of children from low-income families; and . . . expand[ing] and improv[ing] their educational programs by various means . . . which contribute[d] particularly

230. Andrew G. Caffrey, Note, *No Ambiguity Left Behind: A Discussion of the Clear Statement Rule and the Unfunded Mandates Clause of No Child Left Behind*, 18 WM. & MARY BILL RTS. J. 1129, 1131 (2010).

231. *Id.* at 1130; Quick, *supra* note 226, at 2.

232. Quick, *supra* note 226, at 19.

233. *Horne v. Flores*, 557 U.S. 433, 461 (2009).

234. *E.g.*, *The Federal Role in Education*, ED.GOV, <http://www2.ed.gov/about/overview/fed/role.html> (last visited Jan. 9, 2013).

235. Quick, *supra* note 226, at 17.

236. *The Federal Role in Education*, *supra* note 234.

237. See Robert Siegel, *Lyndon Johnson's War on Poverty*, NPR (Jan. 8, 2004, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=1589660>.

238. See, *e.g.*, *The Federal Role in Education*, *supra* note 234.

239. Caffrey, *supra* note 230, at 1133.

to meeting the special educational needs of educationally deprived children.”²⁴⁰

However, after Congress reauthorized ESEA in 1988, it realized that Title I funding was only reaching twenty percent of the nation’s eligible students.²⁴¹ Congress determined this was the cause of the “continuing achievement gap between students of different socio-economic, racial, ethnic, and language backgrounds,” and, therefore, Congress took a bolder step with its education policies.²⁴² “[C]onsistent with its overarching theme of helping disadvantaged and underfunded schools, students, and parents alike[.]”²⁴³ Congress reauthorized Title I of ESEA as NCLB in 2002.²⁴⁴ By reauthorizing the ESEA into NCLB, Congress required states to comply with a number of new conditions in order for them to continue receiving federal education funds under Title I.²⁴⁵ The centerpiece for all of these new NCLB conditions was accountability.²⁴⁶ Congress wanted to demonstrate student progress through accountability reforms, rather than “focusing on how much money school districts spend on each child or ‘dictating funding levels.’”²⁴⁷ As Justice Sutton stated in his concurring opinion in *School District of the City of Pontiac v. Secretary of the United States Department of Education*,²⁴⁸

[T]he act furthers an essential objective . . . of its title—that no child, whether living in inner-city school districts or not, whether suffering from learning disabilities or not, whether English is their second language or not, whether otherwise disadvantaged or not, would be left behind when it came to ensuring not just that more resources were devoted to their education but that objectively measurable progress would be made in their education.²⁴⁹

By reauthorizing ESEA into NCLB, if the states desired to continue receiving Title I funding, that funding was on a take-it-or-leave-it basis with

240. *Part I: Title I in Perspective*, NSBA.ORG, <http://www.nsba.org/bookreports/title1/PartI.htm> (last visited Mar. 18, 2013). “The National School Boards Association (NSBA) is a not-for-profit organization representing State Associations of school boards and their member districts across the United States.” *Mission, Vision & Goals*, NSBA.ORG, <http://www.nsba.org/About/NSBAGovernance> (last visited Mar. 18, 2013).

241. Caffrey, *supra* note 230, at 1132.

242. Quick, *supra* note 226, at 19.

243. Caffrey, *supra* note 230, at 1131.

244. *See id.*

245. *Id.* at 1133.

246. *E.g.*, *Sch. Dist. of Pontiac v. Sec’y of the U.S. Dep’t of Educ.*, 584 F.3d 253, 286 (6th Cir. 2009) (en banc) (Sutton, J., concurring).

247. *Id.*

248. *Id.*

249. *Id.*

NCLB. Thus, if a state chose to remain a recipient of federal Title I funding, it needed to opt in to NCLB. However, even if a state did not want to opt in to NCLB, it would have been difficult for it to decline the program because Title I funding “remains ‘the largest source of states’ elementary education funding from the federal government.”²⁵⁰

NCLB could prompt a coercion analysis because any state that does not want to accept the new version of ESEA—NCLB—faces losing essentially all of its federal education funds, with the exception of certain discretionary grant programs.²⁵¹ Therefore, it is necessary to apply the plurality’s two-element coercion test in order to determine whether NCLB would remain a constitutional use of Congress’s spending power.

1. *Significance*

Although the federal government provides a significant amount of Title I funding to the states, it is unlikely that its amount satisfies the plurality’s significance element. State funding under Title I of NCLB is “based on the amount of poor and disadvantaged children in the state.”²⁵² “The average state receives nearly half a billion dollars each year under Title I and the [Individuals with Disabilities Education Act] [(IDEA)], and primary and secondary education makes up just under a fifth of the average state’s budget.”²⁵³ Total federal funding for elementary and secondary education programs for fiscal year 2012 amounted to only a little over \$35 billion.²⁵⁴ While still a large amount of money, that is almost \$198 billion less than the amount of federal funds that went to *pre-expansion* Medicaid.²⁵⁵ Moreover, unlike state Medicaid programs, which receive anywhere from fifty to eighty-three percent of their funding from the federal government,²⁵⁶ “[s]tates and school districts remain responsible for the majority of [their] funding for public education.”²⁵⁷ Arizona, for example, receives “federal education funds [that] amount to only 9.8% of all state expenditures,” while

250. Caffrey, *supra* note 230, at 1133.

251. See Quick, *supra* note 226, at 30.

252. *Id.* at 22.

253. Bagenstos, *supra* note 10, at 909.

254. ED Data Express, *Total Federal Funding for Elementary and Secondary Education Programs: FY 2012*, ED.GOV, <http://www.eddataexpress.ed.gov/data-element-explorer.cfm/tab/data/deid/16> (last visited Jan. 9, 2013).

255. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2663 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (“Of this, more than \$233 billion went to pre-expansion Medicaid.”).

256. *Id.* at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

257. Sch. Dist. of Pontiac v. Sec’y of the U.S. Dep’t of Educ., 584 F.3d 253, 258 (6th Cir. 2009) (en banc).

its federal Medicaid funds amount to 33% of its expenditures.²⁵⁸ Furthermore, although the federal government has been heavily involved in state primary and secondary education over the past few decades, the states are not significantly reliant on federal money. States receive considerably less federal funding under NCLB than Medicaid and the funds they do receive “are to be used only to implement Title I programming.”²⁵⁹ Thus, the states could probably not argue that their reliance on federal funds is heavy enough to rise to a “significant” level under the plurality’s opinion.

Interestingly, there would be a much better chance that NCLB would fail if the joint dissent’s opinion, rather than the plurality’s opinion, was controlling in *NFIB v. Sebelius*. First, there are abundant similarities between NCLB and the joint dissent’s hypothetical. As the joint dissent concluded, Congress merely offering the states a large federal grant could be considered coercive if a state’s failure to accept the grant would put its citizens in a position of compensating that program with a considerable amount in federal taxes.²⁶⁰ Like the plurality opinion, however, the joint dissent did not leave much indication as to how large a federal grant or federal tax burden would need to be in order to meet the significance element of coercion. Despite this, unlike the plurality, if the joint dissent did find the tax burden for rejecting the law significant, NCLB would be unconstitutional.

Second, the argument that the states could simply increase their own tax revenues to compensate their loss in rejecting NCLB would not survive. Prior to *NFIB v. Sebelius*, Allison Quick, a former Harvard Law School student, addressed this argument in a paper she wrote for a seminar class on federal budget policy.²⁶¹ She concluded that the funds at stake under ESEA’s reauthorization into NCLB would not be significant enough to constitute coercion.²⁶² To support her argument, she relied on the Ninth Circuit Court of Appeals case, *California v. United States*,²⁶³ which held that California had a real choice in whether to remain a participant of the Medicaid program even if opting out of it would bankrupt its state because “a sovereign state . . . is always free to increase its tax revenues.”²⁶⁴ As is now known, Ms. Quick and the Ninth Circuit’s argument would not hold up under the joint dissent’s coercion analysis. Justice Ginsburg made the exact same point in *NFIB v.*

258. *NFIB*, 132 S. Ct. at 2663–64 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

259. *Pontiac*, 584 F.3d at 258.

260. *NFIB*, 132 S. Ct. at 2661–62 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

261. Howell E. Jackson, *Briefing Papers on Federal Budget Policy*, HARV. LAW SCH. (Sept. 2008), <http://www.law.harvard.edu/faculty/hjackson/budget.php>.

