

American University Law Review

Volume 62 | Issue 3

Article 3

2013

Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law

Eloise Pasachoff

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>

 Part of the [Law Commons](#)

Recommended Citation

Pasachoff, Eloise. "Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law." *American University Law Review* 62, no.3 (2013): 577-662.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law

Keywords

education, spending clause, regulation

CONDITIONAL SPENDING AFTER *NFIB V. SEBELIUS*: THE EXAMPLE OF FEDERAL EDUCATION LAW

ELOISE PASACHOFF*

In NFIB v. Sebelius, the Supreme Court's recent case addressing the constitutionality of the Affordable Care Act, the Court concluded that the Act's expansion of Medicaid was unconstitutionally coercive and therefore exceeded the scope of Congress's authority under the Spending Clause. This was the first time that the Court treated coercion as an issue of more than theoretical possibility under the Spending Clause. In the wake of the Court's decision, commentators have expressed either the concern or the hope that NFIB's coercion analysis may lead to the undoing of much of the federal regulatory state, which substantially relies on the spending power. This Article argues that both this concern and this hope are misplaced.

Taking federal education law as a test case for future coercion analysis—since federal funding given to the states for elementary and secondary education is second only to federal funding given to the states for Medicaid—this Article concludes that NFIB's coercion inquiry is unlikely to lead to much else being found unconstitutional. The major federal education laws, and by implication other conditional spending laws, will not likely find their demise under the Court's analysis.

Nonetheless, NFIB will likely have some effect on the future of federal education law and other laws that rely on Congress's spending powers. It

* Associate Professor, *Georgetown University Law Center*. I am grateful to Bill Buzbee, Brian Galle, Irv Gornstein, Lisa Heinzerling, Vicki Jackson, David Law, Marty Lederman, Lilian Faulhaber, Jim Ryan, David Super, and Bill Thro for helpful comments and conversations. Further thanks are due to participants in faculty workshops at the *Georgetown University Law Center* and the *University of Virginia School of Law*, and to participants and my co-panelists at the Association of American Law Schools Annual Conference, for thought-provoking and engaging exchanges. Thanks also to Morgan Stoddard and the rest of the library staff at *Georgetown Law* for their timely and useful assistance, as well as to Susanna Fix at *Georgetown Law* and the staff of the *American University Law Review* for their careful editorial work.

should put a damper on calls to dramatically increase federal education funding; encourage the trend towards smaller grants of limited duration, especially those that bypass the states; result in some structural changes both in funding and enforcement; and, somewhat paradoxically for a decision that found the Medicaid enforcement regime coercive, may lead to greater federal enforcement of conditional spending laws.

TABLE OF CONTENTS

Introduction.....	579
I. Coercion and the Spending Clause from <i>Dole</i> to <i>NFIB</i>	584
A. <i>Dole's</i> Limitations on the Scope of Congress's Authority Under the Spending Clause.....	584
B. The Limitations of <i>Dole's</i> Limitations?	587
C. <i>NFIB</i> and Coercion	591
1. Old funding conditioned on compliance with a new program	596
2. Notice to the states.....	600
3. Economic dragooning.....	605
II. Coercion and Federal Education Law.....	612
A. The Elementary and Secondary Education Act.....	613
1. Background and history of coercion analysis.....	613
2. Old funding conditioned on compliance with a new program	617
3. Notice to the states.....	621
4. Economic dragooning	621
B. The Individuals with Disabilities Education Act	629
1. Background and history of coercion analysis.....	629
2. Old funding conditioned on compliance with a new program	633
3. Notice to the states.....	637
4. Economic dragooning.....	639
C. Conditions Applying to All Federal Education Funding.....	642
1. Background and history of coercion analysis.....	642
2. Old funding conditioned on compliance with a new program	644
3. Notice to the states.....	647
4. Economic dragooning	648
III. Implications for the Future of Conditional Spending in Federal Education Law and More	651
A. Courts.....	651
B. Congress.....	655
C. Agencies	659
Conclusion	662

INTRODUCTION

The sleeper issue in *National Federation of Independent Business (NFIB) v. Sebelius*,¹ the Supreme Court's recent case considering the constitutionality of the Affordable Care Act, was the question of whether that Act's expansion of Medicaid violated the Spending Clause of the Constitution. It was a surprise that the Court agreed to hear this part of the case at all. While the lower courts had divided on the question of whether the Act's mandate that all individuals have health insurance exceeded the scope of Congress's authority under the Commerce Clause,² the cases below had unanimously rejected the Spending Clause argument.³ Nor was there a circuit split on the extent of Congress's spending power.⁴ Commentators therefore surmised that at least one Justice was interested in examining, possibly narrowing, this power⁵—the last remaining congressional power that had survived, expansive and intact, through the Rehnquist Court's federalism revival.⁶

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

2. Compare *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1311 (11th Cir. 2011) (deciding that the individual mandate exceeded Congress's power under the Commerce Clause by requiring everyone, including healthy people, to purchase insurance), *rev'd sub nom. NFIB*, 132 S. Ct. 2566, with *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 544 (6th Cir. 2011) (upholding the individual mandate as constitutional under the Commerce Clause after finding that Congress had a rational basis to believe that, in the aggregate, individuals' practice of purchasing health insurance substantially affects interstate commerce), *abrogated by NFIB*, 132 S. Ct. 2566, and *Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011) (reasoning that the individual mandate is constitutional under the Commerce Clause because Congress could reasonably assume that uninsured people would inevitably enter the health care market and thereby affect it), *abrogated by NFIB*, 132 S. Ct. 2566.

3. See *Florida ex rel. Att'y Gen.*, 648 F.3d at 1263 (holding that the Act's expansion of Medicaid was a valid exercise of the spending power because states had a real choice to participate or not participate in the expansion); *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1266–67 (N.D. Fla. 2011) (finding no coercion because states could opt out), *aff'd in part, rev'd in part sub nom. NFIB*, 132 S. Ct. 2566.

4. See, e.g., Petition for Writ of Certiorari at 18–20, *NFIB*, 132 S. Ct. 2566 (No. 11-400), 2011 WL 4500702, at *18–20 (acknowledging no split on the Spending Clause issue but describing some court of appeals cases that recognized limits on Congress's spending power); Consolidated Brief for Respondents at 15, *NFIB*, 132 S. Ct. 2566 (Nos. 11-393 & 11-400), 2011 WL 4941020, at *11 (arguing against a grant of certiorari because of the lack of a circuit split).

5. See, e.g., Chuck Edwards, *Supreme Court To Weigh in on Federal Grants*, TITLE I-DERLAND BLOG (Nov. 21, 2011), <http://ed.complianceexpert.com/title-i-derland/title-i-derland-1.45712/supreme-court-to-weigh-in-on-federal-grants-1.84072> (suggesting that a reformulation of the Court's Spending Clause analysis would represent a threat to various major federal grants to states); Brad Joondeph, *Big News is the Medicaid Grant, ACA LITIG. BLOG* (Nov. 14, 2011, 7:36 AM), <http://acalitigationblog.blogspot.com/2011/11/big-news-is-medicaid-grant.html> (opining that the Court's willingness to consider the Spending Clause was more significant than its review of the individual mandate).

6. See, e.g., Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 346–50 (2008) (explaining that the Rehnquist Court dramatically

As it happened, seven justices were apparently interested in revisiting Congress's spending power. A plurality of Chief Justice Roberts, joined by Justice Breyer and Justice Kagan,⁷ along with Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito in a joint opinion with no identified author,⁸ concluded that the Medicaid expansion violated the Spending Clause by coercing the states into accepting its terms. As Justice Ginsburg, joined by Justice Sotomayor, noted in dissent on this point, this conclusion was of startling novelty.⁹ “[F]or the first time ever,” Justice Ginsburg noted—italics hers—the Court “finds an exercise of Congress’ spending power unconstitutionally coercive.”¹⁰

The Court's conclusion regarding the Spending Clause was largely lost in the initial hubbub over the Court's having upheld the individual mandate,¹¹ but for those who noticed, the response was dramatic. From the left, scholars called the Court's ruling on the Medicaid expansion “a loaded gun” that should give “Americans who care about economic and social justice a reason to worry this Fourth of July”;¹² “a potential restructuring of federal-state relations” that could “come back in later cases to haunt the federal government”;¹³ and “a really big deal” that “opens the door to challenging a bunch of very significant federal statutes that had not really been subject to effective challenge before.”¹⁴ From the right, the response was one of tentative hope. As one scholar noted, “[w]e take away from *NFIB v. Sebelius* the comfort . . . that the federal government can't compel

limited Congress's regulatory powers under Article I and the Reconstruction Amendments but issued no opinions significantly limiting the spending power).

7. *NFIB*, 132 S. Ct. at 2601–09 (plurality opinion).

8. *Id.* at 2642–60 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Notably, even though these Justices were in agreement with the plurality on this point, the joint opinion is styled entirely as a dissent, so angered were they by the rest of the opinion. The remainder of this Article thus refers to these Justices as “the joint dissenters” and their opinion as “the joint dissent.”

9. *Id.* at 2630 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

10. *Id.*

11. See, e.g., Jordan Weissmann, *The Most Important Part of Today's Health Care Ruling You Haven't Heard About*, 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> (suggesting that the press would have treated the Medicaid holding as more significant had it not been part of the same case that dealt with the individual mandate).

12. Pamela S. Karlan, Opinion, *No Respite for Liberals*, N.Y. TIMES, July 1, 2012, at SR1.

13. Neal Katyal, Op-Ed, *A Pyrrhic Victory*, N.Y. TIMES, June 29, 2012, at A29.

14. Weissmann, *supra* note 11 (interviewing Professor Samuel Bagenstos).

states to do its bidding,” adding, “[t]he size and warmth of that comfort will be determined in future cases.”¹⁵

The Supreme Court’s new coercion analysis under the Spending Clause is sure to lead to much litigation over the constitutionality of a wide variety of statutes.¹⁶ The stakes are high, potentially posing grave challenges for the future of Congress’s ability to enact, reauthorize, and enforce programs under the Spending Clause. Because conditional spending statutes underlie a great deal of the regulatory state—in education and social welfare programs,¹⁷ in transportation and infrastructure programs,¹⁸ and in energy and environmental programs¹⁹—if the Court’s coercion analysis were to apply broadly, it would have the potential to significantly upend the way the federal government functions.

This Article considers whether, in fact, the coercion analysis will have this effect by using federal education law as a test case. Notwithstanding the popular understanding of education as a matter for local control—where the right to education is enshrined in state constitutions (but not the federal one)—federal education laws passed using Congress’s spending power are both wide-ranging and of long standing.²⁰ Indeed, the joint dissent in *NFIB* recognized that

15. Ilya Shapiro, *We Won Everything but the Case*, SCOTUSBLOG (June 29, 2012, 9:38 AM), <http://www.scotusblog.com/2012/06/we-won-everything-but-the-case>.

16. *See, e.g.*, Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2640 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (anticipating that the Court’s decision on the Medicaid expansion would open the door for future Spending Clause challenges); J. Lester Feder & Darren Samuelsohn, *The Medicaid Ruling’s Ripple Effect*, POLITICO (July 3, 2012, 11:59 AM), <http://dyn.politico.com/printstory.cfm?uuid=1CA3036B-912B-4A09-81DE-85258564263B> (suggesting the decision would encourage states to challenge conditions attached to federal spending programs and could also cause Congress to act more cautiously when legislating under the Spending Clause).

17. *See, e.g.*, Elementary and Secondary Education Act, 20 U.S.C. §§ 6301–7941 (2006) (authorizing the Department of Education to make federal grants to states in exchange for compliance with educational standards and various accountability measures); Temporary Assistance for Needy Families, Pub. L. No. 104-193, 110 Stat. 2112 (1996) (codified as amended at 42 U.S.C. §§ 601–619 (2006)) (offering states a block grant of funds to provide temporary financial assistance to poor families).

18. *See, e.g.*, Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144 (2005) (codified in scattered sections of 23 and 26 U.S.C.) (authorizing conditional funds for transportation and highway programs).

19. *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401–7671 (2006) (conditioning certain federal funds on states’ enforcement of pollution standards).

20. *See generally* CHRISTOPHER T. CROSS, POLITICAL EDUCATION: NATIONAL POLICY COMES OF AGE (2004); ELIZABETH H. DEBRAY, POLITICS, IDEOLOGY, AND EDUCATION: FEDERAL POLICY DURING THE CLINTON AND BUSH ADMINISTRATIONS (2006); MARIS A. VINOVSIS, FROM A NATION AT RISK TO NO CHILD LEFT BEHIND: NATIONAL EDUCATION GOALS AND THE CREATION OF FEDERAL EDUCATION POLICY (2009); TO EDUCATE A NATION: FEDERAL AND NATIONAL STRATEGIES OF SCHOOL REFORM (Carl F. Kaestle & Alyssa E. Lodewick eds., 2007).

federal funding for elementary and secondary education is second only to federal Medicaid funding,²¹ while Justice Ginsburg examined federal enforcement of education law in her opinion.²² The two major federal education programs, the Elementary and Secondary Education Act (ESEA)²³ (currently reauthorized as No Child Left Behind) and the Individuals with Disabilities Education Act,²⁴ are each, like Medicaid, “a prototypical example of federal-state cooperation in serving the Nation’s general welfare.”²⁵ Both have been subject to some kind of coercion claims or allegations before.²⁶ Similarly, the civil rights laws that prohibit discrimination on the basis of race, gender, and disability in public schools rely for enforcement on the threat of withholding funds, just like the compliance mechanism the *NFIB* Court deemed coercive with regard to Medicaid.²⁷ If the coercion analysis in *NFIB* were to be the undoing of the federal regulatory state, these federal education laws could be next to fall.²⁸

As the rest of this Article shows, however, these laws are not likely to be found coercive, even under *NFIB*’s revitalization of that inquiry. Careful application of the factors deemed relevant to the finding of coercion in *NFIB* demonstrates that the Medicaid expansion is truly *sui generis* in its program design, in the scope of its funding, and in its effect on state budgets.²⁹ Just as the Court did not disturb the Medicaid program in its pre-Affordable Care Act form even as the Court found the Medicaid expansion coercive, the existing federal education laws should survive any future coercion challenge. And if the federal education laws withstand the *NFIB* Court’s coercion inquiry, other conditional spending programs should as well, given their comparatively smaller size.³⁰

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

22. See *id.* at 2637–38 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (discussing cases in which the federal government sought to recover funds from states that had received federal education grants but failed to comply with federal education law).

23. Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended in scattered sections of 20 U.S.C.).

24. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1482 (2006)).

25. *NFIB*, 132 S. Ct. at 2629 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (describing Medicaid); *cf.* Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 52 (2005) (describing the Individuals with Disabilities Education Act).

26. See *infra* notes 238–43, 349–52 and accompanying text.

27. See *infra* notes 428–37 and accompanying text.

28. See, e.g., Mark Walsh, *Ed. Law Challenges Loom After Health-Care Ruling*, EDUC. WK., July 18, 2012, at 20.

29. See *infra* Part II.

30. See generally NAT’L ASS’N OF STATE BUDGET OFFICERS, FISCAL YEAR 2010 STATE

The Article proceeds in three Parts. In Part I, I describe the pre-*NFIB* understanding of the expansive scope of Congress's power under the Spending Clause; explain the difficulty scholars and courts have had in finding anything administrable about the coercion analysis; and then walk through *NFIB*'s analysis of coercion. It is important to do this last task in some detail, as the particular facts that led the Court to find the Medicaid expansion coercive, as well as the facts the various justices found unconvincing, are the key to understanding why the coercion inquiry is unlikely to jeopardize other major spending programs, notwithstanding concerns to the contrary.

I therefore provide a careful reading of the plurality opinion, arguing that it sets up a three-part sequential inquiry: First, does the condition in question threaten to take away funds for a program that is separate and independent from the program to which the condition in question is attached, or does the condition merely govern the use of the funds to which it is attached? If the latter, then the inquiry ends, and the program is not coercive. Second, if the condition does threaten funds for an independent program, did the states have sufficient notice at the time they accepted funds for the first program that they would also have to comply with the second program? If yes, then the inquiry ends once more with the conclusion that the program is not coercive. Third, if there was no such notice, is the amount of funding at stake so significant that the threat to withdraw it constitutes what the plurality calls "economic dragooning"? Only if this last question is reached and the answer is yes would a program be coercive under the plurality's test. I then examine each of these factors in detail to draw out guidance for future cases. In so doing, I also explain how the joint dissent's analysis differs from the plurality's, focusing on economic dragooning as the sole issue of importance.

In Part II, I apply this analysis to the major federal education laws: No Child Left Behind, the Individuals with Disabilities Education Act, and a series of laws that apply wherever federal education funding exists. I first explain how the history and structure of these laws could conceivably lead to new challenges under *NFIB*. I then examine these laws through the lens of both the plurality's and the joint dissent's analysis, on the theory that the joint dissent's analysis is merely one, possibly fickle, vote shy of being a majority. Because the

EXPENDITURE REPORT: EXAMINING FISCAL 2009–2011 STATE SPENDING (2011) [hereinafter NASBO], available at <http://www.nasbo.org/sites/default/files/2010%20State%20Expenditure%20Report.pdf> (describing federal contributions to state expenditures).

lower courts may well apply the joint dissent's analysis as an alternate test, perhaps expecting that the Chief Justice may switch his vote in a future case, it is important to consider whether the difference between the plurality's analysis and the joint dissent's is likely to produce very different results. Through careful analysis of the structure and funding of federal education laws, I demonstrate how attempts to call these laws coercive are unlikely to be successful under either the plurality's or the joint dissent's analysis.

While in their current form these laws should survive challenges under *NFIB*, there are nonetheless implications from this analysis for the future of federal education law and, more broadly, the structure and enforcement of other federal spending programs. In Part III, I consider these implications from an institutional perspective. I conclude that the largest effects are not likely to be doctrinal but rather legislative and administrative. As to the former, I argue that *NFIB* should put a damper on calls to dramatically increase federal education funding; encourage the trend toward smaller grants of limited duration, especially those that bypass the states; and result in some structural changes both in funding and enforcement. As to the latter, I argue, somewhat counterintuitively, that *NFIB* may (and perhaps should) lead to increased enforcement of conditional spending laws.

The bottom line is that concerns that *NFIB* may undo the regulatory state are overstated. Litigation seeking to challenge other federal statutes as coercive is likely to come, but it is important to address these challenges as expeditiously as possible to avoid distraction from the important work of governance. In fact, inviting such challenges may even be desirable in order to limit the uncertainty surrounding how Congress and agencies may continue to do their jobs.

I. COERCION AND THE SPENDING CLAUSE FROM *DOLE* TO *NFIB*

A. *Dole's Limitations on the Scope of Congress's Authority Under the Spending Clause*

The Spending Clause lies in Article I, Section 8, clause 1 of the Constitution, which permits Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."³¹ Until

31. U.S. CONST. art. I, § 8, cl. 1.

*NFIB, South Dakota v. Dole*³² was the leading modern case setting forth the Court's understanding of the contours of Congress's spending power under this clause. In *Dole*, the Court considered whether the scope of this power was exceeded by a statute permitting the Secretary of Transportation to withhold up to 5% of the federal transportation funds otherwise available to a state for any state that failed to set its minimum drinking age at twenty-one.³³ In a 7–2 opinion written by Chief Justice Rehnquist, the Court held that the spending power permitted such a law.³⁴

The Court first noted the breadth of the spending power, citing previous cases establishing that Congress may use this power to “attach conditions on the receipt of federal funds” in furtherance of “broad policy objectives,” and that this power is not limited to goals that Congress could achieve only through some other enumerated power.³⁵ The Court then reviewed “several general restrictions articulated in our cases” that cabin Congress's authority under this power.³⁶ Notably, coercion was not among the four restrictions considered. First, as the Spending Clause itself explains, the exercise of power under that Clause must be “in pursuit of ‘the general Welfare.’”³⁷ Courts should “defer substantially” to Congress's judgment that any expenditure under this power satisfies this restriction.³⁸ Second, “if Congress desires to condition the States' receipt of federal funds, it ‘must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’”³⁹ Third, the conditions must be related “to the federal interest in particular national projects or programs”—what the opinion later called the “germaneness” requirement.⁴⁰ Fourth, and “finally, . . . other constitutional provisions may provide an independent bar to the conditional grant of federal funds.”⁴¹

32. 483 U.S. 203 (1987).

33. *Id.* at 205.

34. *See id.* at 208, 210–12.

35. *Id.* at 206–07.

36. *Id.* at 207.

37. *Id.*

38. *See id.* at 207 & n.2 (questioning whether “general welfare” is a judicially enforceable restriction at all).

39. *Id.* at 207 (alteration in original) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

40. *Id.* at 207–08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

41. *Id.* at 208.

The Court found the first three of these conditions easily satisfied.⁴² There was no doubt that Congress could have reasonably concluded that it was within the general welfare to try to standardize the minimum drinking age in different states to limit the ability of “young persons to combine their desire to drink with their ability to drive.”⁴³ Nor was there any doubt that Congress had stated its conditions clearly in the legislation in question.⁴⁴ The Court further concluded that the condition of raising the drinking age was germane to the federal interest in safe interstate travel, “one of the main purposes for which highway funds are expended.”⁴⁵

The Court ultimately found the fourth condition satisfied, but considered at somewhat greater length whether the Twenty-First Amendment provided an independent constitutional bar to the spending conditions at issue.⁴⁶ The Court rejected the petitioner’s view that, because the Twenty-First Amendment precludes Congress from directly enacting a national minimum drinking age, the Spending Clause also precludes Congress’s achievement of that goal through a more roundabout way.⁴⁷ Spending for the “general welfare” is not limited to what Congress can achieve through its other enumerated powers, the Court reiterated.⁴⁸ In particular, the Court discussed a previous case in which it had held that “a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants.”⁴⁹ Through the spending power, Congress could reach the conduct of state officials whose positions it funded in whole or in part, even though the Tenth Amendment would preclude it from regulating the conduct of these officials directly.⁵⁰ The Court found no violation of the state’s sovereignty because the state could (and did) simply refuse the federal funds in question.⁵¹ In light of this precedent, the Court concluded that the “independent constitutional bar” limit on the spending power “stands for the unexceptionable proposition that the power may not be used to

42. *Id.* at 208–09.

43. *Id.* at 208.

44. *Id.*

45. *Id.* at 208–09.

46. *Id.* at 209, 212.

47. *See id.* at 209–10.

48. *Id.* at 210.

49. *Id.* (considering the analysis in *Oklahoma v. Civil Serv. Comm’n*, 330 U.S. 127 (1947), of a provision in the Hatch Act that permitted the federal government to withhold specified funds if a state permitted certain employees to engage in political activities).

50. *Id.*

51. *See id.*

induce the States to engage in activities that would themselves be unconstitutional.”⁵²

Towards the end of the opinion, citing a case from the 1930s, the Court remarked that “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion,’”⁵³ suggesting that avoiding coercion could theoretically place a fifth limitation on Congress’s spending power. But, in three brief paragraphs of analysis, it declined to find any such coercion where the states stood to lose only 5% of certain highway funds if they declined to lower their drinking age—“relatively mild encouragement,” in the Court’s words.⁵⁴ Nor did the Court find coercion in the fact that the states had largely accepted the condition and enacted the specified drinking-age legislation.⁵⁵ In the end, the Court noted the difficulty of relying on the coercion inquiry, and drawing a line between permissible temptation and impermissible coercion, at all: “[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties,” the Court observed, quoting Justice Cardozo.⁵⁶ “The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.”⁵⁷ The states exercised their “freedom of the will” by deciding whether to comply with the conditions placed on the highway funds, and the choice to enact higher minimum drinking laws “remains the prerogative of the States not merely in theory but in fact.”⁵⁸ The Court therefore upheld the conditions as within the scope of the spending power.⁵⁹

B. *The Limitations of Dole’s Limitations?*

In the wake of the federalism revival of the Rehnquist Court, many commentators observed that the breadth of the spending power served to undercut the tightened restrictions the Court had placed on Congress’s power under the Commerce Clause, Section 5 of the

52. *Id.* at 210 (explaining, as an example, that the federal government could not condition funds on states’ infliction of cruel and unusual punishment).

53. *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

54. *See id.*

55. *Id.*

56. *Id.* (quoting *Steward Mach.*, 301 U.S. at 590).

57. *Id.* (quoting *Steward Mach.*, 301 U.S. at 590).

58. *Id.* at 211–12.

59. *Id.* at 212.

Fourteenth Amendment, and the Tenth Amendment.⁶⁰ If Congress could simply attach conditions to federal grants to accomplish aims that it could not accomplish with direct regulation under its enumerated powers and without upsetting the federal-state balance under the Tenth Amendment, Congress's ability to effect national regulation would in practice be limited only by its willingness to spend money, not by any real constitutional hurdle.⁶¹ Thus, with eager anticipation, concerned gloom, or tentative disbelief that such an event would happen, commentators considered how the Court might cut back on the scope of the spending power by tightening one of the limitations set forth in *Dole*⁶² or through some other means.⁶³

While an assessment of the post-*Dole*, pre-*NFIB* literature on the Spending Clause is both beyond the scope of this Article and unnecessary to its argument, three points are worth making here. First, with one exception—the requirement that Congress set forth the conditions attached to federal grants unambiguously—these arguments have received more critical commentary than judicial traction.⁶⁴ As Professor Bagenstos has argued, a major reason why most of *Dole*'s limitations have received so little play (let alone success) in the courts is because they pose no “analytically tractable limitation on congressional power,”⁶⁵ suffering variously from a level-of-generality problem⁶⁶ and a baseline problem.⁶⁷ In contrast, the

60. See, e.g., Bagenstos, *supra* note 6, at 346–47 (describing the literature making this claim); Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 126, 139–40 (2006) (observing that there is a discrepancy between the Rehnquist Court's treatment of federal legislative power under Article I and the Reconstruction Amendments and its treatment of the Spending Clause).

61. See Bagenstos, *supra* note 6, at 347 (noting that the Court's treatment of the Spending Clause led some legislators and scholars to reframe proposals in terms of the spending power).

62. See, e.g., *id.* at 356–80, 393–409 (canvassing and assessing arguments to make more robust the general welfare, germaneness, coercion, and unambiguous statements limitations set forth in *Dole*); Douglas A. Wick, Note, *Rethinking Conditional Federal Grants and the Independent Constitutional Bar Test*, 83 S. CAL. L. REV. 1359, 1362 (2010) (offering a reinterpretation of the independent constitutional bar limit set forth in *Dole*, which would make the standard more robust by invalidating any condition that the federal government would be barred from pursuing directly).

63. See, e.g., Bagenstos, *supra* note 6, at 384–93 (assessing the argument that conditions attached to federal funds are merely contractual provisions and thus do not involve the actual use of federal legislative power); Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 97–100 (2001) (finding no constitutional or precedential support for the argument that the anti-commandeering doctrine under the Tenth Amendment should limit the Spending Clause).

64. See Bagenstos, *supra* note 6, at 346–50 (noting that the Court has not taken advantage of opportunities to address these arguments).

65. *Id.* at 355.

66. *Id.* at 355–67 (noting that any application of the *Dole* “general welfare” limitation would depend in part on the level of abstraction that the problem is

unambiguous-condition requirement has more analytic bite, and the Court has, in fact, expanded this requirement into a clear-notice rule for Spending Clause interpretation.⁶⁸

In *Arlington Central School District Board of Education v. Murphy*,⁶⁹ for example, the Court explained that because the Individuals with Disabilities Education Act (IDEA) was enacted pursuant to Congress's authority under the Spending Clause, it was not enough to engage in ordinary statutory interpretation to determine whether the Act provides fee-shifting for expert fees to parents who prevail against school districts in litigation under the Act.⁷⁰ Instead, the question was whether a state official, in deciding whether to accept federal funds under the Act, would "clearly understand" that this was one of the conditions under the Act.⁷¹ "In other words," explained the Court, "we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case."⁷² While such a clear-notice rule has some restrictive effect, limiting the enforcement of Spending Clause statutes on particular issues or grounds, this rule is a rule of interpretation, rather than a rule limiting federal power.⁷³ That is, if Congress wants to reject the Court's conclusion in *Murphy* that the IDEA does not require prevailing parents to be compensated for their expert fees because of the absence of a clear statement in the statute on the issue, all Congress need do is speak clearly on the issue in the future.

This observation leads to the second point worth making here: the scope of Congress's power under the Spending Clause has remained extremely broad. Congress has accordingly relied on its spending power to accomplish a large number of its policy objectives in a wide range of fields, from education and social welfare to the environment

viewed from, and that application of the germaneness limitation requires a determination of how broadly to consider relatedness).

67. *Id.* at 372–84 (explaining that the major problem with the coercion doctrine is that any determination that coercion exists requires making an assumption about states' baseline entitlement to federal funds).

68. *Id.* at 393–409 (describing variants of the Court's developing notice doctrine in Spending Clause cases).

69. 548 U.S. 291 (2006).

70. *Id.* at 300; *see also id.* at 305 (Ginsburg, J. concurring in part and concurring in the judgment) (disputing the need for a "clear notice" requirement in Spending Clause cases in general or this case in particular).

71. *Id.* at 296 (majority opinion) (explaining that courts must be more rigorous in interpreting notice in the context of conditional spending legislation, because of the contractual nature of such legislation).

72. *Id.*

73. *See* Bagenstos, *supra* note 6, at 350 (noting that the clear notice requirement allows the Court to limit the spending power only indirectly).

and transportation,⁷⁴ and states have relatively rarely filed lawsuits seeking declarations that statutes are unconstitutional on Spending Clause grounds.⁷⁵ As Professor Ryan has observed, then, even though education policy is theoretically a matter for state and local governments, in the absence of serious constitutional limitations under the Spending Clause, “Washington has wide latitude to affect education policy by attaching conditions to its funding. . . . [T]he only real limits on federal power over education policy are political.”⁷⁶ While Professor Ryan was writing about education policy in particular, the same could be said of the wide range of other areas in which Congress relies on its spending power to regulate.

The last point before turning to *NFIB* is merely a more particular version of the previous two points, but it is nonetheless important to make in light of the Court’s reliance on the coercion theory in *NFIB*: While scholars have struggled mightily to come up with a logically sound and judicially administrable version of the coercion theory considered (but not adopted) at the end of *Dole*, they have had little success in doing so.⁷⁷ Again, Professor Bagenstos explains why:

Determinations that a conditional offer of federal funds coerces the states tend to depend on normatively contestable premises about states’ baseline entitlement to federal largesse. Such premises are “especially problematic” when considered “against the backdrop of a constitutional jurisprudence in which most redistribution is permissible and few affirmative obligations on government are imposed.”⁷⁸

How, then, are judges to tell “whether the states are faced . . . with an offer they cannot refuse or merely with a hard choice?”⁷⁹ For these reasons, until *NFIB*, the coercion theory found essentially no approval in the courts.⁸⁰ Even in the ACA litigation, no lower court

74. See *supra* notes 17–19.

75. See, e.g., *Kansas v. United States*, 214 F.3d 1196, 1200, 1204 (10th Cir. 2000) (dismissing a Spending Clause challenge to the Personal Responsibility and Work Opportunity Reconciliation Act and noting, in absence of precedent, Kansas’s “very heavy burden in seeking to have the PRWORA declared unconstitutional”).

76. James E. Ryan, *The Tenth Amendment and Other Paper Tigers: The Legal Boundaries of Education Governance*, in WHO’S IN CHARGE HERE? THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY 42, 53 (Noel Epstein ed., 2004).

77. See Bagenstos, *supra* note 6, at 374–80 (critically assessing several attempted reformulations of the coercion test).

78. *Id.* at 372–73 (footnote omitted) (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1450 (1989)); see also Ryan, *supra* note 76, at 64–65 (explaining conceptual difficulties with coercion argument).

79. *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981).

80. See, e.g., *West Virginia v. U.S. Dep’t of Health & Human Servs.*, 289 F.3d 281, 289–90 (4th Cir. 2002) (noting that most courts have “effectively abandoned any real effort to apply the coercion theory”). While a minority of the en banc Fourth Circuit in *Virginia Department of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc)

judge accepted the argument that the Medicaid expansion was coercive, even as the courts divided on the constitutionality of the individual mandate.⁸¹ It was therefore a surprise to many when the Court agreed to hear argument on this question in *NFIB*.⁸²

C. *NFIB* and Coercion

In *NFIB*, a plurality of Chief Justice Roberts, Justice Breyer, and Justice Kagan reframed the inquiry under the Spending Clause. As in *Dole*, the plurality explained that “our cases have recognized limits on Congress’s power under the Spending Clause to secure state compliance with federal objectives.”⁸³ But instead of turning to the series of limitations articulated in *Dole*, the plurality narrowed the focus of concern. Because “Spending Clause legislation [i]s much in the nature of a contract[,] . . . [t]he legitimacy of Congress’s exercise of the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the contract.”⁸⁴ A state cannot be said to have acted voluntarily when Congress uses “financial inducements to exert a ‘power akin to undue influence.’”⁸⁵ Congress, the plurality explained, “may use its spending power to create incentives for States to act in accordance with federal policies. But when ‘pressure turns into compulsion,’ the legislation runs contrary to our system of federalism,” and exceeds the scope of the Spending Clause.⁸⁶ In other words, the issue of coercion—mentioned only in passing in *Dole*⁸⁷—became the central show.⁸⁸

(per curiam), would have found coercive the Department of Education’s threat to withhold IDEA sums from Virginia for failure to comply with part of the Act, that conclusion did not carry the day. *Id.* at 560–61 (noting that only six of the thirteen judges on the en banc court adopted the full dissenting panel opinion of Judge Luttig, which included the coercion conclusion, while the remaining seven judges either declined to join this conclusion or dissented entirely). Subsequent Fourth Circuit cases have treated the coercion doctrine as fatal in theory but toothless in fact. *See, e.g., West Virginia*, 289 F.3d at 288–90 (acknowledging that the coercion theory finds some support in the Fourth Circuit but holding that there was no coercion in the case under consideration).

81. *See* cases cited *supra* notes 2–3.

82. *See, e.g., Joondeph, supra* note 5.

83. *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2602 (2012) (plurality opinion); *see also South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (“The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases.” (internal citation omitted)).

84. *NFIB*, 132 S. Ct. at 2602 (plurality opinion) (internal quotation marks omitted).

85. *Id.* (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

86. *Id.* (citation omitted).

87. *Dole*, 483 U.S. at 211–12 (raising and resolving the coercion issue briefly at the end of the opinion, separate from the four restrictions on the spending power considered earlier in the opinion); *see New York v. United States*, 505 U.S. 144, 172 (1992) (identifying the “four” limitations on the Spending Clause set forth in *Dole*); *see also NFIB*, 132 S. Ct. at 2634 (Ginsburg, J., concurring in part, concurring in the

For the plurality, the rationale for avoiding coercion under the Spending Clause was rooted in respect for the states as “independent sovereigns in our federal system.”⁸⁹ The plurality identified two values associated with this sovereignty. First, “individual liberty would suffer” in “a system that vests power in one central government.”⁹⁰ And second, “the political accountability key to our federal system” would suffer if voters do not understand which government officials—federal or state—to blame for a particular program.⁹¹ Only when a state has a legitimate choice whether to accept federal funds and the accompanying programmatic conditions can voters hold state officials accountable for their choice.⁹²

In connecting Spending Clause conditions to these values of individual liberty and political accountability, the plurality newly presented the Spending Clause as closely aligned with the anti-commandeering doctrine under the Tenth Amendment. Indeed, it is telling that the key cases the plurality cited for its explanation of the limitations on the spending power were the anti-commandeering cases of *Printz v. United States*⁹³ and *New York v. United States*,⁹⁴ rather than *Dole*.⁹⁵ *Dole*, it bears reiterating, did not focus much on state sovereignty, individual liberty, or political accountability,⁹⁶ while *New York v. United States* carefully

judgment in part, and dissenting in part) (noting that the *Dole* Court “mentioned, but did not adopt,” the coercion inquiry, which had been “hypothetically raised a half-century earlier” in *Steward Machine*).

88. To be sure, the plaintiffs below did not challenge the Medicaid expansion on any ground other than coercion, see *Florida ex rel. Att’y Gen. v. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1263–64 (11th Cir. 2011), *rev’d sub nom.*, *NFIB*, 132 S. Ct. 2566, but both Justice Ginsburg, *NFIB*, 132 S. Ct. at 2634 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part), and the joint dissent, *id.* at 2659 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting), placed the coercion inquiry in the context of the *Dole* factors, while the plurality did not.

89. *NFIB*, 132 S. Ct. at 2602 (plurality opinion).

90. *Id.*

91. *Id.* The plurality did not seem to consider that voters might wish to *praise* government officials for a particular program.

92. *Id.*

93. 521 U.S. 898 (1997).

94. 505 U.S. 144 (1992).

95. *NFIB*, 132 S. Ct. at 2602–03; see also *Kansas v. United States*, 214 F.3d 1196, 1203 (10th Cir. 2000) (calling *Printz* and *New York* “inapposite” to the state’s challenge of conditions attached to its acceptance of federal welfare funds).

96. See *South Dakota v. Dole*, 483 U.S. 203, 210 (1987) (describing a previous case in which the Court had found no violation of state sovereignty where a state could simply refuse federal funds whose accompanying conditions it did not like, and making no mention of individual liberty or political accountability as a concern under the Spending Clause).

distinguished commandeering from conditional spending.⁹⁷ It has long been thought that Congress can accomplish almost anything with conditional spending under the Spending Clause, even when it cannot accomplish its goals with more direct regulation.⁹⁸ The plurality's articulation of spending conditions as akin to commandeering—an idea that the joint dissent agreed with⁹⁹—suggests a new way of looking at Congress's spending power.

While the plurality did not articulate a clear test for finding coercion or attempting to “fix the outermost line’ where persuasion gives way to coercion,”¹⁰⁰ it is nonetheless possible to discern three key factors on which the plurality relied to find the Medicaid expansion coercive: (1) the Medicaid expansion constituted a new, independent program, which the states could reject only if they were willing to relinquish all of their funds for the older, pre-expansion program; (2) the states had insufficient notice that they would have to comply with the new program's conditions; and (3) the states were “economic[ally] dragoon[ed]” into the new program by the financial terms of the expansion.¹⁰¹ According to the plurality, these factors had the constitutionally impermissible effect of “conscript[ing] state

97. See *New York*, 505 U.S. at 161–67 (tracing the distinction between commandeering and conditional spending to the Framers' original understanding of the Constitution); see also Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 616 (2011) (explaining that the anti-commandeering prohibition under the Tenth Amendment is the reason why Congress used the spending power to get the states to participate in the Affordable Care Act and Race to the Top, the Obama administration's major education initiative).

98. See, e.g., *Dole*, 483 U.S. at 207 (explaining that Congress may pursue objectives through the use of the spending power where it may not do so under Article I's enumerated powers); see also *id.* at 210 (“We have also held that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants.”); Bagenstos, *supra* note 6, at 347 n.2 (citing articles addressing how the Court's Spending Clause jurisprudence has granted Congress a sort of indirect regulatory power); Metzger, *supra* note 97, at 616–17 (explaining that federalism doctrines such as anti-commandeering have only limited effectiveness in restricting federal power, in part because of the breadth of the spending power).

99. See *NFIB*, 132 S. Ct. at 2660 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (citing *New York* and *Printz* for the proposition that spending conditions may violate the commandeering prohibition).

100. *Id.* at 2606 (plurality opinion) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 591 (1937)).

101. *Id.* at 2603–07. Justice Ginsburg analyzed each of these factors in turn in her dissent. *Id.* at 2635–41 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). I therefore do not agree with Professors Huberfeld, Leonard, and Outtersen that “the Court has crafted little doctrine to follow.” Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in the Healthcare Cases*, 93 B.U. L. REV. 1, 6–8 (2013) (criticizing the plurality for “declin[ing] to articulate any test or rubric for deciding whether a spending clause program crosses the coercion line” and instead presenting only “fact-specific” “slogans” that “provide little guidance to future courts and litigants”).

[agencies] into the national bureaucratic army”¹⁰² and “surely” made the Medicaid expansion coercive.¹⁰³ In the joint dissent, Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito focused on the last of these factors and agreed that the financial terms of the Medicaid expansion were coercive.¹⁰⁴ Thus, while Justice Ginsburg, joined by Justice Sotomayor, dissented from this conclusion,¹⁰⁵ seven Justices held that the Medicaid expansion exceeded the scope of Congress’s spending power.

Four interpretive questions about these opinions immediately present themselves. First, what is the relationship among the three key factors in the plurality’s opinion: Must they all be present in order for a law to be coercive, or does any one of them alone establish coercion? Second, what is the relationship between the plurality opinion and the joint dissent: Where do they overlap, where do they differ, and what is the likely effect of their difference? Third, which opinion—the joint dissent or the plurality—is likely to provide the framework that lower courts will follow? And fourth, what do the opinions reveal about how to determine whether a program is new and independent, provides insufficient notice, or constitutes economic dragooning?

As to the first question, the best reading of the plurality’s opinion is that the three factors may not independently lead to a finding of coercion but instead must be tied together. As I explain in the rest of this section, the three factors are properly read to operate in sequence: Does the condition in question threaten to take away funds for a program that is separate and independent from the program to which the condition in question is attached?¹⁰⁶ If so, did the states have sufficient notice at the time they accepted funds for the first program that they would also have to comply with the second program?¹⁰⁷ If not, is the amount of funding at stake so significant that the threat to withdraw it constitutes economic dragooning?¹⁰⁸ This reading supports and refines into a three-part sequential test Professor Bagenstos’s conclusion that the plurality opinion establishes an “anti-leveraging principle,” under which a statute is

102. *Id.* at 2607 (plurality opinion) (second alteration in original) (quoting *FERC v. Mississippi*, 456 U.S. 742, 775 (1982) (O’Connor, J., concurring in judgment in part and dissenting in part)) (internal quotation marks omitted).

103. *Id.* at 2606 (plurality opinion).

104. *Id.* at 2664 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

105. *Id.* at 2666–67 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

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

107. *Id.* at 2606.

108. *Id.* at 2604–05.

unconstitutionally coercive “when Congress takes an entrenched federal program that provides very large sums to the states and tells states they can continue to participate in that program only if they *also* agree to participate in a separate and independent program.”¹⁰⁹

As to the second question—the relationship between the plurality opinion and the joint dissent—I agree with Professor Bagenstos that the joint dissent’s analysis would in theory raise constitutional questions about more statutes than the plurality’s analysis. This is because the joint dissent would focus on the size alone of a spending program, while the plurality would additionally examine whether separate programs are yoked together and the extent of notice to the states about this yoking.¹¹⁰ As my discussion in Part II indicates, however, I disagree with Professor Bagenstos that application of the joint dissent’s analysis would, in the end, “render many more spending conditions unconstitutional.”¹¹¹ I demonstrate below that federal education funding, the second largest source of federal funds to the states, is unlikely to be deemed coercive under either the plurality’s or the joint dissent’s understanding of “economic dragooning.” And if federal education funding is unlikely to be found coercive along these lines, smaller sources of federal funding are even less likely to be found coercive.