262. Quick, *supra* note 226, at 44.

263. 104 F.3d 1086 (9th Cir. 1997).

264. *Id.* at 1092 (quoting *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989)).

Sebelius, and the joint dissent shot it down because “heavy federal taxation diminishes the [States’ ability] . . . to collect their own taxes.”²⁶⁵

Finally, the joint dissent might find further evidence of coercion, like it did in *NFIB v. Sebelius*, based on Congress’s underlying intent with the NCLB. Ms. Quick explained in her paper that after Congress passed NCLB in 2002, “[i]n January 2004, the Superintendent of Public Instruction in the Utah State Office of Education wrote a letter to the [U.S.] Secretary of Education asking for an opinion on the consequences of potential nonparticipation by the state in [NCLB].”²⁶⁶ The Department of Education (DOE) responded a month later explaining that Utah could opt out of NCLB if it wished and still participate in separate discretionary grant programs, however, doing so would be “particularly detrimental.”²⁶⁷ For instance, the DOE explained that “opting out of Title I . . . would . . . jeopardiz[e] funding for a number of other programs because the funding formulas are linked.”²⁶⁸ Statements like these from the DOE would suggest that, like in *NFIB v. Sebelius*, Congress wrote NCLB in such a way that it knew the states would be unable to reject it. Thus, if the joint dissent’s opinion were controlling, this further evidence would simply be icing on the cake for it to conclude that Congress was coercing the states into accepting NCLB.

Nevertheless, as we know from *NFIB v. Sebelius*, the joint dissent’s opinion did not carry the day. Based on the plurality opinion’s coercion analysis and the figures above, it is unlikely that the threatened funding under NCLB would rise to a requisite level of significance and be considered coercive. This is not to say the plurality’s holding in *NFIB v. Sebelius* did not at least open the door for a state to challenge a law like NCLB. After all, “[a]fter Medicaid, the next biggest federal funding item is aid to support elementary and secondary education.”²⁶⁹ However, the gap between federal funding for Medicaid and federal funding for primary and secondary education still remains large and, while the states might be able to at least make a claim of coercion since *NFIB v. Sebelius*, they are still quite far off from having a strong case. Notwithstanding the fact that it would be difficult for a state to meet *NFIB v. Sebelius*’s significance element in challenging NCLB, for a full coercion analysis under the plurality’s opinion, it is still necessary to apply its independence element to NCLB.

265. *NFIB*, 132 S. Ct. at 2662 n.13 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

266. Quick, *supra* note 226, at 30.

267. *Id.* at 30–31.

268. *Id.* at 31.

269. *NFIB*, 132 S. Ct. at 2663 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

2. Independence

In order to not confuse the understanding of the independence element, it is first necessary to start by applying the germaneness test. As previously explained, *South Dakota v. Dole*'s²⁷⁰ germaneness test is different from the independence element of coercion in *NFIB v. Sebelius*.²⁷¹ Rather than being an element of coercion, the test, like coercion, is a separate limitation on Congress's spending clause power.²⁷² To be germane, Congress's "condition must be related, or have a nexus, to the purpose of the appropriation."²⁷³ As Justice Sutton stated in his concurring opinion in *Pontiac*,

Surely there is a legitimate connection between the Act's funding and the conditions imposed on the States who accept it. Congress did not give the States federal money for education, then insist that they move the location of their capitals or rename their state birds. Congress asked them to meet a series of educational requirements in return for receiving education funding.²⁷⁴

In fact, Congress's stated purpose with NCLB "was to increase the proficiency of students in underachieving school districts, while simultaneously 'provid[ing] parents with options.'"²⁷⁵ Clearly there is a nexus between increasing the proficiency of students in underachieving school districts and federal education funding, and, thus, NCLB meets the *Dole* germaneness test. However, because this test is different from the independence element discussed in *NFIB v. Sebelius*, a different analysis must be conducted to examine that element.

When Congress amended ESEA to become NCLB, it created many new conditions for states to receive Title I funding. One of the new conditions was that states submit accountability plans to the Secretary of Education.²⁷⁶ These plans require that states create and maintain Adequate Yearly Progress (AYP) programs that are designed to improve student academic proficiency rates.²⁷⁷ If a particular state's school fails to meet the necessary

270. 483 U.S. 203 (1987).

271. See *infra* Parts II.A.3, II.B.1.

272. See *Dole*, 483 U.S. at 207 ("Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'").

273. W. Paul Koenig, Comment, *Does Congress Abuse Its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State's Compliance with "Megan's Law"?*, 88 J. CRIM. L & CRIMINOLOGY 721, 746 (1998).

274. *Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ.*, 584 F.3d 253, 284 (9th Cir. 2009) (en banc) (Sutton, J., concurring).

275. Caffrey, *supra* note 230, at 1131 (alteration in original).

276. See generally 20 U.S.C. § 6311 (2006).

277. *Id.* § 6316(b)(8).

AYP measurements, that school would be required to take certain actions such as replacing the school staff, instituting a new curriculum, and turning the operation of the school over to the state educational agency.²⁷⁸ Another new condition that Congress created under NCLB was that states prepare and disseminate annual state report cards.²⁷⁹ These report cards must contain information such as a comparison of student proficiency levels, the professional qualifications of teachers in the state, and trends in student achievement areas.²⁸⁰ Congress also required under NCLB that states in need of school improvement establish support teams.²⁸¹ These teams must be composed of knowledgeable individuals who can design and implement a plan to help the schools meet yearly progress reports and evaluate school personnel.²⁸²

Given these extensive new conditions under NCLB, one might argue the new conditions are so distinct that they are independent of the original Title I funding, and Congress is using the old Title I funding as leverage for the states' acceptance of NCLB. Like the Medicaid expansion, many new provisions were created under NCLB. Moreover, these new NCLB provisions are more distinct than former new provisions because they create a significant amount of different and additional work for states that want to receive Title I funding.²⁸³ In fact, the Supreme Court itself has stated that NCLB is a "dramatic shift in federal educational policy."²⁸⁴ Because states cannot continue to receive Title I funding without accepting the new NCLB conditions, one could argue that Congress is using future Title I funding as leverage to force the states into accepting this new, independent NCLB program.

On the other hand, however, one could also argue that NCLB's conditions are not independent because they are not distinct and separate enough from the original ESEA conditions. In *NFIB v. Sebelius*, the plurality did not find the Medicaid expansion to be an independent program simply because

278. *Id.* See also Quick, *supra* note 226, at 28–29.

279. 20 U.S.C. § 6311(c)(1), (h) (2006).

280. See *id.* § 6311(h)(1)(C). Aside from the required information that must be provided in school report cards under § 6311(h)(1)(C), schools may provide other optional information in their annual state report cards such as attendance rates, average class sizes, and the extent of parent involvement as well. See *id.* § 6311(h)(1)(D).

281. *Id.* § 6317(a) (2006).

282. *Id.* § 6317(a)(5)(A).

283. A significant amount of this additional work involves school districts attempting to meet the many unattainable achievement levels under NCLB. See Caffrey, *supra* note 224, at 1133–36. As a result of this different and additional work, many states have been put in the position of trying to come up with additional money to fund NCLB. See *id.* at 1137–38. This has been the result because the government significantly undershot how much Title I funding would be necessary to allocate for the states that accepted NCLB. *Id.*

284. *Horne v. Flores*, 557 U.S. 433, 461 (2009).

Congress added a new group of “needy individuals” to the original Medicaid program.²⁸⁵ It was also the size of that new group, how that group would be funded, and the difference in health insurance that group would receive that caused the plurality to find the Medicaid expansion was an entirely separate health insurance program.²⁸⁶ Perhaps if the Medicaid expansion had instead required the original Medicaid program to encompass a much smaller group, such as unemployed former law professors, rather than all people 133% below the poverty line, the plurality would not have concluded that the expansion was “an element of a comprehensive national plan to provide universal health insurance.”²⁸⁷ Thus, one could argue that the NCLB’s changes to ESEA are not similar enough to the Medicaid expansion’s changes to the original Medicaid program to become independent. Furthermore, although NCLB does add significant requirements for states to implement in order to receive future Title I funding, even if Congress allocates more funding for those requirements, they will all still be paid for under the banner of Title I funding.²⁸⁸ Thus, unlike the Medicaid expansion, NCLB conditions restrict how Title I funding is to be used.²⁸⁹ Therefore, one could just as easily argue that the new NCLB conditions are not so distinct from the original conditions under ESEA that they amount to an independent program on their own.