As to the third question—which opinion lower courts are likely to follow—once more I agree with Professor Bagenstos that in a rigid, doctrinal sense, the plurality opinion provides “the analysis that lower courts will most safely follow”¹¹² because any statute that would be invalidated under the narrower rationale provided by the plurality would also be found problematic by the four Justices in the joint dissent.¹¹³ But it seems to me that lower courts may well apply the joint dissent’s analysis in the alternative, given the lack of binding precedent that attaches to a plurality opinion,¹¹⁴ and given the

109. See Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 *GEO. L.J.* (forthcoming 2013) (manuscript at 3), available at <http://ssrn.com/abstract=2128977>. I share Professor Bagenstos’s views that this reading of the plurality’s opinion further produces a test for coercion that is normatively superior to a test that would find coercion where any one of the factors is present in isolation. See *id.* (manuscript at 11–42). However, as the normative aspect of this analysis is not important for the purposes of my project—which instead is to try to make sense of the two alternate tests and apply them faithfully to the area where the challenges seem most likely to loom next—I refer readers interested in that aspect to Professor Bagenstos’s article.

110. *Id.* (manuscript at 5–6).

111. *Id.* (manuscript at 5).

112. *Id.* (manuscript at 6).

113. *Id.* (manuscript at 5–6 & n.17) (citing *Marks v. United States*, 430 U.S. 188, 195 (1977)).

114. *Id.* (manuscript at 6 n.17); see also Huberfeld et al., *supra* note 101, at 36 & n.236

possibility that *NFIB* is merely the opening salvo in a revitalized coercion inquiry.¹¹⁵ It is therefore important to provide guidance to the lower courts on how to apply the joint dissent, and in particular, to show how even the joint dissent would not jeopardize as many laws as one might think on an initial read.

Finally, it is to the fourth question I now turn: how to understand and extract guidance from the facts that the plurality and joint dissent found compelling in their coercion analysis. What indicators mattered? What indicators were deemed irrelevant? And given this analysis, what opportunities and vulnerabilities present themselves to litigants seeking to make or defend against a challenge of coercion? As I unpack these indicators and explain how best to read each factor, I show at the same time how the three factors should be read together.

1. *Old funding conditioned on compliance with a new program*

The plurality began by distinguishing between two types of spending conditions that Congress might conceivably impose: conditions on the use of federal funds and conditions that threaten to take away federal funds for other programs.¹¹⁶ According to the plurality, the former is constitutionally permissible: “We have upheld Congress’s authority to condition the receipt of funds on the States’ complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the ‘general Welfare.’”¹¹⁷ In contrast, the latter is constitutionally suspect: “Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.”¹¹⁸

One could question whether the offered justification for this distinction makes sense. At some level, imposing conditions on the use of federal funds could also be seen as “pressuring the States to accept policy changes.”¹¹⁹ For example, if the federal government offers a grant that is designed to pay for standardized tests taken by

(noting that plurality decisions are “notoriously difficult to interpret” and cause confusion for lower courts).

115. See Huberfeld et al., *supra* note 101, at 50 (suggesting that *NFIB*’s Spending Clause analysis represents “a launch, not a landing”).

116. Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2603–05 (2012) (plurality opinion).

117. *Id.* at 2603–04.

118. *Id.* at 2604.

119. *Id.*

students in certain grades, that grant is also a way of pressuring states to administer standardized tests in those grades. By the same token, the federal government could reasonably believe that tying together separate and independent programs is the best way to promote the general welfare. For example, Congress might want to require states currently accepting funds for elementary and secondary education to also accept a new grant for preschool programs or lose the old grant, on the theory that the general welfare is best served by integrating preschool and subsequent education.¹²⁰

But setting these questions aside and taking the plurality's distinction at face value, three points become apparent. First, the plurality did not challenge at any fundamental level Congress's ability to impose conditions on a source of funding.¹²¹ That is clear from its explanation that tying such conditions to funding permits Congress to effectuate the general welfare.¹²² To make the point more directly: "Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use."¹²³ Existing laws (or future laws) that simply impose conditions on the use of program funds are therefore not jeopardized by the plurality's holding.

Second, the plurality indicated that the size of a spending program cannot itself trigger a finding of coercion.¹²⁴ As the plurality suggested by imposing no spending cap in its discussion of how Congress achieves the general welfare, where conditions govern the use of funds, the conditions are not coercive, no matter the size of the funds. The plurality gave no impression that it found the large sums involved with pre-ACA Medicaid problematic, as the conditions associated with those funds governed the use of those funds. Similarly, the plurality gave no impression that it found the large sums offered to expand Medicaid problematic, as long as those sums were conditioned on their use and not the use of other funds. For the plurality, then, the size of a spending program is relevant for

120. Bagenstos, *supra* note 109 (manuscript at 46).

121. *NFIB*, 132 S. Ct. at 2601–02 (plurality opinion).

122. *Id.*

123. *Id.* at 2607; *see also id.* at 2603 ("Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds.").

124. *See id.* at 2601–02 (emphasizing the nature, not the amount, of the spending to find it coercive). The joint dissent did not agree on this point, as I discuss shortly. *See infra* Part I.C.3.

coercion purposes only where a condition threatens to terminate “other significant independent grants.”¹²⁵

Third, the plurality did not suggest that coercion is apparent whenever “significant independent grants” are threatened. Instead, because “conditions [that] take the form of threats to terminate other significant independent grants . . . are properly viewed as a means of pressuring the States to accept policy changes,”¹²⁶ such a threat merely prompts an inquiry into “whether ‘the financial inducement offered by Congress’ [is] ‘so coercive as to pass the point at which pressure turns into compulsion.’”¹²⁷ Take, for example, the plurality’s analysis of *Dole*. The plurality acknowledged that the condition at stake in *Dole* “was not a restriction on how the highway funds . . . were to be used,” but rather a threat to terminate the independent grant of highway funds.¹²⁸ For the plurality, that threat triggered the *Dole* Court’s analysis of whether the threat was significant enough to be deemed coercive, but did not require a finding that it was.¹²⁹

Under the plurality’s analysis, then, the first element for a finding of coercion is that a “significant independent” grant is threatened. The next question then becomes how to determine whether a grant is “significant” and “independent.” I explain how to determine if a grant is financially significant below in my discussion of “economic dragooning,”¹³⁰ but turn to the determination of a grant’s independence now.

Sometimes the independence of a grant will be obvious. There is no doubt that Medicaid itself is a separate and independent program from No Child Left Behind, for example. But where it is less clear whether a condition is merely a modification to an existing program or a new and independent program, the plurality’s analysis of why it placed the Medicaid expansion into the latter category provides some guidelines.

125. *NFIB*, 132 S. Ct. at 2604 (plurality opinion).

126. *Id.*

127. *Id.* (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).

128. *Id.*

129. *Id.* Note that this is a separate inquiry from whether the condition is germane or related to the federal interest in the program, one of *Dole*’s requirements. The plurality did not suggest that the Medicaid expansion was not germane to Medicaid funding, just as it did not disavow the *Dole* Court’s conclusion that the drinking age was germane to federal highway funding. For the plurality, then, a program can be germane and yet nonetheless separate and independent.

130. See *infra* Part I.B.3.

First, unlike previous modifications to the program, the Medicaid expansion constituted “a shift in kind, not merely degree”¹³¹:

The original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children. Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. 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.¹³²

To be sure, whether something will qualify as a shift in kind rather than degree is not entirely straightforward, and one could well challenge the plurality’s understanding of Medicaid’s categories and history as it applied this inquiry in *NFIB*.¹³³ But to say that this analysis provides *no* guidance to litigants, courts, or Congress is not accurate. The more a statutory change can be said to “merely alter[]” or “expand[] the boundaries” of previously existing statutory categories, the more likely it is that the change works no shift in kind.¹³⁴ On the other hand, the more a statutory change can be said to “transform” a program by exploding the concept of statutory categories or by making those statutory categories so broad that they start to become “comprehensive” or “universal,” the more likely it is that the change is a shift in kind rather than degree.¹³⁵ Courts make assessments about where an action falls along a spectrum of interpretive possibility all the time.¹³⁶

Second, and in my view more importantly, the plurality took very seriously the idea that the basic contours of the pre-ACA Medicaid—

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

132. *Id.* at 2605–06 (citation omitted).

133. *See id.* at 2636 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (disagreeing with the plurality’s interpretation of the history and structure of Medicaid); Huberfeld et al., *supra* note 101, at 13–29, 75–86 (discussing the history of Medicaid and arguing that the plurality’s understanding of this history was incorrect).

134. *NFIB*, 132 S. Ct. at 2606 (plurality opinion).

135. *Id.*

136. For example, the questions of whether government action results in “excessive entanglement” with religion under the First Amendment, *see Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971), whether an action “shocks the conscience” for due process purposes, *see County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998), or whether a federal statute enacted under Section 5 of the Fourteenth Amendment is “congruent and proportional” to violations of Section 1 of the Fourteenth Amendment, *see Tennessee v. Lane*, 541 U.S. 509, 548 (2004), all have a similar flavor.

what it called “existing Medicaid”—remained in place, while the ACA’s expansion of Medicaid was an addition on top of the old program, not a wholesale replacement of the old program.¹³⁷ In other words, it is not that the ACA transformed the entire Medicaid program that made the Medicaid expansion “independent”—it is that “existing Medicaid” stayed on the books while the expansion, as appended to “existing Medicaid,” was so large as to become itself an independent program. The second indicator as to whether a modification is actually an independent program is thus whether the underlying, pre-modification program remains intact.

The third and fourth indicators of an independent program identified by the plurality strike me as sufficient but not necessary under the plurality’s reading: whether “Congress created a separate funding provision to cover the costs of” the modification and whether “[t]he conditions on use of the different funds are also distinct” from the conditions placed on the pre-modification program.¹³⁸ These indicators are likely sufficient because separate funding and distinct conditions suggest that the modification could itself be a stand-alone program. But they are not necessary. As a matter of interpretation, the plurality offered these two indicators as supporting, not establishing, its conclusion that the Medicaid expansion was a new program.¹³⁹ Moreover, the plurality agreed that the condition in *Dole* was imposed on a separate, independent program, and there were no new funds attached to that condition.¹⁴⁰ And as a matter of logic, it is difficult to see how the absence of these indicators would undermine the plurality’s reliance on the “shift in kind” and on the continued existence of the pre-modification program. In other words, had Congress not provided separate funding for the Medicaid expansion and had instead made the conditions of the Medicaid expansion match the conditions on the pre-ACA Medicaid, it would not have diminished the argument that the expansion was so transformative that, layered on top of the still-existing pre-ACA Medicaid, it constituted a new and independent program.

2. *Notice to the states*

Once it has been determined that a condition does not govern the use of the funds in question but rather threatens to terminate

137. *NFIB*, 132 S. Ct. at 2606 (plurality opinion).

138. *Id.*

139. *Id.* (“Indeed, the manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program.”).

140. *Id.* at 2604.

another independent program, the next question under the plurality's analysis is whether the states had notice at the time they first accepted funding under the first program that they would also have to comply with the second program.¹⁴¹ If the states had proper notice of this tying condition at the start, the condition would not be coercive under the plurality's reading, for the "legitimacy of Congress's exercise of the spending power 'thus rests on whether the State voluntarily and knowingly accepts the terms of the contract.'"¹⁴² If the states did not have proper notice, then the question becomes whether the terms of the financial inducement constitute economic dragooning.

Justice Ginsburg took the plurality to say that "States must be able to foresee, when they sign up, alterations Congress might make later on."¹⁴³ In her view, the plurality's references to "existing" or "pre-existing" Medicaid at the same time as it rejected the ACA's expansion "limit[ed] Congress' authority to alter its spending programs."¹⁴⁴ She rightly explained that such an interpretation ran counter to longstanding precedent.¹⁴⁵ If this broad reading were what the plurality meant, then the regulatory state would indeed be in jeopardy, since Congress periodically reauthorizes and modifies its spending programs as a matter of course in ways that are not previewed in the original legislation.¹⁴⁶ If reservation of "the right to alter, amend, or repeal" any provision of Medicaid did not provide the requisite notice about the Medicaid expansion, as the plurality held it did not,¹⁴⁷ then, under Justice Ginsburg's understanding of the plurality, states would essentially have the right to freeze the design of a spending program and Congress's hands would be tied with respect to modification.¹⁴⁸

Justice Ginsburg's alarmist reading of the plurality's notice requirement, however, is not an accurate one. The plurality's notice

141. *Id.* at 2606–07.

142. *Id.* at 2602 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

143. *Id.* at 2637 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

144. *Id.* at 2641.

145. *Id.* at 2638–39 (citing *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986); *Bennett v. New Jersey*, 470 U.S. 632 (1985); *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

146. *See id.* at 2639 (discussing previous alterations to the Aid to Families with Dependent Children program).

147. *Id.* at 2606 (plurality opinion).

148. *Id.* at 2638–39 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

requirement hinged on its conclusion that the Medicaid expansion was a separate program from the pre-ACA Medicaid.¹⁴⁹ The allusions to existing and pre-existing Medicaid referred to the fact that the pre-ACA version of Medicaid was still on the books.¹⁵⁰ These references are better seen merely as a way of distinguishing the pre-ACA version of Medicaid, with its still-specified program design and funding, from the ACA's expansion of Medicaid, with its new specifications and new funding, and not as any limitation on Congress's authority to alter its spending programs.¹⁵¹ As the plurality explained, the states may have agreed, in taking pre-ACA Medicaid funds, that Congress could "alter, amend, or repeal any provision," but nothing in this language indicated that Congress could "enlist[] the States in a *new* health care program" as a condition of receiving those funds.¹⁵² The notice the plurality actually required, then, is not notice of any change to the program Congress might make in the future, but notice that the states would have to participate in a separate, independent program if they want to participate in the first program.

Justice Ginsburg's reading would not square with the plurality's explanation that Congress may "offer[] funds . . . to expand the availability of health care, and requir[e] that States accepting such funds comply with the conditions on their use,"¹⁵³ in keeping with what the plurality recognized as Congress's right to "ensure[] that the funds are spent according to its view of the 'general Welfare.'"¹⁵⁴ As I explained in the previous section, the plurality would find no coercion when Congress merely places conditions on the use of funds.¹⁵⁵ The plurality did not indicate that Congress may place conditions on a program only at the time the program is first implemented.

That the plurality cannot have meant Justice Ginsburg's reading is also clear from its treatment of earlier revisions to Medicaid. If the plurality really meant that states must be able to foresee any change Congress might make to a program at the moment they first accept funds for it, the plurality would have presumably had some difficulty with the "[p]revious amendments to Medicaid eligibility," which

149. *Id.* at 2606 (plurality opinion).

150. *Id.* at 2601.

151. *See id.* (comparing "existing Medicaid," which covered certain needy groups before the Medicaid expansion, with the expansion, which covers all individuals below 133% of the poverty line).

152. *Id.* at 2605–06 (emphasis added).

153. *Id.* at 2607.

154. *Id.* at 2603–04.

155. *See supra* part I.B.1.

“altered and expanded the boundaries of [the original] categories” set forth in 1965.¹⁵⁶ Such alterations and expansions would not have been foreseeable when the states originally accepted funds under Medicaid, given the contours of the original eligibility categories, and yet the plurality did not object.¹⁵⁷

The same is true for the plurality’s treatment of the statute at issue in *Dole*. That statute was an amendment to the Surface Transportation Assistance Act of 1982.¹⁵⁸ There is no chance that when states took funds under that Act in 1982 they could have foreseen that a 1984 law would require them to raise their drinking age or lose some funding under the Act. Yet the plurality did not conclude that the subsequent amendment was therefore coercive.¹⁵⁹

The distinction between these two examples—previous amendments to Medicaid and the amendment at issue in *Dole*—helps elucidate the effect of the plurality’s notice requirement. Notice at the time the state first accepts funding under a program that two programs will be tied together should end the coercion inquiry,¹⁶⁰ but the absence of such notice does not mean that the condition is coercive; it simply means that the coercion inquiry should proceed to the third stage, asking whether the financial inducements are so significant as to constitute economic dragooning.¹⁶¹ For the plurality, previous amendments to Medicaid were merely modifications on the use of Medicaid funds, not the creation of a separate program, and were therefore not coercive at the first stage of the analysis. However, because the condition at issue in *Dole* did threaten to remove funds from a separate program, the plurality considered the second stage of the analysis. Finding no notice at the time the states first accepted highway funds that this independent condition would also be required, the plurality nonetheless did not conclude at this second stage that the condition was coercive. Instead, the plurality went on to examine the scope of the financial inducement under the third stage of analysis. The plurality’s notice requirement therefore

156. *NFIB*, 132 S. Ct. at 2606 (plurality opinion).

157. *Id.*

158. Act of July 17, 1984, Pub. L. No. 98-363, sec. 6(a), § 158, 98 Stat. 435, 437.

159. *NFIB*, 132 S. Ct. at 2604 (plurality opinion).

160. Thus, under the facts in *Dole*, had the original 1982 Transportation Act included the requirement that states accepting funds under the Act would have to raise their drinking age, presumably the plurality’s notice requirement would have been satisfied because the states would have had full notice of the requirement to participate in an independent program at the moment they first decided whether to accept the funds in question.

161. See *infra* part I.B.3 (explaining when economic dragooning occurs).

determines whether the coercion analysis stops at the second stage or proceeds to the third; it does not provide a final answer itself.

The plurality introduces one distinction between the notice required of conditions that tie together two independent programs and the notice that is typically required of Spending Clause conditions. Whereas most Spending Clause conditions must provide adequate notice at the time they are imposed, even if that is years after the original legislation was passed,¹⁶² the notice the plurality required of tying conditions comes earlier in time, at the moment states first accept funds under a program.¹⁶³ This distinction fits with the plurality's concern that tying conditions are meant to "pressur[e] the States to accept policy changes" and therefore deserve closer scrutiny.¹⁶⁴ If a state knows at the time it accepts funds for a program that it will also have to comply with the terms of another program, it can understand the choice before it and make its own decisions.¹⁶⁵ But if a state understands that it must comply with the terms only of the program for which it is accepting funds (even knowing that those terms may change), and only later learns that it must take on the conditions of the new program if it wants to retain funds under the old program, its ability to make a knowing choice is compromised. It is in that sense that condition that ties two programs together once a state is already deeply entrenched in the first program is a "post-acceptance" or "retroactive" condition.¹⁶⁶ "A State could hardly anticipate that Congress's reservation of the right to 'alter' or 'amend' the Medicaid program included the power to transform it so dramatically," by adding "a new health care program" on top of "existing Medicaid."¹⁶⁷ But a notice provision that tied Medicaid to another program when the states first accepted money under Medicaid in 1965 would not face this difficulty.

The plurality did not explain what would constitute sufficient notice of a tying condition, but the typical clear statement rule applicable in Spending Clause cases would seem to apply: what "a state official would clearly understand" about the obligations imposed

162. See, e.g., *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295–97 (2006) (considering notice requirement as to provision added in 1986 to legislation originally passed in 1975).

163. *NFIB*, 132 S. Ct. at 2606 (plurality opinion).

164. *Id.* at 2604.

165. This would be a paradigmatic example of the plurality's dramatic explanation that "[t]he States are separate and independent sovereigns. Sometimes they have to act like it." *Id.* at 2603.

166. *Id.* at 2606.

167. *Id.*

by the Act.¹⁶⁸ One can certainly argue about the value or meaning of this rule,¹⁶⁹ but read properly, the plurality's opinion did not expand the notice requirement in any way that meaningfully disrupts Congress's ability to modify Spending Clause legislation.

3. *Economic dragooning*

The last part of the plurality's coercion analysis is that Congress may not offer "financial inducement" that constitutes "economic dragooning that leaves the States with no real option but to acquiesce."¹⁷⁰ As I have just explained, the plurality would reach this question only if the condition in question threatened to take away funds from an independent program and if that condition were added after the states first joined the original program.¹⁷¹ However, the joint dissent would start here.

Initial responses to the issue of economic dragooning have suggested that the plurality and joint dissent provide no real signposts for how to determine when such dragooning exists.¹⁷² That is not entirely accurate. It is possible to draw out facts that the opinions found relevant and irrelevant, thereby highlighting the proper focus for future spending challenges.

First, *the effect of the federal funding on the state budget is key*. The plurality and joint dissent agreed that the threat of losing over 10% of a state's overall budget, the percentage that federal Medicaid funding represented, could not be sustained.¹⁷³ The plurality made this calculation by noting that 20% of the average state's budget goes to Medicaid payments, with the federal government covering 50% to 83% of those payments.¹⁷⁴ The joint dissent emphasized that Medicaid spending constitutes the greatest line item in the average state's budget, the federal government pays for almost two-thirds of

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

169. *See, e.g.*, Bagenstos, *supra* note 6, at 403–08 (critiquing the rule); Brian Galle, *Getting Spending: How To Replace Clear Statement Rules with Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 156–57 (2004) (same); Nicole Huberfeld, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Healthcare Programs*, 86 N.C. L. REV. 441, 446 (2008) (same).

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

171. *See supra* Part II.C.2 (discussing the relationship between coercion and notice to the states).

172. *See, e.g.*, *NFIB*, 132 S. Ct. at 2640–41 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (suggesting that the plurality and joint dissent raise more questions than they answer); Huberfeld et al., *supra* note 101, at 5–6 (lamenting that neither the plurality nor the joint dissent articulated a clear test for future courts to follow).

173. *NFIB*, 132 S. Ct. at 2604 (plurality opinion); *id.* at 2662–63 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

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

all Medicaid spending, most states receive over \$1 billion annually in Medicaid funds, and a quarter of all states receive over \$5 billion annually in Medicaid funds.¹⁷⁵

Both the plurality and joint dissent contrasted the percentage of the budget affected here with the percentage of state budgets affected in *Dole*. As the plurality explained, “[i]t is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota’s budget left that State with a ‘prerogative’ to reject Congress’s desired policy, ‘not merely in theory but in fact.’”¹⁷⁶ For its part, the joint dissent called the amount at issue for South Dakota “less than 1% of its annual state expenditures,” noted that the total amount of federal funding jeopardized in *Dole* constituted 0.19% of all state expenditures combined, and agreed with the *Dole* Court that the threat to withhold that amount “is aptly characterized as ‘relatively mild encouragement.’”¹⁷⁷ For both the plurality and joint dissent, then, financial inducement crosses the line to coercion when the threatened loss is somewhere between less than 1% and as much as 10% of a state’s overall annual expenditures.

The plurality’s inquiry into the effect on the state budget was largely retrospective. In other words, the plurality focused on the economic dragooning inherent in taking away a sum of money on which states had come to rely, not on whether any future offer of independent funds would constitute economic dragooning. This inquiry makes sense from the perspective of the sequence in which the plurality considered the question of coercion. Because conditions that govern the use of funds are, for the plurality, constitutionally permissible no matter their size, and because the question of notice looks back to when the states originally signed on to a program, the plurality’s focus for economic dragooning was properly on the threat of losing funds that states had otherwise expected for the state budget—that is, a retrospective evaluation of economic dragooning.

The joint dissent’s focus on state budgets was broader. The joint dissent agreed with the plurality that the threat to withdraw federal funds could be so large as to constitute economic dragooning, but the joint dissent also expressed the belief that an offer of federal

175. *Id.* at 2662–63 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

176. *Id.* at 2604 (plurality opinion) (quoting *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987)).

177. *Id.* at 2664 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

funding could ab initio be so large as to be coercive.¹⁷⁸ From the joint dissent's perspective, both the amount of federal funds offered and the extent of the federal tax burden on a state's citizens are relevant to the question of whether a state has a real (rather than a theoretical) ability to turn down an offer of federal funds from the start.¹⁷⁹ Under this view, the larger the program, and the more taxes citizens must pay to support it, the less likely the states will feel able to turn down the funds, because, according to the joint dissent, there is a practical limitation to how much citizens are able and willing to pay in their overall combined tax burden.¹⁸⁰ Taxpayers whose heavy federal taxes would go to support the federal program in question in other states might not also be able to pay whatever state taxes would be needed to fund a state-run version of the program.¹⁸¹ In such circumstances, the joint dissent would find coercion.¹⁸²

After the effect of the challenged conditional spending program on the state budget, whether retrospective or prospective, the plurality and joint dissent both focused on *the percentage of the federal program's funding at stake*. States that did not want to sign on to the Medicaid expansion faced the possibility of losing 100% of their Medicaid funds¹⁸³—not, as in *Dole*, “a relatively small percentage” of the funds in question.¹⁸⁴

178. *Id.* at 2666.

179. *See id.* at 2661–62.

180. *Id.*

181. *Id.*

182. *Id.* at 2663. In explaining this point, the joint dissent implicitly rejected the assessment of several lower courts and commentators that because the states have sovereign taxing authority and can—in principle—raise whatever funds they need, no offer of federal funds can actually be coercive. *See, e.g., Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1268 (11th Cir. 2011) (finding that the Medicaid expansion was not coercive because a state can create its own program if it rejects Congress's conditions), *rev'd sub nom. NFIB*, 132 S. Ct. 2566; Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 881–82 (2008) (arguing that there is no evidence that states are unable to raise funds equivalent to federal program funds). That the joint dissent did not engage with this alternative assessment provides an opening for future litigants defending a conditional spending program to argue that the factual premise underlying the joint dissent's conclusion is wrong. Recent work by Professor Galle, for example, provides empirical evidence that federal taxes do not actually crowd out state taxes; instead, “federal revenues increase both state revenues and state revenue as a fraction of available state wealth.” *See* Brian Galle, *Does Federal Spending “Coerce” States? Evidence from State Budgets*, 107 NW. U. L. REV. (forthcoming 2013) (manuscript at 6, 37, 46–56), *available at* <http://ssrn.com/abstract=2150721> (finding that research favors the “crowd in” theory and arguing that, contrary to common belief, state revenues rise when federal revenues rise).

183. *NFIB*, 132 S. Ct. at 2604 (plurality opinion).

184. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (noting that the amount at stake was “5% of the funds otherwise obtainable under specified highway grant programs”).

Could a finding of economic dragooning exist where only a high percentage of the funding for a federal program is at stake and yet the overall amount at stake is relatively small? Neither opinion explicitly answers this question, but I think it likely that it is instead the percentage of the state budget at stake that controls. Given the plurality and joint dissent's shared focus on the bottom line for state budgets, it is hard to see how a loss of 100% of a small federal grant could constitute economic dragooning. How, after all, would that threaten state sovereignty? At the same time, if only 5% of the Medicaid grant were at stake—the same percentage at issue in *Dole*¹⁸⁵—the plurality and joint dissent would have confronted a much less dramatic effect on the state budget.

What is clear from both opinions is that agency discretion in determining the actual amount of a cut-off or whether to impose any cut-off at all for noncompliance does not matter.¹⁸⁶ What matters is the statutory possibility that 100% of the funds could be at stake.

The last relevant detail for the plurality was *the extent of administrative entrenchment*. As the plurality explained as part of its reasoning for finding economic dragooning, “the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid.”¹⁸⁷ Although the plurality did not explore this observation further, the idea presumably is that the extent of the resources states have committed to the “existing” program contributes to trapping the states into continuing with the program when it changes, because it would be too costly to unwind those resources and commit them to a different, state-run program.

The plurality and joint dissent both treated as immaterial *the amount of federal funding offered to offset the state share of a cooperative program*.¹⁸⁸ As the plurality explained somewhat wryly, “It is not unheard of . . . for the federal government to increase requirements in such a manner as to impose unfunded mandates on the States.”¹⁸⁹ The joint dissent agreed that a currently high percentage of federal contributions cannot always be counted on.¹⁹⁰

185. *Id.*

186. 42 U.S.C. § 1396c (2006) (granting the Secretary “discretion” to limit or cut off Medicaid funds entirely); *cf. NFIB*, 132 S. Ct. at 2641 n.27 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (emphasizing that the Secretary can, but does not have to, withhold all Medicaid funding for noncompliance).

187. *NFIB*, 132 S. Ct. at 2604 (plurality opinion).

188. *Id.* at 2605 n.12.

189. *Id.*

190. *Id.* at 2666 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

But the plurality and joint dissent disagreed about whether the amount of the state contribution has any bearing on the question of economic dragooning. The plurality indicated that the size of the state's contribution is irrelevant: "Your money or your life' is a coercive proposition, whether you have a single dollar in your pocket or \$500."¹⁹¹ For the joint dissent, however, it was relevant that the Medicaid expansion would impose substantial costs on the states, on the order of many tens of billions of dollars a year in substantive and administrative costs.¹⁹² The joint dissent did not indicate that an increase in state costs could, on its own, constitute coercion, although it noted that the increase in state costs undercut the government's argument that the financial terms of the Medicaid expansion were "exceedingly generous."¹⁹³

The joint dissent offered two other rationales for its conclusion that the Medicaid expansion was coercive. The joint dissent pointed to the broader implications of losing federal Medicaid funds because of *the extent of intertwined funding with other programs*.¹⁹⁴ Some other large federal funding programs, such as welfare payments, depend on Medicaid eligibility, so those other funding sources might be lost if Medicaid funding were withdrawn.¹⁹⁵ In addition, federal law requires hospitals receiving federal funds to provide certain care for indigent patients, care that is now typically paid for by Medicaid.¹⁹⁶ If Medicaid were no longer available in a state, hospitals would find it very difficult to treat indigent patients in compliance with federal law unless the state contributed substantially.¹⁹⁷ For the joint dissent, these broader implications underscored the coercion inherent in the expansion because the amount of money threatened was even larger than Medicaid funding alone.