Despite these two competing arguments, the structure of NCLB might actually cause the law to survive the independence inquiry altogether. Professor Samuel R. Bagenstos persuasively argues that *reauthorization* of a law matters when analyzing the plurality’s two-part coercion test in *NFIB v.*

285. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606–09 (2012) (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

286. *Id.* at 2606.

287. *Id.*

288. *See generally* 20 U.S.C. § 6302 (2006).

289. *Compare NFIB*, 132 S. Ct. at 2604–06 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.) (using *South Dakota v. Dole*, 483 U.S. 203 (1987) as an analogy to show that the Medicaid expansion does not govern how original Medicaid funds are used), *and* Bagenstos, *supra* note 10, at 918–19 (explaining that the plurality found independence occurs when the new conditions do not govern how the threatened funding is to be used), *with* *Sch. Dist. of Pontiac v. Sec’y of the U.S. Dep’t of Educ.*, 584 F.3d 253, 258–59 (9th Cir. 2009) (en banc) (“[T]he funds distributed under Title I are to be used only to implement Title I programming, not to replace funds already being used for general programming.”), *and* 20 U.S.C. § 6302 (2006) (listing the numerous appropriations for each fiscal year and their respective subsections that each amount of funds will go towards). Unlike NCLB, which governs how schools are to use their threatened Title I funds, the threatened Medicaid funds in *NFIB v. Sebelius* were contingent upon states accepting and using entirely different federal money to create a less comprehensive Medicaid benefit package for new Medicaid expansion recipients. *NFIB*, 132 S. Ct. at 2606 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

Sebelius.²⁹⁰ Under its spending power, Congress must “ensure[] that funds are spen[t] according to its view of the ‘general Welfare.’”²⁹¹ Citing former U.S. Supreme Court Justice Benjamin Cardozo, Professor Bagenstos explains that Congress’s understanding of the general welfare is constantly changing.²⁹² This constant change can be caused by a number of reasons such as political party differences and unforeseen consequences of a law. As history has shown, neither the Republicans nor the Democrats alone have consistently controlled our branches of government. If citizens are unhappy with their politicians or a certain political party, they can act on their feelings through our democratic voting process. Sometimes a citizen’s issue will not be with either political party but instead with a particular law. In that case, the citizen could relay any concerns about the law to his or her federal representatives, and those representatives could then amend the law accordingly. These examples are just a few of the ways that show why the Supreme Court has never viewed Congress’s understanding of the general welfare as static, and Professor Bagenstos explains that this view did not change after *NFIB v. Sebelius*.²⁹³

Given the precedence of this longstanding view of the general welfare, the plurality seemed to acknowledge that Congress could have constitutionally repealed the old Medicaid program and then enacted an entirely new program that contained both old Medicaid and Medicaid expansion conditions.²⁹⁴ This procedure of repealing and replacing a law can be seen as a

290. See Bagenstos, *supra* note 10, at 870–71, 910 (implying that reauthorization does not involve the type of cross-program leveraging that occurred with the Medicaid expansion in *NFIB v. Sebelius*).

291. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

292. See Bagenstos, *supra* note 10, at 885–87.

293. See *id.*

294. See *NFIB*, 132 S. Ct. at 2606 n.14; see also Bagenstos, *supra* note 10, at 885. Professor Bagenstos points out, however, that Chief Justice Roberts noted that repealing and replacing the Medicaid law would “not be that easy.” *Id.* Professor Bagenstos admits it is hard to decipher exactly what the Chief Justice was implying with this statement. *Id.* It is certainly true that regardless of the possible political difficulties with repealing and replacing Medicaid, the Chief Justice would require Congress to go through that process rather than engage in coercion through its use of the Medicaid expansion. After all, even if the result would be the same, these are the types of checks and balances on federal power that our government is designed to have. Even so, however, given the phraseology of the opinion, it remains questionable how sympathetic the Chief Justice would really be to a repealed and replaced version of Medicaid. E-mail from Joshua M. Silverstein, Professor of Law, UALR William H. Bowen School of Law, to Ellen K. Howard, Law Student, UALR William H. Bowen School of Law (Feb. 20, 2013, 12:45 PM) (on file with author). Chief Justice Roberts’s statement is also worth questioning because of the unconstitutional conditions doctrine. *Id.* Although this doctrine focuses on the relationship between individuals and the government, it would be unsurprising to see the Court apply the doctrine to federalism and enumerated powers disputes between the federal government and a state. *Id.* But see *Pace v. Bo-*

close parallel to reauthorization of a law—particularly, a law such as NCLB.²⁹⁵ Professor Bagenstos explains that at the core of the plurality’s independence element is this idea of “cross-program leveraging.”²⁹⁶ With cross-program leveraging, there are two programs in play and Congress is using the funds of one of the programs as leverage for the other.²⁹⁷ Professor Bagenstos explains that cross-program leveraging cannot occur when Congress repeals and replaces a law or reauthorizes a law because, in each instance, there is only one law being created, and that law alone is on a take-it-or-leave-it basis.²⁹⁸ Furthermore, reauthorization may also be somewhat different because a key feature of the process is a program’s inevitable termination if Congress does nothing.²⁹⁹

Neither reauthorization feature applied to the Medicaid expansion in *NFIB v. Sebelius*. In *NFIB v. Sebelius*, two programs were at issue, an old Medicaid program and new Medicaid expansion program, and the former was being used as leverage for the latter.³⁰⁰ Congress, however, did not use this same technique with ESEA’s Title I funding and NCLB.³⁰¹ By reauthorizing ESEA into NCLB, Congress was not leveraging the states’ future Title I funding under the old ESEA program upon their acceptance of a new NCLB program.³⁰² Rather, because of the process of reauthorization, NCLB itself would now *be* the law, and the states that wanted to continue receiving

galusa City Sch. Bd., 403 F.3d 272, 286–287 (5th Cir. 2005) (explaining that the Supreme Court has never applied the unconstitutional conditions doctrine to a dispute between sovereigns; further concluding that, in the spending context, the doctrine is “subsumed” by the coercion element of *Dole*). For further explanation of this doctrine, see *infra* text accompanying note 409. At some point, the line starts to break down between repealing a program and starting over, and cross leveraging one program with another. See E-mail from Joshua M. Silverstein to Ellen K. Howard, *supra*. Perhaps it would also be the case that the Chief Justice was simply throwing his statement about the difficulty out there and implying that he *would* discuss the constitutional implications of repealing and replacing Medicaid, but there is no need because the likelihood of Congress repealing and replacing Medicaid is slim-to-none. Because it is uncertain what exactly the Chief Justice meant with this statement, for the sake of argument, probably the best we can do is take the statement at its face value—Congress can still constitutionally repeal and enact an entirely new Medicaid law.

295. See Bagenstos, *supra* note 10, at 885, 909–10 (“As I argued in Part II.B. . . .”).

296. See *id.* at 870–71.

297. *Id.*

298. Compare *id.* (“Congress did not merely change the terms of the ongoing Medicaid program but . . . it allowed states to remain in that program only if they would agree *also* to participate in . . . a separate and independent program.” (emphasis added)), with *id.* at 910 (“[U]nder that proposal there would effectively be *no* Title I program . . .”).

299. See E-mail from Professor Joshua M. Silverstein to Ellen K. Howard, *supra* note 294.

300. Bagenstos, *supra* note 10, at 891–92.

301. See *id.* at 910–11.

302. See *id.* at 910 (“NCLB itself—laws in which Congress decided that it would no longer fund preexisting programs unless they assumed a fundamentally different form.”).