Additionally, for the joint dissent, *the goal and structure of the program indicated Congress's belief that no state could refuse the offer*.¹⁹⁸ Without the Medicaid expansion in place in every state, the ACA's goal of providing a minimum level of coverage for everyone would be jeopardized, explained the joint dissent.¹⁹⁹ And yet despite this fact, Congress provided no backup plan on the chance that any states

191. *Id.* at 2605 n.12 (plurality opinion).

192. *Id.* at 2665–66 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

193. *Id.*

194. *Id.* at 2663.

195. *Id.* at 2664 (citing 42 U.S.C. § 602(a)(3) (2006)).

196. *Id.*

197. *Id.* (citing 42 U.S.C. § 1395dd).

198. *Id.* at 2664–65.

199. *Id.*

declined to participate in the expansion.²⁰⁰ The joint dissent inferred that Congress thought no backup plan would be needed because all of the states would feel compelled to join the new plan.²⁰¹ The structure of the Act therefore underscored the coercion in the program for the joint dissent.

Two additional strands of analysis from the joint dissent are worthy of note. The joint dissent seemed to suggest several times that litigants seeking to establish coercion face *a heightened burden of proof*, stating that “[w]hether federal spending legislation crosses the line from enticement to coercion is often difficult to determine, and courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is *unmistakably clear*.”²⁰² This suggestion was echoed elsewhere: “The question whether a law enacted under the spending power is coercive in fact will sometimes be difficult, but where Congress has *plainly* crossed the line distinguishing encouragement from coercion, a federal program that coopts the States’ political processes must be declared unconstitutional.”²⁰³ And in explaining its conclusion, the joint dissent asserted, “[i]n this case . . . there can be *no doubt*” that “[i]f the anticoercion rule does not apply in this case, then there is no such rule.”²⁰⁴

The joint dissent also seemed to suggest *the need to be particularly solicitous of the question of financial coercion with respect to policy* “in areas traditionally governed primarily at the state or local level.”²⁰⁵ As its prime example of the evils associated with coercion, the joint dissent offered a hypothetical related to education law. Imagine a situation in which the federal government were to offer

each State a grant equal to the State’s entire annual expenditures for primary and secondary education . . . 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.²⁰⁶

Citizens of a state that turned down the money would not only have to continue to pay enough state taxes to support their state education

200. *Id.* at 2665.

201. *Id.* at 2666.

202. *Id.* at 2662 (emphasis added).

203. *Id.* at 2661 (emphasis added) (citation omitted) (internal quotation marks omitted).

204. *Id.* at 2662 (emphasis added).

205. *Id.* (emphasis added).

206. *Id.*

programs but would also have to pay the federal taxes needed to fund this program in states that accepted the money.²⁰⁷ At the same time, for a state that accepted the federal money, “the State and its subdivisions would surrender their traditional authority in the field of education.”²⁰⁸ As a matter of *law*, the joint dissent agreed, the state could turn down the money. However, as a matter of *fact*, the states would be trapped between what the joint dissent viewed as an untenable choice between unfair and burdensome taxation on the one hand and relinquishing control over the boundaries of a core sovereign function on the other.²⁰⁹ Under such factual circumstances, the joint dissent would find coercion.

It is important to understand the limits of this point. The joint dissent did not suggest that coercion exists any time the federal government offers money for a program related to matters of traditional state concern. Such a move would return the Court to the now-abandoned regime of *National League of Cities v. Usery*,²¹⁰ which held that the Tenth Amendment precluded Congress from interfering with “integral” or “traditional” state activities²¹¹—an idea overruled as unworkable more than three decades ago.²¹² Instead, the joint dissent’s concern is best read as focusing on the size of the money offered and the effect on the state budget. It is no mistake that the hypothetical sum of money offered by the federal government in the example is an amount equivalent to the state’s annual education expenditures (which joins Medicaid as the states’ other largest budget item).²¹³ The joint dissent explained that the real problem with the example is that if a state turned down the offer, “its residents would not only be required to pay the federal taxes

207. *Id.*

208. *Id.*

209. *Id.*

210. 426 U.S. 833 (1976).

211. *Id.* at 852.

212. See *García v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling *National League of Cities*); see also Ryan, *supra* note 76, at 46 (discussing the overruling of *National League of Cities*). Professor Metzger accurately notes that the *NFIB* opinions do not mention *García*. Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 98 (2012). Whereas *García* relied on the political safeguards of federalism to protect state interests, 469 U.S. at 552, the *NFIB* opinions take seriously the judicial role in policing the limits of federal power, Metzger, *supra*, at 98. Yet although the *NFIB* plurality and joint dissent take this perceived obligation seriously, neither roots the analysis in the subject matter of Congress’s attention, focusing instead on the mechanisms by which Congress acts. The failure to cite *García*, then, does not suggest a repudiation of its key insight that a rule limiting federal power that “turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional’ to state operations is ‘unsound in principle and unworkable in practice.’” 469 U.S. at 546–47.

213. See *infra* note 452.

needed to support this expensive new program, but they would also be forced to pay an equivalent amount in state taxes.”²¹⁴ Again, for the joint dissent, the size of the program is crucial: “When a *heavy* federal tax is levied to support a federal program that offers *large* grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative.”²¹⁵ It may be worth paying special attention when the federal government is offering funds that affect an area of traditional state concern, then, but the effect of the federal funding at stake on the state fisc remains the key factor for the joint dissent.

II. COERCION AND FEDERAL EDUCATION LAW

In the previous Part, I offered a reading of the plurality’s opinion that ties together different strands of logic into a three-part sequential test: First, does the condition in question threaten to take away funds for a program that is separate and independent from the program to which the condition in question is attached? Second, if it does, did the states have sufficient notice at the time they accepted funds for the first program that they would also have to comply with the second program? Third and finally, if not, is the amount of funding at stake so significant that the threat to withdraw it constitutes economic dragooning? I then demonstrated how to assess whether each of these parts is satisfied by drawing on and then abstracting from the facts about the Medicaid expansion that the plurality found either important or irrelevant. For the third factor, economic dragooning—the centerpiece of the joint dissent—I showed where the plurality and the joint dissent overlapped in establishing economic dragooning and where they differed.

In this Part, I now take this analysis and apply it to federal education funding, the next largest use of federal money to the states after Medicaid. This application provides one way to test the limits of *NFIB*’s coercion analysis. If the federal education laws seem likely to wither under this examination, then the fate of the Medicaid expansion may well be the tip of the iceberg, the first domino about to topple a long line of funding programs. As this Part shows, however, the federal education laws should survive this examination, whether under the plurality’s test or under the joint dissent’s analysis.

The rest of this Part examines in turn the major federal education laws: first the Elementary and Secondary Education Act, currently

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

215. *Id.* at 2661 (emphasis added).

reauthorized as No Child Left Behind; next the Individuals with Disabilities Education Act; and finally a series of laws that apply wherever federal education funding exists, including various civil rights laws, the Family Educational Rights and Privacy Act, and a law providing for the celebration of Constitution Day. Each of the following three sections first provides a brief background to the law(s) at issue and then applies both the *NFIB* plurality's coercion analysis and that of the joint dissent. I conclude that each law survives this analysis and therefore argue that the laws will not be found coercive.

Because federal education funding is second only to Medicaid, this examination of federal education law leads to a much broader conclusion about the future of conditional spending in the regulatory state after *NFIB*. Far from being the tip of the iceberg or the first in a long line of dominoes, the fate of the Medicaid expansion is more likely "limited to present circumstances."²¹⁶

A. *The Elementary and Secondary Education Act*

1. *Background and history of coercion analysis*

Like Medicaid,²¹⁷ the ESEA was passed in 1965 as part of the War on Poverty, President Johnson's Great Society legislation that transformed the role of the federal government in social welfare programs and beyond.²¹⁸ While the federal government had long been involved in funding a variety of targeted educational programs—from land grants in the 19th century to vocational education in the early 20th century to science education in the mid-20th century—the ESEA represented a massive expansion in scope, almost immediately providing funding to nearly every school district around the country, with accompanying conditions placed on the use of the funds.²¹⁹ The ESEA has been reauthorized eight times since 1965,²²⁰ most recently in the No Child Left Behind Act of 2001²²¹

216. *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam).

217. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended in scattered sections of 42 U.S.C.).

218. For background on the rationales for and programs in the War on Poverty, see generally MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 262–69 (1996); and JAMES T. PATTERSON, *AMERICA'S STRUGGLE AGAINST POVERTY IN THE TWENTIETH CENTURY* 122–37 (2000).

219. See, e.g., Michael W. Kirst, *Turning Points: A History of American School Governance, in WHO'S IN CHARGE HERE?*, *supra* note 76, at 14, 18–23; see also Paula S. Fass, *Before Legalism: The New Deal and American Education*, in *SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION* 22–44 (David L. Kirp & Donald N. Jensen eds., 1986).

220. DEBRAY, *supra* note 20, at 7.

(NCLB), which itself significantly increased both federal funding and requirements.²²² While the original legislation came directly from the White House, with little input coming from Congress, much less the states,²²³ Congress and the states have been very involved with all subsequent iterations.²²⁴

The ESEA consists of a wide variety of education programs, including programs supporting the education of homeless²²⁵ and migrant children²²⁶ as well as English language learners,²²⁷ promoting technology²²⁸ and drug-free schools,²²⁹ and improving teacher quality.²³⁰ However, the centerpiece of the Act has long been Title I, which focuses on the education of poor children.²³¹

Title I is generally understood as having gone through three periods that coincide with different views of the federal role in education. In the first period, from 1965 through 1980, there were few specifications on the use of Title I money, and Title I programs were typically run at the local level separately from regular education in the classroom (although there was a great degree of spillover from these funds, which were supposed to be restricted for poor children, to other needs of local school districts).²³² In the second period, during the 1980s, federal spending and regulatory oversight decreased.²³³ The federal government became less focused on promoting funding equity and more interested in promoting educational excellence, although the understanding was that it was states and localities, not the federal government, who would undertake the work to achieve that goal.²³⁴ In the third period, starting with the 1988 reauthorization of the ESEA and continuing through today, the federal role began to shift again, as increased federal funding accompanied increased requirements.²³⁵ The federal

221. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

222. See, e.g., VINOVSIS, *supra* note 20, at 169–70.

223. CROSS, *supra* note 20, at 28.

224. See generally DEBRAY, *supra* note 20, at 81–126.

225. See No Child Left Behind Act §§ 1031–1034, 42 U.S.C. §§ 11431–11435 (2006).

226. See NCLB tit. I, §§ 1301–1309, 20 U.S.C. §§ 6391–6399.

227. See NCLB tit. III, 20 U.S.C. §§ 6801–7104.

228. See NCLB § 1051.

229. See NCLB tit. IV, §§ 4001–4155, 20 U.S.C. §§ 7101–7165.

230. See NCLB tit. II, 20 U.S.C. §§ 6751–6777.

231. See NCLB tit. I.

232. DEBRAY, *supra* note 20 at 7–8; Lorraine M. McDonnell, *No Child Left Behind and the Federal Role in Education: Evolution or Revolution?*, PEABODY J. EDUC., no. 2, 2005, at 19, 22–25.

233. DEBRAY, *supra* note 20, at 8; McDonnell, *supra* note 232, at 25–29.

234. DEBRAY, *supra* note 20, at 8–9; see McDonnell, *supra* note 232, at 25–29.

235. DEBRAY, *supra* note 20, at 9; McDonnell, *supra* note 232, at 29–33.

government started to demand accountability in exchange for funds, with a new focus on school-wide programs at the instructional core of schools.²³⁶ This change reached its most dramatic expansion in NCLB.²³⁷

To say that NCLB was (and remains) controversial is putting it mildly. While some states and districts began the work of implementing the heightened obligations without objection, a number of states and districts balked.²³⁸ Almost half of the states took some form of action to protest NCLB, whether passing symbolic legislation objecting to its reach or considering whether to decline the funds.²³⁹ The biggest complaint was that the law was inadequately funded in comparison to the requirements placed on the states—requirements that some states felt they were forced into accepting.²⁴⁰ In a widely publicized exchange in 2004, after the Utah superintendent of education made a formal inquiry to the federal Department of Education about the consequences of opting out of some or all of NCLB, the Department responded that declining to participate in any program was entirely up to the state, but that turning down Title I funds would have broader financial ramifications because a number of other NCLB programs tie their funding streams to the amount of Title I funding a state receives.²⁴¹ The National Conference of State Legislatures characterized this exchange as “sobering,” stating that it “reinforced the notion . . . that compliance with NCLB is coerced.”²⁴² Of the two (ultimately

236. DEBRAY, *supra* note 20, at 9; McDonnell, *supra* note 232, at 29–33.

237. DEBRAY, *supra* note 20, at 81–133; McDonnell, *supra* note 232, at 29–33.

238. See, e.g., DEBRAY, *supra* note 20, at 135–36; Lance D. Fusarelli, *Gubernatorial Reactions to No Child Left Behind: Politics, Pressure, and Education Reform*, PEABODY J. EDUC., no. 2, 2005, at 120, 128–30; McDonnell, *supra* note 232, at 20; Eloise Pasachoff, *How the Federal Government Can Improve School Financing Systems 15* (Jan. 2008) (working paper), available at http://www.brookings.edu/~media/research/files/papers/2008/1/education%20pasachoff/01_education_pasachoff.pdf. Legal scholars have also been divided in their assessments of the law. For more positive views, see, for example, James S. Liebman & Charles F. Sabel, *The Federal No Child Left Behind Act and the Post-Desegregation Civil Rights Agenda*, 81 N.C. L. REV. 1703, 1734 (2003); and Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 254–57 (2005). For more critical views, see, for example, Heise, *supra* note 60, at 126; and James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 936 (2004).

239. William J. Mathis, *The Cost of Implementing the Federal No Child Left Behind Act: Different Assumptions, Different Answers*, PEABODY J. EDUC., no. 2, 2005, at 90, 91–92.