Title I funding could take it or leave it.³⁰³ Furthermore, if Congress never reauthorized ESEA into NCLB, and simply did nothing, there would be no Title I funding for the states to receive in the future anyway.³⁰⁴ Title I funding would essentially end without reauthorization.³⁰⁵

Because there is no cross-program leveraging occurring with NCLB, it is irrelevant whether the ESEA assumed a fundamentally different form under NCLB.³⁰⁶ When Congress reauthorized ESEA into NCLB, Congress was simply “governing the use of funds” according to its current understanding of the general welfare.³⁰⁷ Professor Bagenstos argues that this reading of *NFIB v. Sebelius* must necessarily follow because otherwise “Congress’s authority to tailor spending to its current understanding of what serves the general welfare [would be undercut]—an authority that Chief Justice Roberts expressly endorsed.”³⁰⁸

3. Conclusion

NCLB is overdue for reauthorization again, and many of Congress’s new proposals for the act could impose major new requirements on states.³⁰⁹ Before the 2012 Presidential Election, Governor Mitt Romney, the 2012 Republican presidential candidate, had a long list of new conditions for Title I of NCLB that he wanted to require of states if he were elected.³¹⁰ Some of these conditions included “portable” vouchers, open-enrollment policies, and online schooling—all of which would be required for states to accept if they wished to continue receiving federal education funds.³¹¹ If the current Congress has anything like Governor Romney’s proposals in mind when it comes time to reauthorize NCLB, while a state would now at least have a coercion argument under *NFIB v. Sebelius*, given the analysis above it is unlikely that a state would win. The better conclusion under the plurality’s analysis is that a court would find that a reauthorization of NCLB—even with major changes—does not constitute coercion. A court would probably

303. *See id.*

304. *See* E-mail from Professor Joshua M. Silverstein to Ellen K. Howard, *supra* note 294.

305. In fact, funding under NCLB expired in 2007, and President Barack Obama and Congress have been discussing measures to take to reauthorize the law ever since then. Joy Resmovits, *No Child Left Behind Vote in House Passes Substitute, Shifting Away from Bush’s Education Vision*, HUFFINGTON POST (July 19, 2012, 11:22 AM), http://www.huffingtonpost.com/2013/07/19/no-child-left-behind-vote_n_3623100.html.

306. *See* Bagenstos, *supra* note 10, at 892.

307. *Id.* at 910.

308. *Id.*

309. *Id.* at 907.

310. *Id.*

311. *Id.*

find this way because ESEA's reauthorization into NCLB would not meet the independence element, and federal education funding does not rise to the requisite level of significance under *NFIB v. Sebelius*.

If the states really want out of NCLB today, their better option, and one that many—including Arkansas—are currently exercising, is to seek waivers of the law.³¹² In fact, the Obama Administration has been very lenient in granting waivers to states that want to be released from NCLB³¹³—so long as those states agree, in exchange for those waivers, to accept his administration's education policies, which some argue has legal issues of its own.³¹⁴ Nevertheless, considering all of the extreme and imminent financial penalties that many states face due to their failure to meet NCLB standards, the waivers may still be the better option rather than waiting around to challenge Congress on its next reauthorization of NCLB.

B. The Clean Air Act

Another law that could face legal challenges after *NFIB v. Sebelius* is The Clean Air Act (CAA).³¹⁵ The CAA requires that each state submit a State Implementation Plan (SIP) to the Administrator of the Environmental Protection Agency (EPA) within three years after the promulgation of primary and secondary National Ambient Air Quality Standards (NAAQS).³¹⁶ These SIPs must meet the minimum requirements of the primary and secondary NAAQS³¹⁷ and must include items such as enforceable emission limitations, schedules and timetables for compliance, and provisions that provide for the establishment and operation of appropriate systems that monitor ambient air quality data.³¹⁸ If any state fails to submit a SIP, submits an inadequate SIP, or is not implementing a requirement of its SIP, the Administrator is required to impose sanctions on that state.³¹⁹ The Administrator may impose sanctions that deny the noncomplying state any projects or

312. Education Week, *NCLB Waivers: A State-by-State Breakdown*, VISUALIZING.ORG (Nov. 8, 2011), <http://www.visualizing.org/visualizations/nclb-waivers-state-state-breakdown>.

313. Motoko Rich, *'No Child' Law Whittled Down by White House*, N.Y. TIMES, July 6, 2012, at A1, available at http://www.nytimes.com/2012/07/06/education/no-child-left-behind-whittled-down-under-obama.html?pagewanted=all&_r=0.

314. See Lindsey Burke, *No Child Left Behind Waivers: Bogus Relief, Genuine Overreach*, THE HERITAGE FOUND. (Sept. 5, 2012), <http://www.heritage.org/research/reports/2012/09/no-child-left-behind-waivers-bogus-relief-genuine-overreach>.

315. See generally Clean Air Act, 42 U.S.C. §§ 7401–7671q (2006 & Supp. V 2011).

316. *Id.* § 7410(a)(1) (2006); see also Bagenstos, *supra* note 10, at 917.

317. 42 U.S.C. § 7410(k)(1)(A)–(B); *id.* § 7511 (2006).

318. See *id.* § 7410(a)(2).

319. See *id.* § 7509(a) (2006).

highway grants that the Secretary of Transportation has awarded to it for its “nonattainment areas.”³²⁰ Nonattainment areas are areas that do not meet the primary or secondary NAAQS and also include stationary sources.³²¹ The Administrator, however, is barred from denying the noncomplying state any federal highway grants or projects that have the principal purpose of improving highway safety.³²² The Administrator is also barred from denying the noncomplying state certain federal grants or projects that help reduce emissions.³²³ Some of these exclusions include capital programs for public transit, construction of roads for the use of high occupancy vehicles, and programs that improve traffic flow.³²⁴ There are also times when these SIPs have the possibility of being suspended for emergency situations.³²⁵ If any state’s governor petitions the President of the United States to temporarily suspend any part of a SIP based on a national or regional energy emergency, the President has the discretion to allow that temporary suspension.³²⁶ Except for the few safety and energy exceptions, and severe emergency situations, the Administrator may revoke the noncomplying state’s federal highway projects or funding until he or she “determines that the state has come into compliance.”³²⁷

Congress’s tailoring of the CAA would certainly prompt a coercion analysis because Congress is threatening to take away a state’s federal highway funding if that state does not implement Congress’s condition of NAAQS. Thus, in applying the plurality’s coercion test to the CAA, it is necessary to determine the significance of the highway funds that the Administrator could revoke and the independence of the condition (the NAAQS) from the highway funding.

1. *Significance*

While the plurality did not specify exactly how significant a federal grant would need to be to constitute coercion, it did leave a number of clues as to how future courts might determine this element. For example, one of the reasons the plurality found the original Medicaid funds significant was because Congress threatened to revoke the entire grant.³²⁸ The CAA differs

320. *Id.* § 7509(b)(1)(A).

321. *See id.* § 7407(d)(1)(A)(i) (2006) (“any area”).

322. *Id.* § 7509(b)(1).

323. *See* 42 U.S.C. § 7509(b)(1)(B).

324. *Id.* For the full list, see *id.* § 7509(b)(1)(B)(i)–(viii).

325. *Id.* § 7410(f) (2006).

326. *Id.*

327. *See id.* § 7509(a)(4)–(b)(1).

328. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

in this respect because the Administrator is barred from revoking *all* of a state's federal highway funds.³²⁹ There are certain grants and projects that promote highway safety and emission reduction that the Administrator is not allowed to touch when he or she is imposing sanctions on a noncomplying state.³³⁰

There were two additional reasons that the original Medicaid grant at stake was significant enough to constitute coercion: (1) The amount an average state devoted to its overall budget in Medicaid spending, and (2) the amount the federal government contributed to that spending.³³¹ Based on these two reasons, there is a very low possibility that a court would ever find that the federal highway funds at stake under the CAA rise to a level of "significance." Medicaid spending accounts for more than 20% of the average state's overall budget.³³² This is almost triple the average state budget's transportation spending, which amounted to only 7.4% in fiscal year 2011.³³³ Moreover, out of that 7.4%, only 32.1% of it is covered by federal funds,³³⁴ which is less than a third of the average state's transportation spending.³³⁵ This is significantly less than the 50% to 83% of funds that the federal government contributes to the average state budget's 20% in Medicaid spending³³⁶ and amounts to nearly two-thirds of the average state's overall Medicaid spending.³³⁷

The federal highway funds that a state stands to lose under the CAA become even more insignificant when it is also taken into consideration that Administrator would probably not revoke the full 32.1% of federal funds. At least some of those funds would probably be designated for safety or emission reduction, which the Administrator is denied power over.³³⁸ In contrast, if a state rejected the Medicaid expansion and, thus, lost all of its federal Medicaid funds, it could potentially lose over ten percent of its entire state

329. See 42 U.S.C. § 7509(b)(1) ("The Administrator may impose a prohibition . . . other than projects or grants for safety . . . [i]n addition to safety . . .").