240. *Id.*

241. Letter from Eugene W. Hickok, Acting Deputy Sec’y, U.S. Dep’t of Educ., to Steven O. Laing, Superintendent of Pub. Instruction, Utah State Office of Educ. (Feb. 6, 2004), available at http://www.thompson.com/images/tpg/pdfs/Utah_2004_letter.pdf.

242. NAT’L CONFERENCE OF STATE LEGISLATURES, TASK FORCE ON NO CHILD LEFT BEHIND: FINAL REPORT, at x (2005), available at <http://www.hartfordinfo.org/issues>

unsuccessful) lawsuits that challenged the law as an unfunded mandate, one made an additional claim under the Spending Clause, arguing that the law was coercive.²⁴³

This experience is influencing the discussion around the pending reauthorization of NCLB, as relief from many of the conditions imposed by NCLB is under consideration.²⁴⁴ In the meantime, as reauthorization has been delayed by several years—the law was originally set to expire in 2007²⁴⁵—the Department of Education has started to give waivers from some of NCLB's more stringent provisions to states agreeing to certain other, supposedly more flexible requirements.²⁴⁶

The prevalence of these waivers combined with the imminence of reauthorization means that NCLB no longer provides a widely relevant set of operative legal requirements. Still, *NFIB* has reopened the debates about the extent to which NCLB exceeded the scope of Congress's authority under the Spending Clause by being coercive.²⁴⁷

/documents/education/nclb.pdf; see also *id.* at 49–50; Coulter M. Bump, Comment, *Reviving the Coercion Test: A Proposal to Prevent Federal Conditional Spending that Leaves Children Behind*, 76 U. COLO. L. REV. 521, 546–57 (2005) (arguing that the coercion inquiry should be revitalized to find NCLB unconstitutionally coercive).

243. *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 492–94 (D. Conn. 2006) (concluding that the district court lacked subject matter jurisdiction over the state's pre-enforcement declaratory judgment claim against NCLB on coercion grounds), *aff'd sub nom.* *Connecticut v. Duncan*, 612 F.3d 107 (2d Cir. 2010); see also *Sch. Dist. of the City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 255–56 (6th Cir. 2009) (en banc) (upholding by en banc court split 8–8 the district court's grant of a motion to dismiss a lawsuit alleging that NCLB imposed an unfunded mandate in contravention of its statutory language). Amici in *Pontiac* made the argument that the law was unconstitutionally coercive, but the court stated that the plaintiff essentially conceded that the NCLB program was voluntary and did not consider the question of coercion further. *City of Pontiac*, 584 F.3d at 275 & n.7; see also Martha Derthick, *Litigation Under No Child Left Behind*, in *FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION* 213, 216–20 (Joshua M. Dunn & Martin R. West eds., 2009).

244. See, e.g., Dylan Scott, *New NCLB Reauthorization Bills Introduced in U.S. House*, GOVERNING (Jan. 6, 2012), <http://www.governing.com/news/federal/gov-new-NCLB-reauthorization-bills-introduced-in-US-house.html> (explaining similarities between the House and Senate bills with respect to removal of onerous federal conditions).

245. See, e.g., VINOVSIS, *supra* note 20, at 200.

246. Waivers are granted pursuant to NCLB tit. IX, § 9401, 20 U.S.C. § 7861 (2006). See Metzger, *supra* note 97, at 612–13 (noting that such waivers are “contingent on states’ agreeing to federal policy priorities as in *Race to the Top*”); Alyson Klein, *More Than Half of States Now Have NCLB Waivers*, EDUC. WK., Jul. 18, 2012, at 22.

247. See, e.g., Bagenstos, *supra* note 109 (manuscript at 31, 46, 48) (considering constitutionality of NCLB in light of *NFIB*); Metzger, *supra* note 212, at 101 (same); Walsh, *supra* note 28 (anticipating legal challenges to NCLB in light of *NFIB*); see also Julia Martin, *Health Care in the Dock: What's at Stake for Education?*, TITLE I-DERLAND (Apr. 17, 2012), <http://ed.complianceexpert.com/title-i-derland/title-i-derland-1.45712/health-care-in-the-dock-what-s-at-stake-for-education-1.84194> (suggesting, while *NFIB* was still pending, that NCLB could be in jeopardy if the Court struck down the Medicaid expansion as coercive).

And the extent to which NCLB could be deemed coercive has implications for its reauthorization. As the rest of this section demonstrates, however, reports of NCLB's death in the wake of *NFIB* are greatly exaggerated.

2. *Old funding conditioned on compliance with a new program*

Were the changes to the Elementary and Secondary Education Act in No Child Left Behind more akin to the Medicaid expansion, and therefore the creation of a new and independent program conditioning funds on a previously existing one, or closer to previous modifications to Medicaid, and therefore simply conditions on the use of federal funds?

While NCLB was a significant revision of the ESEA, nothing about it conditions funds for one program on acceptance of another. Unlike the plurality's view of the Medicaid expansion, NCLB is not a new program attached to a still-existing old program. Instead, the old program no longer exists, and the program remains unified, although seriously transformed. That NCLB contains no separate funding streams for any old and new program, and that its program requirements are seamless rather than separated into different requirements for old and new beneficiaries, underscore this point. Although NCLB expanded requirements under Title I, the same requirements are now applicable to every funding recipient, and there are no separate streams of money, one for the old program, one for the new, to be conditioned on each other.²⁴⁸ Therefore, Congress did not use NCLB to threaten any other independent significant grant, but merely specified what funds granted under NCLB were to be used for. While the Medicaid expansion had to proceed to the rest of the plurality's coercion analysis, NCLB would not.

One argument to the contrary might seize on the plurality's description of the Medicaid expansion as "a shift in kind, not merely

248. 20 U.S.C. § 6302(a) (2006) (local educational agency grants). To be sure, NCLB contains two different standards for withholding funds, depending on whether the requirements at issue dated from the 1994 reauthorization of the ESEA or the 2001 reauthorization in NCLB. For a state that fails to meet the deadlines established in the 1994 reauthorization for putting in place certain educational standards, "the Secretary shall withhold 25 percent" of the funds that would otherwise be available until the deadlines are met. *Id.* § 6311(g)(1)(A). For a state that fails to meet the additional requirements of NCLB, the Secretary "may withhold" funds at his discretion. *Id.* § 6311(g)(2). Still, the relevant deadlines established in 1994 governed substantive activities that NCLB expanded upon. *Compare* 20 U.S.C. § 6311(b)(6) (1994) (setting forth requirements for educational standards), *with* 20 U.S.C. § 6311(b) (2006) (expanding requirements for educational standards). It is not as if the 1994 reauthorization remained in place with its own continued funding stream.

degree,”²⁴⁹ making the same case about NCLB.²⁵⁰ This argument might point to all of the new aspects of NCLB: it introduced a heavy focus on state standardized assessments;²⁵¹ required all schools to ensure that all students make “adequate yearly progress” on these assessments, to report annual success on this measure disaggregated by race, income group, disability status, and the like, and to face a series of detailed interventions for failure to meet this goal within a certain number of years;²⁵² dictated new requirements for teacher qualifications;²⁵³ and required schools to use teaching methods and strategies, and in some cases even curriculum, that are validated by “scientifically based research.”²⁵⁴

This argument might also focus on the shift in purpose between the original ESEA of 1965 and the ESEA as reauthorized by NCLB in 2001. In 1965, the Act’s stated purpose was “to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.”²⁵⁵ In 2001, the purpose of NCLB was to “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”²⁵⁶ No longer limited to providing money for poor children, the Act now focuses on *all* children.²⁵⁷ Instead of vague language about meeting the “educational needs of educationally deprived children,” now the

249. Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2605 (2012) (plurality opinion).

250. Professor Metzger raises a version of this argument. See Metzger, *supra* note 212, at 101.

251. See, e.g., Ryan, *supra* note 238, at 940.

252. See *id.* at 940–41.

253. 20 U.S.C. §§ 6319(a), 7801(23); see also Susanna Loeb & Luke C. Miller, *A Federal Foray into Teacher Certification: Assessing the “Highly Qualified Teacher” Provision of NCLB*, in *NCLB AT THE CROSSROADS: REEXAMINING THE FEDERAL EFFORT TO CLOSE THE ACHIEVEMENT GAP 199, 199* (Michael A. Rebell & Jessica R. Wolff eds., 2009); Ryan, *supra* note 238, at 939–40.

254. Kathryn A. McDermott & Laura S. Jensen, *Dubious Sovereignty: Federal Conditions of Aid and the No Child Left Behind Act*, PEABODY J. EDUC., no. 2, 2005, at 39, 45.

255. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, sec. 2, § 201, 79 Stat. 27, 27.

256. No Child Left Behind Act of 2001, Pub. L. No. 107-110, sec. 101, § 201, 79 Stat. 27, 27 (codified at 20 U.S.C. § 6301 (2006)).

257. See *id.*

law demands “proficiency” on state tests.²⁵⁸ Under this argument, NCLB would be akin to the Medicaid expansion in that it “is no longer a program to” provide federal education funding “for the neediest among us, but rather an element of a comprehensive national plan to provide universal” excellence and equity in education.²⁵⁹

One could well argue about this characterization of NCLB; the academic literature is divided on how much of a radical transformation NCLB actually represented.²⁶⁰ The key point, however, is that to the extent NCLB represented a transformation of the ESEA, the transformation was to the program as a whole. The conditions in the previous version of the law no longer exist.²⁶¹ Unlike the Medicaid expansion, which did not change the underlying contours of “pre-existing Medicaid,” there is no more “pre-existing ESEA” after NCLB. Therefore, there is no threat to remove funds from a separate and independent program, and the conditions under NCLB simply govern the use of NCLB funds. Just as Congress may “offer[] funds . . . to expand the availability of health care, and require[e] that States accepting such funds comply with the conditions on their use,”²⁶² so may Congress offer funds through NCLB to expand the availability of high-quality education through the conditions the law imposes.

A second possible attempt to shoehorn NCLB into *NFIB*’s analysis of Medicaid could try to conceive of NCLB as actually composed of two different programs—the new, expanded requirements imposed by NCLB on top of the old, lesser requirements of the 1994 law. This argument might emphasize that not everything in NCLB was without precedent in its immediate predecessor. For example, the 1994 reauthorization required *some* testing over the course of a child’s educational career; NCLB just increased the number and breadth of

258. Compare Elementary and Secondary Education Act § 201, with No Child Left Behind Act § 1001.

259. Cf. Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2606 (2012) (plurality opinion).

260. Compare, e.g., Heise, *supra* note 60, at 126 (“NCLB represents a dramatic break from the federal government’s traditional posture regarding policymaking for the nation’s public elementary and secondary schools.”), with McDonnell, *supra* note 232 (arguing that NCLB is better seen as a gradual expansion over the course of several reauthorizations).

261. Compare 20 U.S.C. § 6311 (Supp. II 2003) (outlining requirements for state plans to be submitted under No Child Left Behind) with 20 U.S.C. § 6311 (1994 & Supp. II 1997) (outlining requirements for state plans to be submitted under the Improving America’s Schools Act of 1994).

262. *NFIB*, 132 S. Ct. at 2607 (plurality opinion).

tests required.²⁶³ The 1994 reauthorization required that the tests would assess the progress of schools and districts participating in Title I; NCLB expanded this requirement to assess the progress of *all* schools and districts.²⁶⁴ The 1994 reauthorization required *some* form of Adequate Yearly Progress (AYP) for *some* schools; NCLB expanded this requirement to require a more specific form of AYP for all students in all schools, with the results disaggregated by student type.²⁶⁵ If, under the *NFIB* analysis, the Medicaid expansion is a new program added to an existing program, this argument might suggest that NCLB is a new program (for example, one requiring testing for all students) overlaid onto an existing program (for example, one requiring testing for Title I students). Under this view, the additional sums of money authorized under NCLB²⁶⁶ would be intended to support the additional obligations. It would be immaterial that Congress sees it all as one program and one funding stream.²⁶⁷ Congress would thus be conditioning sums of money for a new program (increased obligations under NCLB) upon threat of losing money for a pre-existing program (the related obligations states were in the process of fulfilling under the 1994 reauthorization).

This argument would have more bite if the NCLB requirements were really only additions to the underlying requirements that were still in place. But that is not the case. None of these requirements left the pre-NCLB version intact. That NCLB's new requirements were on the same theme as pre-NCLB requirements does not establish the existence of two separate programs, the new one and the pre-existing one.

Moreover, while the existence of a separate funding stream is not necessary for a new set of conditions to constitute an independent program, it seems particularly difficult to find an independent program without a separate funding stream when the new set of conditions are so closely related to the old set. In this way, NCLB's modifications seem much closer to the *NFIB* plurality's

263. See, e.g., Doris Redfield & Jan Sheinker, Council of Chief State School Officers, *Framework for Transitioning from IASA to NCLB*, September 2004, at 19, available at <http://www.eric.ed.gov/PDFS/ED484704.pdf>.

264. *Id.*

265. *Id.*

266. Compare 20 U.S.C. § 6302(a) (1994) (authorizing \$7.4 billion for fiscal year 1995), with 20 U.S.C. § 6302(a)(1) (Supp. II 2003) (authorizing \$13.5 billion for fiscal year 2002). For a description of NCLB's historic increase of federal education funds, see VINOVSIS, *supra* note 20, at 170.

267. See *NFIB*, 132 S. Ct. at 2605 (plurality opinion).

understanding of previous modifications to Medicaid, which “merely altered and expanded the boundaries of these categories.”²⁶⁸

Under the plurality’s analysis, the coercion inquiry should end here, because NCLB simply imposes conditions on the use of NCLB funds.²⁶⁹ But even if it were possible to see NCLB as constituting two programs, the new one conditioning its acceptance on taking away funding for the older one, that would not itself constitute coercion under the *NFIB* plurality’s reading. It would require only turning to the next stage of analysis: Was notice of such a condition part of the states’ original understanding of the program?

3. *Notice to the states*

As I have explained, there should be no relevant notice issue with respect to NCLB, for the notice required for coercion purposes arises only if two independent programs are tied together with acceptance of one conditioned on compliance with the other. As I just demonstrated, NCLB consists of one program, not two programs tied together; it therefore does not matter how different NCLB is from the original ESEA.

If, however, one were to accept that NCLB consists of two programs tied together, it would be difficult to make the case that such notice was in place in 1965, since the original ESEA law surely did not contemplate any explicit tying together with another program.