330. *Id.*

331. See *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.); see also *supra* Part II.A.2.

332. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

333. NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: EXAMINING FISCAL 2010-2012 62 (2012), http://www.nasbo.org/sites/default/files/State%20Expenditure%20Report_1.pdf.

334. *Id.*

335. Bagenstos, *supra* note 10, at 919.

336. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

337. Bagenstos, *supra* note 10, at 919.

338. See 42 U.S.C. § 7509(b)(1) (2006).

budget.³³⁹ To further contrast this point, in *Dole*, South Dakota's potential loss of less than half of one percent of its overall state budget was not significant enough to constitute coercion.³⁴⁰ Needless to say, if the federal highway funds at stake under the CAA were placed on a significance balancing scale—*Dole* being the insignificant side and *NFIB v. Sebelius* being the significant side—they would more likely lean towards *Dole*.

A final reason that the plurality found the size of the original federal Medicaid grant significant was because of the states' reliance on that entrenched federal grant.³⁴¹ The states had, for many years now, used their federal Medicaid funds to develop intricate statutory and administrative schemes, and if those funds were terminated, their efforts would become futile.³⁴² Professor Jonathan Adler notes that states are heavily reliant on federal funds in their transportation budgets.³⁴³ Professor Adler explains that “[h]ighway funds are raised from a dedicated revenue source in gasoline taxes and placed in the Highway Trust Fund[,]” which for many states, “represent[s] the lion’s share of their transportation budget.”³⁴⁴ He argues that “[a]s a consequence, threatening to take highway funds may strike some courts as unduly coercive under [*NFIB v. Sebelius*].”³⁴⁵ However, even if the states are heavily reliant on these federal highway grants, their reliance is probably still not enough to constitute “significance.” The plurality seems to be much more likely to find the significance element met if the states were not just heavily reliant, but heavily reliant on a *large* federal grant. In other words, the larger the threatened federal grant, the more likely coercion is present. In the fiscal year of 2011, only 32.1% of state expenditures for transportation came from federal funding,³⁴⁶ which is significantly lower than the 50% to 83% of federal funds that went to state Medicaid expenditures.³⁴⁷ Moreover, the average state spends only 7.4% of its budget on transportation,³⁴⁸ which is well below the 20% spent on Medicaid.³⁴⁹ While

339. *NFIB*, 132 S. Ct. at 2605 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

340. *Id.* at 2604–05.

341. *See id.* at 2604.

342. *See id.*

343. Bagenstos, *supra* note 10, at 917.

344. Jonathan Adler, *Could the Health Care Decision Hobble the Clean Air Act?*, THE PROP. & ENV'T RESEARCH BLOG, <http://perc.org/blog/could-health-care-decision-hobble-clean-air-act> (last visited Jan. 9, 2013).

345. *Id.*

346. NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 333, at 62.

347. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

348. NAT'L ASS'N OF STATE BUDGET OFFICERS, *supra* note 333, at 62.

349. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

there is definitely a real argument to be made that the amount of federal highway funds that could be terminated under the CAA is significant enough to constitute coercion, the stronger argument is that the threat to revoke those funds would only constitute “mild encouragement.”³⁵⁰ For purposes of this coercion analysis, however, it is still necessary to analyze the independence element from the plurality’s opinion in *NFIB v. Sebelius*.

2. Independence

Again, it is helpful to start this section with an application of the germaneness test in order not to confuse the understanding of independence. A condition can be germane to one of the purposes of the threatened federal funding while at the same time be completely independent from that funding.³⁵¹ In *Dole*, Congress’s condition that called “upon states to raise [their] drinking age[s]” was germane because it “echoed the explicit purposes of the federal highway programs—safe highways[;]”³⁵² and in *NFIB v. Sebelius*, the Medicaid expansion met the germaneness test because it was related to the purpose of the original Medicaid program—providing healthcare to the nation’s poor.³⁵³ The CAA’s requirement that states submit SIPs that comply with NAAQS would meet the germaneness test “because both automobiles and stationary sources contribute to ‘the overall problem of air pollution.’”³⁵⁴

At the same time, however, the CAA conditions could also be independent from the threatened federal highway grants. If the states choose to challenge the CAA’s condition in the lower court systems, the courts could find that, like the Medicaid expansion, the CAA’s SIP requirements are independent of the threatened grant. The states would need to argue that Congress is continuing to fund essentially the same highway program, under essentially the same rules as it did before, but now it is requiring that if states wish to continue that program, they must agree to implement the CAA’s new and separate SIP program.³⁵⁵ This argument would probably succeed. Like the conditions in *Dole* and *NFIB v. Sebelius*, the condition under the CAA is not a restriction on *how* the highway funds are to be

350. See *id.* at 2604 (citing *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).

351. See discussion *supra* Parts II.A.3, II.B.1.

352. Jonathan H. Adler, *Judicial Federalism and the Future of Environmental Regulation*, 90 IOWA L. REV. 377, 450 (2005).

353. *NFIB*, 132 S. Ct. at 2634 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (joined by Sotomayor, J.).

354. Bagenstos, *supra* note 10, at 917–18 (quoting *Virginia v. Browner*, 80 F.3d 869, 882 (4th Cir. 1996)). In fact, some lower courts have expressly said that the CAA meets the germaneness test. *Id.*

355. See *id.* at 910.

used.³⁵⁶ In *Dole*, for example, the threatened federal highway funds were used for improving and maintaining specific highways, and Congress's requirement that the states raise their drinking ages had nothing to do with that use.³⁵⁷ Similarly, in *NFIB v. Sebelius*, the plurality concluded that the independence element was met because rather than governing the use of the original Medicaid funding, Congress threatened to terminate that funding if the states did not accept a new program that came with new recipients, new funding, and new coverage plans.³⁵⁸ The plurality found that this represented such significant growth in the original Medicaid program that the expansion was, in reality, a completely different program.³⁵⁹

Although the CAA's condition of requiring states to submit SIPs does not exactly mirror the Medicaid expansion, those requirements, at least for stationary sources of pollution, "do not govern *how* states should construct and maintain highways."³⁶⁰ Additionally, Professor Bagenstos explains that those requirements also do not "govern the *use* of the highways constructed or maintained with federal funds[.]" or even "*which* highways to construct and maintain."³⁶¹ To illustrate, suppose the Secretary of Transportation allotted highway funding for states to repaint their highway ramps. Under the CAA, because this is not one of the specified safety or emission reduction projects, the Administrator would have free reign in his or her decision to revoke it. If a state's SIP failed to meet the required NAAQS because of some stationary source of pollution, like a bakery, the Administrator would be allowed to revoke that state's project to repaint its highway ramps³⁶² when that bakery's emissions had nothing to do with the funding for that project—they were completely independent of each other.³⁶³ Similarly, in *NFIB v. Sebelius*, if a state chose to decline the Medicaid expansion, it would have lost all of its original Medicaid funding when that expansion had nothing to do with the original funding in the first place.³⁶⁴ Under the plurality opinion, neither one of these scenarios would be acceptable because they each involve Congress using funding from one program as leverage for states to accept an independent program, which constitutes coercion

356. *Id.* at 918–19; *see also supra* Part II.A.3.

357. *See* Bagenstos, *supra* note 10, at 918–19.

358. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2606–07 (2012) (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

359. *Id.*

360. Bagenstos, *supra* note 10, at 918 (emphasis added).

361. *Id.*

362. *Id.* at 917 (illustrating this distinction with Professor Jonathan Adler's analogy).

363. *See* Adler, *supra* note 352, at 451.

364. *See NFIB*, 132 S. Ct. at 2606 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.) (explaining that the Medicaid expansion creates a completely independent program).

when coupled with significance.³⁶⁵ Therefore, due to these important similarities between the Medicaid expansion and the CAA's condition, and their relation to federal funding, a state that challenges the CAA's condition would have a strong argument that the condition is independent of its federal highway funding.

3. *Conclusion*

It is likely that the CAA's condition would meet the independence element of plurality's coercion test but fail its significance element. It remains unclear how exactly courts will interpret the plurality's opinion, or whether it would even apply to the CAA at all. Professor Bagenstos argues that the plurality meant it when it said that for coercion to be present, both elements of the coercion test in *NFIB v. Sebelius* must be met.³⁶⁶ Specifically, "[c]oercion is present only when the new condition ties continued participation in an entrenched and lucrative funding program to a state's agreement *also* to participate in a separate and independent program."³⁶⁷ Under his interpretation, Congress's condition under the CAA should still likely survive because, while the highway funds are independent from the condition, there is far less money and reliance at stake to meet the significance element under *NFIB v. Sebelius*.³⁶⁸ Because the amount of funds being threatened under the CAA simply does not rise to the requisite level of significance described in *NFIB v. Sebelius*, the states would be able to reject the CAA's condition not just in theory, but also in fact.

However, Professor Bagenstos declined to find, even under his interpretation of *NFIB v. Sebelius*, that a case against the CAA would be a slam-dunk for the federal government: "[b]ecause it is unclear at exactly what point a state should be understood to lack a real choice to refuse a federal grant, it is impossible to predict precisely how courts will apply *NFIB* to the CAA."³⁶⁹ Rather, he concluded that when *NFIB v. Sebelius* is applied to laws like the CAA, the states will have stronger bargaining power:

[I]f the Administrator were to shut off *all* federal highway funds to a state based on the state's failure to provide a sufficient response to *stationary* sources of pollution, her actions would raise serious questions under the Chief Justice's opinion. That is not to say that those actions

365. *See id.* at 2605–06.

366. Bagenstos, *supra* note 10, 909–10.

367. *Id.* at 910.

368. *See id.* at 919–20.

369. *Id.* at 920.

would be unconstitutional. . . . But . . . the federal executive may not want to take the chance that courts will disagree.³⁷⁰

Another interpretation that could develop from the plurality's coercion test is the application of principles from the doctrine of unconscionability.³⁷¹ For the doctrine to apply, both procedural and substantive unconscionability must be present.³⁷² Unlike typical element structures used throughout the common law, however, there is a sliding scale with the two unconscionability elements.³⁷³ This means that the more one element of unconscionability is present, the less we need of other.³⁷⁴ If this type of structure operates in the spending clause context, then the more a court finds a spending condition independent of the original spending program that Congress claims it modifies, the less necessary it will be for that court to find the threatened funds significant. Of course, the same would be true if the outcome of the elements was reversed in that situation. Applying these principles to the plurality's holding and to the CAA's condition might strengthen the states' argument. Although there might be only a small amount of significance present, because the level of independence is so great, the states would have a stronger argument that the CAA's conditions are coercive and thus, an unconstitutional use of Congress's spending power.

Despite all of this, some law professors have argued that the *NFIB v. Sebelius* holding would not even apply to the CAA because the Medicaid expansion and the CAA are too distinct. Professor Jonathan Zasloff argues that the CAA and the Medicaid expansion in *NFIB v. Sebelius* are distinct from each other because Medicaid is an entitlement program in which federal funds flow automatically, and federal highway spending requires Con-

370. *Id.*

371. See Interview with Joshua M. Silverstein, Professor of Law, UALR William H. Bowen School of Law, in Little Rock, Ark. (Nov. 12, 2012). My thanks to Professor Joshua Silverstein of UALR William H. Bowen School of Law for helping me develop this argument.

372. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (2008); see also Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487–88 (1967) (discussing the necessity of both procedural and substantive unconscionability).

373. *E.g.*, *Dean Witter Reynolds, Inc. v. Superior Court*, 259 Cal. Rptr. 789, 795 (Cal. Ct. App. 1989) (both elements of unconscionability required under the sliding scale). Not all courts apply the sliding scale to unconscionability, however. See *Maxwell v. Fid. Fin. Servs., Inc.*, 907 P.2d 51, 58–59 (Ariz. 1995) (agreeing with jurisdictions that accept either procedural or substantive unconscionability alone).

374. *Dean Witter Reynolds*, 259 Cal. Rptr. at 795.

gress to appropriate money annually.³⁷⁵ States have relied on federal Medicaid grants for decades, so Congress's threat to revoke that funding seems much more coercive than a threat to revoke federal highway funds in which states have less of an expectation.³⁷⁶ According to Professor Zasloff, the states are accustomed to Congress apportioning federal highway funds to them every year and "always are on the alert"—this is not the case for Medicaid.³⁷⁷ While Professor Zasloff even questions himself as to whether "this [is] a distinction without a difference," he notes that there is at least precedent for his distinction.³⁷⁸ He used the case of *Goldberg v. Kelly*³⁷⁹ to explain the distinction:

[The Supreme Court] held that AFDC [Aid to Families with Dependent Children] benefits constituted "property" within the meaning of the Due Process Clause, and thus an AFDC recipient had a right to a hearing before they were cut off. Central to *Goldberg* was the notion that AFDC was an entitlement, and thus it generated reasonable expectations under recipients.³⁸⁰

Although he admits that "*Goldberg's* notion of an entitlement is somewhat different than [*NFIB v. Sebelius's*], . . . it is not really that different than the normal sort of analogical reasoning traditional[ly] used by courts[,] [and] [m]oreover, the terseness of the Chief Justice's opinion pretty much requires this."³⁸¹

While it is unclear how exactly future courts will interpret the plurality's coercion test for the CAA, or whether *NFIB v. Sebelius* would even be applicable to the CAA, one thing is certain: *NFIB v. Sebelius* has opened up the possibility that a state challenging the CAA's conditions will have a fighting chance in the federal court systems.

C. "Megan's Law"

In the late 1980s and early 1990s, there was an outbreak of violent sexual crimes against children.³⁸² The media reported one child after another who were kidnapped, violently raped, and then brutally murdered by previ-

375. Jonathan Zasloff, *Conditional Spending and the Clean Air Act*, LEGAL PLANET (June 28, 2012), <http://legalplanet.wordpress.com/2012/06/28/conditional-spending-and-the-clean-air-act/>.

376. *Id.*

377. *Id.*

378. *Id.*

379. 397 U.S. 254 (1970).

380. Zasloff, *supra* note 375 (emphasis added).

381. *Id.*

382. Koenig, *supra* note 273, at 723–24.

ously convicted child sex offenders.³⁸³ This sparked outrage by the parents of the victims and the rest of the American public.³⁸⁴ They asserted that “if they had known the danger posed by their previously convicted [sex offender] neighbors, they [might] have been able to protect [the] children.”³⁸⁵ This prompted the politicians in Washington to respond by enacting law enforcement laws, which is an area that is traditionally left up to state regulation.³⁸⁶ One of the first laws that emerged from the public’s outcry was “Megan’s Law.”³⁸⁷ This law was named after Megan Kanka, a seven-year-old girl, who was one of the highly publicized victims of this sexual predator epidemic in the late 80s and 90s.³⁸⁸

Under Megan’s Law, Congress provides states with the incentive to “implement a system where all persons who commit sexual or kidnapping crimes against children or who commit sexually violent crimes against any person (whether adult or child) are required to register their address with the state upon their release from prison.”³⁸⁹ If a state chooses to implement Megan’s Law, “immediately after a sex offender registers or updates [his or her] registration [information], an appropriate [state] official . . . [is then required to] provide the [offender’s registry] information . . . to” a number of different agencies.³⁹⁰ Some of which include school and public housing agencies; social service agencies responsible for protecting minors in the child welfare system; and volunteer organizations that have contact with minors and other vulnerable individuals.³⁹¹ If a state that agreed to this condition fails to provide the sex offender’s information to the appropriate agencies, it faces losing ten percent of its annual funds from the Edward Byrne Memorial Justice Assistance Grant Program (JAG).³⁹² States use this

383. *See id.*

384. *See id.* at 724.

385. *Id.*

386. *Id.*

387. *See id.* at 729. The first of these laws was the “Wetterling Act,” which was enacted “as part of the Violent Crime Control and Law Enforcement Act of 1994.” *Id.* at 728. The Wetterling Act was named after Jacob Wetterling who was abducted in 1989 near his home in Minnesota—both his and his perpetrators whereabouts remain unknown to date. *Id.* at 727. Congress later found the Wetterling Act’s language to be too weak. *See id.* at 729. This prompted Congress to amend the act to include stronger language that required the states’ local law enforcement agencies to release relevant information about sex offenders. *Id.* Congress, also at that time, changed the name of the act to “Megan’s Law.” *Id.*

388. *See Koenig, supra* note 273, at 721–24.

389. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

390. 42 U.S.C. § 16921(b) (2006). For a list of those agencies, see *id.* § 16921(b)(1)–(7).

391. *Id.* § 16921(b)(1)–(7).

392. *Id.* § 16925(a) (2006); *see also id.* § 3750 (2006).

funding for necessities such as law enforcement programs, prosecution and court programs, prevention and education programs, etc.³⁹³

Like NCLB and the CAA, Megan's Law would at least prompt a coercion analysis because Congress is threatening to take away a state's law enforcement funding if it does not implement the law's condition of supplying sex predator information to certain agencies. Thus, in order to discover whether Megan's Law would survive the plurality's coercion test, it is necessary to determine the significance of JAG and the independence of Megan's Law from that grant.

1. *Significance*

JAG is said to provide "the leading source of federal justice funding to state, tribal, and local jurisdictions."³⁹⁴ The vast majority of the grant goes toward state law enforcement funding.³⁹⁵ In fact, sixty-two percent of JAG from the fiscal years of 2009-2011 went solely to funding state law enforcement programs.³⁹⁶ The size of the JAG grant differs from year to year.³⁹⁷ Congress bases the amount of the JAG grant for each fiscal year on an eligibility formula that takes into account the individual population of each state and the total population of the United States.³⁹⁸ In addition to populations, the formula requires that the average annual number of violent crimes for each state individually, and also collectively as a whole, be calculated to determine JAG funding.³⁹⁹ Based on this formula, Congress allocated over \$423 million for the JAG grant in 2009.⁴⁰⁰ In 2010, it allocated over \$349 million, and in 2011, over \$225 million, totaling over \$998 million in the past three fiscal years.⁴⁰¹

Although within the fiscal years of 2009-2011 Congress allocated almost a billion dollars in JAG grants to the states, that amount does not hold a candle to federal Medicaid funding. In the fiscal year of 2010 alone, Con-

393. *Id.* § 3751(a)(1) (2006).

394. *See* CSR, INC., JUSTICE ASSISTANCE GRANT (JAG) PROGRAM CLOSEOUT REPORT—JANUARY 2010–MARCH 2012, at 2 (Dec. 6, 2012), available at <https://www.bja.gov/Publications/JAG0312CloseoutReport.pdf>.

395. *See id.* at 2–5.

396. *Id.* at 4.

397. *See* 42 U.S.C. § 3755(a)(1) (2006); *see also* *Justice Assistance Grant (JAG) Program*, BUREAU JUST. ASSISTANCE, https://www.bja.gov/ProgramDetails.aspx?Program_ID=59 (last visited Mar. 19, 2013).

398. *See* 42 U.S.C. § 3755 (a)(1); BUREAU JUST. ASSISTANCE, *supra* note 397.

399. 42 U.S.C. § 3755(a)(1)(B); *see also* BUREAU JUST. ASSISTANCE, *supra* note 397.

400. CSR, INC., *supra* note 394, at 4.

401. *Id.*

gress allocated more than \$233 billion to the original Medicaid program.⁴⁰² Thus, what the states received in pre-expansion Medicaid funding in one year is almost twenty-three times the amount they received from the JAG grant in three years. Moreover, “[t]he Federal Government estimates that it will pay out approximately \$3.3 trillion between 2010 and 2019 in order to cover the costs of *pre-expansion* Medicaid.”⁴⁰³ Clearly, based on the eligibility formula, Congress would never come close to paying that amount in JAG funding.

Furthermore, unlike with the Medicaid expansion, under Megan’s Law, the states that fail to provide sex offenders’ information to the specified agencies do not stand to lose *all* of their JAG funds. Rather, all a state stands to lose is ten percent of whatever amount it received from that grant for that year.⁴⁰⁴ A ten percent loss of state JAG funding is closer in amount to what South Dakota stood to lose in *Dole* than what an average state stood to lose in *NFIB v. Sebelius*. The average state that rejected the Medicaid expansion in *NFIB v. Sebelius* stood to lose over ten percent of its entire state budget.⁴⁰⁵ This loss was much more significant than South Dakota’s potential loss of less than half of one percent of its total state budget in *Dole*.⁴⁰⁶ Based on Congress’s formula and the amount of funding it allocates for JAG each year, it is much more likely that the average state’s budget loss would be closer to South Dakota’s, and thus, pales in comparison to the funding that was at stake in *NFIB v. Sebelius*. Therefore, it is extremely unlikely that a court would find the JAG grant under Megan’s Law significant enough to constitute coercion. If the size of the grant was the only coercion element in *NFIB v. Sebelius*, it would not even be necessary to consider independence because the states would still have a real choice in whether or not to follow the requirements under Megan’s Law.

Interestingly enough, however, back in 1998, attorney Paul Koenig wrote an article about Congress’s spending clause power and its connection to Megan’s Law.⁴⁰⁷ This article grappled with many of the same arguments identified in *NFIB v. Sebelius*. At that time, although Mr. Koenig came to the ultimate conclusion that Megan’s Law was a constitutional use of Congress’s spending power,⁴⁰⁸ he was skeptical of both this conclusion and the

402. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2663 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

403. *Id.* at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

404. 42 U.S.C. § 16925(a) (2006).

405. *NFIB*, 132 S. Ct. at 2605 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

406. *Id.* at 2604–05.

407. *See generally* Koenig, *supra* note 273.

408. *Id.* at 764–65.

Supreme Court's holding in *Dole*.⁴⁰⁹ At one point in the article, Mr. Koenig appeared to be channeling the plurality's coercion analysis in *NFIB v. Sebelius*:

At least in theory, states can choose to refuse to release [a sex offender's] information and forego the federal funds. . . . However, this distinction becomes less clear if the enticement of federal funds becomes so strong that it presents the states with no realistic choice. If the states are sufficiently dependent on the federal funds, it may not matter that they have choice in theory. In reality, the "enticement" in Megan's Law may leave the states with as little choice as the federal coercion in *Printz*. This would occur if the states were so reliant on the federal funds that they felt compelled to adhere to whatever terms the federal government included in its conditions.⁴¹⁰

Of course, as already demonstrated, because the size of the JAG grant is not even in the same ballpark as the size of the federal Medicaid grant, it is highly unlikely that states could demonstrate enough reliance for courts to find the threat of losing the JAG grant significant. It is not just the reliance itself that seemed to matter to the plurality. Rather, it was a state's reliance

409. See *id.* at 749–50. Mr. Koenig seemed to be skeptical of the constitutionality of Megan's Law primarily because he disagreed with the Court's ruling in *Dole*. One reason he took issue with the holding in *Dole* is because of the doctrine of "unconstitutional conditions." *Id.* at 750. Under this doctrine, the government is barred from conditioning a person's receipt of a governmental benefit on the waiver of a constitutionally protected right. *Id.* For example, under this doctrine, the government would be disallowed from conditioning a person's receipt of social security benefits on his or her promise to only practice Catholicism. See *id.* Mr. Koenig explains that the Court in *Dole* "tried to circumvent this [doctrine] by attempting to distinguish between conditional grants which are incentives and grants which are 'so coercive as to pass the point at which 'pressure turns into compulsion.'"⁴¹⁰ *Id.* at 751 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)). Professor Richard Epstein would agree with Mr. Koenig's argument. See Epstein, *supra* note 86. Professor Epstein, critiquing the spending clause issue in *NFIB v. Sebelius*, explained that the "line [is] in the wrong place when it says that small threats should be treated like inducements[;] . . . it makes no sense to say that the robber who wants only 5 percent of your money for car fare has not coerced you." *Id.* Like Professor Epstein, Mr. Koenig believes that "degree of the conditional expenditure[] . . . should be irrelevant." Compare Epstein, *supra* note 86, with Koenig, *supra* note 273, at 751. Rather, he explains that what matters is whether "the condition on the grant is an unconstitutional exercise of congressional regulation." Koenig, *supra* note 273, at 751. According to Mr. Koenig, because Congress is barred under the constitution from directly regulating state laws that pertain to matters such as drinking age and law enforcement, Congress should not be able to regulate them indirectly by "us[ing] its purse strings." *Id.* at 754. However, the Court in *Dole* clearly did not follow this logic. Thus, Mr. Koenig explains that because of the Court's ruling in *Dole*, the idea that the federal government is limited to enumerated powers is extremely diminished. *Id.* Nevertheless, although he takes issue with *Dole's* holding, the holding still leads to the ultimate conclusion that Megan's Law remains constitutional. *Id.* at 764–65.

410. Koenig, *supra* note 273, at 742–43 (emphasis added).

on a program that is *so large in size* that was important.⁴¹¹ Thus, states would have a difficult time demonstrating that they were so heavily reliant on a grant that is so small in size.

In addition to the plurality's coercion analysis, Mr. Koenig, along with other legal scholars, channeled the joint dissent's coercion analysis as well:

Scholars have argued that the states often do not have a realistic choice other than to accept the federal government's condition upon the receipt of funds. This lack of real choice occurs because the federal government has become richer in relation to the states; the federal tax burden has steadily increased over the last several decades. This heightened federal burden makes it more difficult for the states to raise local taxes because their constituents have less after-federal-tax income than [sic] in the past. Therefore, the increased federal income tax in relation to the states has resulted in the states being put in a position of greater dependence on federal funds.⁴¹²

Although we know that the joint dissenters lost in the battle of the coercion tests, even if they had won, Megan's Law would probably still not be significant enough to amount to coercion. The joint dissent's hypothetical dealt with education funding.⁴¹³ While federal education funding for the states amounts to far less than federal Medicaid funding, it is still significantly more than the JAG grant. In the fiscal year of 2011 alone, the government allocated over \$35 billion to the states for elementary and secondary education programs.⁴¹⁴ This amount of money makes the JAG grant's less than half a billion dollars over the course of three years look like chump-change. This is not to diminish the importance that the states or the federal government place on our law enforcement in this country, but is merely to exhibit that the difference in amount of federal funds is important in determining whether a state is being coerced into doing the federal governments bidding; and, even based on the joint dissent's analysis, it appears Megan's Law would survive. Despite all of this, it is still necessary to do a full coercion analysis using the plurality's coercion test. Thus, Megan's Law must be analyzed under the test's independence element.

2. *Independence*

In Mr. Koenig's 1998 article, he concluded that one of the reasons Megan's Law was constitutional was because it met the "germaneness" or "re-

411. See *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

412. Koenig, *supra* note 273, at 749–50.

413. *NFIB*, 132 S. Ct. at 2662 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

414. ED Data Express, *supra* note 254.

latedness” test in *Dole*.⁴¹⁵ Again, while the germaneness test is different from the independence element of coercion, it is still necessary to mention because it is required for Congress to have authority to enact its spending condition⁴¹⁶ and can easily become confused with coercion’s independence element. After a lengthy germaneness analysis, Mr. Koenig finally concluded that Megan’s Law was germane to the purpose of law enforcement funding because the goal of releasing a sex offender’s information was to deter crime, which is a traditional function of law enforcement.⁴¹⁷

It is somewhat unclear whether the condition in Megan’s Law is independent from the JAG grant. On the one hand, when contrasted with *Dole*, the condition does not seem like an independent condition. In *Dole*, the drinking age condition was independent because it “was not a restriction on how the highway funds—set aside for specific highway improvement and maintenance efforts—were to be used.”⁴¹⁸ However, “[t]he condition Congress imposed on the states with the passage of Megan’s Law specifies how some of the federal money is to be spent by local law enforcement agencies—to release information pertaining to sex offenders necessary to protect the public.”⁴¹⁹ Moreover, there are significant structural differences between the Medicaid expansion and Megan’s Law. The Medicaid expansion provided for the new recipients to be covered with completely different funds than the original Medicaid recipients.⁴²⁰ Megan’s Law, however, uses the original threatened federal funding to expand state law enforcement programs.⁴²¹ In addition, many states’ law enforcement agencies prior to Megan’s Law “frequently compile[d] and retain[ed] information pertaining to convicted offenders,”⁴²² many of which were sex offenders.⁴²³ “Additionally, police [would] often make [this] information available to the public when doing so would aid in the apprehension of a suspect.”⁴²⁴ This is in contrast to the Medicaid expansion, which had never before covered all individuals under the age of 65 with incomes below 133% of the federal poverty line.⁴²⁵ Thus,

415. Koenig, *supra* note 273, at 758.

416. *South Dakota v. Dole*, 483 U.S. 203, 207–08 & 218 n.3 (1987).

417. *See* Koenig, *supra* note 273, at 757–58.

418. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ); *see also* Bagenstos, *supra* note 10, at 916.

419. Koenig, *supra* note 273, at 756.

420. *NFIB*, 132 S. Ct. at 2606 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

421. *See* Koenig, *supra* note 273, at 756.

422. *Id.* at 757.

423. *See id.* at 724–25.

424. *Id.* at 757.

425. *See NFIB*, 132 S. Ct. at 2606 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

there is a strong argument that Megan's Law is not an independent program but is simply a continuation of something law enforcement has always done.

On the other hand, because releasing relevant information about sex offenders is only one aspect of law enforcement, Megan's Law could also be seen as independent. The plurality opinion was somewhat unclear where to draw the line—even the Medicaid expansion was a toss-up.⁴²⁶ At first glance, the Medicaid expansion seemed like it was simply another change to a federal program—something Congress has always done. Before the expansion, Medicaid covered four particular groups.⁴²⁷ After the expansion, however, Medicaid was required to cover those four groups plus an additional other large group.⁴²⁸ Although Congress claimed that all of these groups were part of one health care program, the plurality did not agree.⁴²⁹ To the plurality, there were now two different health care programs—one old Medicaid program and one new Medicaid program.⁴³⁰ The old Medicaid program would cover the original four groups, and the new Medicaid program would cover this new expansive group of uninsured individuals.⁴³¹ There is an argument that Megan's Law accomplishes the same outcome. There are other aspects of law enforcement other than providing sex offender information to the public; however, this particular condition under Megan's Law covers only that aspect.⁴³² Thus there are now two different law enforcement programs—the original all-encompassing law enforcement program and a new law enforcement program designed to deal solely with sex offender information. Therefore, one could argue that, like the Medicaid expansion, Congress is using the funding for states' current law enforcement programs as leverage to force them to accept this new and independent law enforcement program known as Megan's Law.

3. Conclusion

Based on the above analysis, it is highly probable that Mr. Koenig's conclusion back in 1998 would still be correct today: Megan's Law is not an unconstitutional use of Congress's power under the Spending Clause of the U.S. Constitution. The threatened JAG grant amounts to such a small amount of money and Congress is only threatening to revoke a mere ten percent of it. These two factors make it next-to-impossible for the condition

426. See *supra* note 121 and accompanying text.

427. *NFIB*, 132 S. Ct. at 2605–06 (Roberts, C.J.) (plurality opinion) (joined by Breyer & Kagan, JJ.).

428. *Id.* at 2606.

429. *Id.*

430. *Id.*

431. *Id.* at 2605–06.

432. 42 U.S.C. § 16921(b) (2006).

to meet the significance element of coercion. If Professor Bagenstos is correct and “[c]oercion is present only when the new condition ties continued participation in an entrenched and lucrative funding program to a state’s agreement *also* to participate in a separate and independent program,”⁴³³ it is unnecessary to even move to the next element of the coercion test. Thus, although it is unclear whether Megan’s Law satisfies the independence element, it is irrelevant because the threatened JAG grant does not rise to a requisite level of significance under the *NFIB v. Sebelius* standard.

Furthermore, even under an interpretation using unconscionability principles, Megan’s Law would still likely be constitutional. Regardless of the independence element’s outcome, it is likely that no court would find enough significance to balance out a sliding scale of coercion. Therefore, although Megan’s Law might have, at first glance, prompted an initial coercion analysis, even after *NFIB v. Sebelius*, it is highly unlikely that any state would have a chance at proving its case of coercion to the courts.

IV. CONCLUSION

Despite all of the initial fear that arose after the Supreme Court’s spending clause ruling in *NFIB v. Sebelius*, a powerful argument can be made that the Court did not disrupt the status quo. Congress’s ability to place conditions on the federal grants it distributes remains largely intact. This case, however, still remains incredibly important. Before this case, a state’s argument that a federal condition was coercive was doomed in any court. Although the pendulum has not swung in the complete opposite direction since *NFIB v. Sebelius*, the states should at least now be able to get their coercion argument in the door of the lower court system. While it may still be too soon to tell the outcome of future state litigation based on the *NFIB v. Sebelius* decision, one thing is for certain with the lower courts: the significance and independence elements will play a huge role in their decision-making process of whether a federal condition is coercive.

*Ellen K. Howard**

433. Bagenstos, *supra* note 10, at 910.

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