But the absence of such notice would not require a finding that NCLB was unconstitutionally coercive. It would merely lead to the last stage of the plurality’s analysis, where the joint dissent would begin: Do the financial terms of the program constitute economic dragooning?

4. *Economic dragooning*

Examination of the financial terms of No Child Left Behind should lead to the conclusion that the law does not constitute economic dragooning under either the plurality’s analysis or the joint dissent’s.

The joint dissent referred several times to federal funding for elementary and secondary education overall,²⁷⁰ but it is important to get the comparison with Medicaid right. Medicaid is one program (or, under the plurality’s reading, two programs), while federal funding for elementary and secondary education comes in a variety of clearly delineated and obviously independent programs. NCLB

268. *Id.*

269. *Id.*

270. *See, e.g., id.* at 2662–64 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

itself encompasses separate programs in its different titles,²⁷¹ and itself is distinct from other separately reauthorized programs providing funding for elementary and secondary education, such as the Individuals with Disabilities Education Act.²⁷² In order to receive federal funding for one education program, states need not participate in others.²⁷³ The relevant comparison for the question of economic dragooning, then, is to examine the size of funding for individual programs.

The largest funding stream that is part of ESEA/NCLB is Title I.²⁷⁴ In 2008-2009, Title I funds stood at \$12.57 billion,²⁷⁵ while federal Medicaid funds were over \$200 billion.²⁷⁶ Title I funds that year constituted only 2.12% of all revenues available for elementary and secondary education,²⁷⁷ while federal funds provided 64.6% of all spending for Medicaid.²⁷⁸ Perhaps most importantly, Title I funds that year represented only 0.8% of the average state's overall budget,²⁷⁹ compared with federal Medicaid funds representing at least 10% of the states' overall budgets.²⁸⁰ The figures for Title I are much closer the size of the threatened loss at issue in *Dole*—less than half of one percent of the state's overall budget²⁸¹—than they are to Medicaid.

There are other reasons to think that the states have not been economically dragooned into accepting Title I funds. Medicaid is

271. See *supra* notes 220–24 and accompanying text.

272. See, e.g., Jason Delisle & Jennifer Cohen, *2011 Education Appropriations Guide*, NEW AM. FOUND. 5, 5–6 (May 2011), <http://education.newamerica.net/sites/newamerica.net/files/policydocs/2011%20Education%20Appropriations%20Guide.pdf>.

273. Letter from Eugene W. Hickok to Steven O. Laing, *supra* note 241. Medicaid funding, on the other hand, is all or nothing. See 42 U.S.C. § 1396a (2006) (describing requirements for state participation in Medicaid).

274. DEBRAY, *supra* note 20, at 3.

275. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2012-313, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS: SCHOOL YEAR 2008–09 (FISCAL YEAR 2009) 15 tbl.9 (2011) [hereinafter NCES REPORT], available at <http://nces.ed.gov/pubs2012/2012313.pdf>.

276. NASBO, *supra* note 30, at 47 tbl.28.

277. Calculated by dividing \$12.571 billion in Title I funds for fiscal year 2009 by \$593 billion in all education revenues received by public elementary and secondary schools that year. See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., REVENUES FOR PUBLIC ELEMENTARY AND SECONDARY SCHOOLS, BY SOURCE AND STATE OR JURISDICTION: 2008–09, at tbl.181 (2011), available at http://nces.ed.gov/programs/digest/d11/tables/dt11_181.asp (listing all education revenues regardless of source for each state within the United States).

278. NASBO, *supra* note 30, at 46 fig.16.

279. Calculated by dividing \$12.571 billion in Title I funds for fiscal year 2009 by \$1.558 trillion in overall state expenditures for fiscal year 2009. See *id.* at 7 tbl.1 (listing overall state expenditures for fiscal year 2009).

280. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2604–05 (2012) (plurality opinion).

281. *Id.* at 2604.

essentially a federal program. It was designed by the federal government and offered to the states to do something that states were not already doing in 1965; that is why the federal share of Medicaid spending is so high. While Title I is also a federal program designed by the federal government, the states were already providing education, including to poor children, in 1965.²⁸² Indeed, the right to education is enshrined in state constitutions, unlike the right to a minimum level of health care.²⁸³ The federal money is designed to be supplemental.²⁸⁴ The plurality's concern about the sunk costs embedded in state administrative and regulatory regimes to implement the federal program²⁸⁵ thus finds little comparison in Title I and elementary and secondary education more generally. The administrative regimes set up to implement Medicaid would not have existed without the federal program. The administrative regimes to implement elementary and secondary education were certainly aided by federal dollars, but they would have existed in any event.

It is also relevant that nothing in "existing" Medicaid—that is, the Medicaid program before the ACA—was found unconstitutionally coercive. The plurality did not suggest that the size or scope of "existing" Medicaid constituted economic dragooning and reiterated that Congress can "condition the receipt of funds on the States' complying with restrictions on the use of those funds"²⁸⁶ without suggesting that at some point a program can become too large to turn down. The joint dissent did raise this latter concern, but its recitation of the facts regarding Medicaid's size expressed no concern that Medicaid itself had already crossed that line.²⁸⁷ And if existing Medicaid remains within the line, Title I and other programs within NCLB must as well, given their much smaller size.

Nor does anything about the "goal and structure"²⁸⁸ of Title I or NCLB as a whole suggest that the law was designed to preclude states from refusing the offer of funds, contrary to the joint dissent's view of the Medicaid expansion.²⁸⁹ The law would still work even if different states backed out. To be sure, some states would then require the tests,

282. How well they were providing this education is another question, but that they were providing it is beyond doubt.

283. See, e.g., John Dinan, *School Finance Litigation: The Third Wave Recedes*, in FROM SCHOOLHOUSE TO COURTHOUSE, *supra* note 243, at 96, 97–101.

284. 20 U.S.C. § 6321(b) (2006) ("Federal funds to supplement, not supplant, non-Federal funds.").

285. *NFIB*, 132 S. Ct. at 2604 (plurality opinion).

286. *Id.* at 2603–04.

287. *Id.* at 2661–62 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

288. *Id.* at 2664.

289. *Id.* at 2661–62.

teacher qualifications, and so on required by NCLB, while other states would not; but because NCLB itself let states decide how to design the tests, what the minimum teacher qualifications should be, etc., the patchwork quality of coverage would not be dramatically different.²⁹⁰

While these facts underscore the dramatic differences between NCLB and Medicaid spending that should result in the conclusion that NCLB would survive the economic dragooning inquiry, there are, nonetheless, a handful of possible arguments to the contrary that should be considered. First is the issue of the percentage of funds at stake. Both the plurality and the joint dissent emphasized that 100% of the states' Medicaid funds were at stake, ignoring Justice Ginsburg's observation that the Secretary actually had discretion about how much to withhold, and that "political pressures" might make the Secretary "all the more reluctant to cut off funds Congress has appropriated for a State's needy citizens."²⁹¹ NCLB contains a similar withholding provision, assigning the Education Secretary the same discretion with respect to any individual grant, such as Title I.²⁹²

As I suggested earlier, however, what seemed most important for the plurality and dissent was not merely that 100% of the program's funding was at stake, but that it was 100% of a substantial amount of money, representing a sizeable share of the state's overall budget.²⁹³ The joint dissent, for example, contrasted the \$233 billion at stake in the Medicaid expansion with the \$614.7 million at stake in *Dole*, noting that "[w]ithholding \$614.7 million, equaling only 0.19% of all state expenditures combined, is aptly characterized as 'relatively mild encouragement,' but threatening to withhold \$233 billion, equaling 21.86% of all state expenditures combined, is a different matter."²⁹⁴ For South Dakota, the state in question in *Dole*, the loss of Title I funds in 2008–2009 would have been \$44 million,²⁹⁵ or 1.2% of all

290. As Professor Ryan points out, this aspect of NCLB's design works against its intent to raise the achievement of all students. See Ryan, *supra* note 238, at 940–41.

291. See *NFIB*, 132 S. Ct. at 2641 n.27 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (discussing scope of the Secretary's discretion to withhold funds under 42 U.S.C. § 1396c).

292. See 20 U.S.C. § 6311(g)(2) (2006) (stating that if a state plan fails to meet the requirements, "the Secretary *may* withhold funds" (emphasis added)); *id.* § 1234d(a) (stating in General Provisions Concerning Education, "the Secretary may withhold from a recipient, in whole or in part, further payments (including payments for administrative costs) under an applicable program").

293. See *supra* notes 196–98 and accompanying text.

294. *NFIB*, 132 S. Ct. at 2664 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); see also *id.* at 2661 (discussing the coercive potential of "large grants to the States"); *id.* at 2663 (discussing "the sheer size of this federal spending program in relation to state expenditures"); *id.* at 2605 (plurality opinion) (calling "threatened loss of over 10 percent of a State's overall budget . . . economic dragooning").

295. NCES REPORT, *supra* note 275, at 15 tbl.9.

state expenditures combined.²⁹⁶ Even in 2009–2010, with the American Recovery and Reinvestment Act of 2009 (ARRA)²⁹⁷ providing a historic and temporarily high amount of Title I funds,²⁹⁸ the loss to South Dakota from refusing to comply with Title I would have been \$59 million,²⁹⁹ or 1.5% of all state expenditures combined.³⁰⁰ For Florida, one of the lead plaintiffs in *NFIB*, the loss of Title I funds in 2008–2009 would have been just shy of \$694 million,³⁰¹ or 1.1% of all state expenditures combined.³⁰² In 2009–2010, with ARRA’s historically high Title I funding, Florida’s loss would have been \$892 million,³⁰³ or 1.4% of all state expenditures combined.³⁰⁴ Again, these figures are far closer to *Dole*’s figures than the Medicaid figures in *NFIB*. Under this logic, that 100% of Title I funds were theoretically at issue would not make the grant coercive.

Another potential counterargument of particular relevance to the education arena is the joint dissent’s suggestion that one ought to be particularly concerned about coercion in areas where federal grants “permit Congress to dictate policy in areas traditionally governed primarily at the state or local level.”³⁰⁵ Recall the joint dissent’s illustration of this concern, suggesting that it would be coercive if the federal government were to offer states an amount of money equal to the sum states currently spend from their own budgets on education, conditioned on the states’ acceptance of federal prescriptions in the areas of curriculum, teacher hiring, student discipline rules, and the like.³⁰⁶ An argument in favor of NCLB’s coerciveness might note that NCLB already “dictates policy” in a number of these arenas,³⁰⁷ but for

296. Calculated by dividing \$44 million in Title I funds, *see id.*, by \$3.5 billion in overall expenditures, *see* NASBO, *supra* note 30, at 7 tbl.1.

297. Pub. L. No. 111-5, 123 Stat. 115 (codified in scattered titles of the U.S.C.).

298. *See, e.g.*, NASBO, *supra* note 30, at 14 (describing the one-time increase in education funding under the Recovery Act).

299. MARK DIXON, U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES: 2010, at 2 tbl.2 (2012), available at <http://www.census.gov/govs/school/10f33pub.pdf>.

300. Calculated by dividing \$59 million in Title I funds, *see id.*, by \$3.8 billion in overall state expenditures, *see* NASBO, *supra* note 30, at 11 tbl.5.

301. NCES REPORT, *supra* note 275, at 15 tbl.9.

302. Calculated by dividing \$694 million in Title I funds, *see id.*, by \$60 billion in overall state expenditures, *see* NASBO, *supra* note 30, at 7 tbl.1.

303. DIXON, *supra* note 299, at 2 tbl.2.

304. Calculated by dividing \$892 million in Title I funds, *see id.*, by \$60 billion in overall state expenditures, *see* NASBO, *supra* note 30, at 7 tbl.1.

305. Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2662 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

306. *Id.*

307. On curriculum, *see, for example*, McDermott & Jensen, *supra* note 254, at 46–47, explaining how NCLB’s focus on “scientifically based research” “marks a major extension of federal control over curricula”; and Ryan, *supra* note 76, at 54, explaining that current federal education law prohibits Congress from imposing “specific” curricula on the states, but does not prohibit regulation in curricular

a sum much less than the state's entire annual education expenditures, and go on to propose that the states have thus been forced to relinquish their sovereignty on these matters.

As I explained above, however, the joint dissent did not say that imposing conditions of this sort or in this area of regulation are necessarily coercive.³⁰⁸ To the contrary, it is the size of the grant offered in exchange for the conditions that matters: The example explicitly contemplates the federal government offering "a grant equal to the State's entire annual expenditures for primary and secondary education."³⁰⁹ In 2010, all state expenditures on elementary and secondary education stood at \$261 billion.³¹⁰ A federal grant in this amount would be almost four times the \$70 billion in federal money the states actually received for elementary and secondary education overall that year,³¹¹ more than twenty times the \$12 billion provided under Title I,³¹² and would even surpass the \$233 billion in federal money the states spent on Medicaid that year by almost \$30 billion.³¹³ In other words, as these figures show, the joint dissent's hypothetical contemplates an amount of federal funding that would be off the charts in comparison to what actually exists. That the joint dissent would find \$278 billion in imagined federal education funding troublesome does not easily lead to the conclusion that it would find \$12 billion in actual Title I funding troublesome.

A third potential argument that NCLB is coercive would focus on the increased amounts of state spending required by the Act. This was the states' primary objection to NCLB; they claimed it imposed an unfunded mandate on them. It was this objection that gave rise to a coercion claim in one of the lawsuits challenging the law.³¹⁴ Yet *NFIB* does not actually provide much support for this argument. Recall the plurality's explanation that "the size of the new financial

matters more generally. On teacher hiring, see, for example, 20 U.S.C. § 6319(a)(2) (2006), requiring that all teachers of core academic subjects in schools receiving federal funds under NCLB be "highly qualified"; and *id.* § 7801(23), defining "highly qualified" teachers. On discipline, see, for example, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-210, STUDENT DISCIPLINE: INDIVIDUALS WITH DISABILITIES EDUCATION ACT 3 (2001), stating that "[i]n recent years . . . federal law has required states and local districts to implement certain discipline-related policies in schools"

308. See *supra* notes 205–15 and accompanying text.

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

310. See NASBO, *supra* note 30, at 16 tbl.7 (showing the source figures for this amount, which is calculated by subtracting federal funds from total state expenditures for fiscal year 2010).

311. *Id.*

312. NCES REPORT, *supra* note 275, at 15 tbl.9.

313. NASBO, *supra* note 30, at 47 tbl.28.

314. See *supra* note 243 and accompanying text.

burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden,” because “[y]our money or your life’ is a coercive proposition, whether you have a single dollar in your pocket or \$500.”³¹⁵ On this logic, what really matters is the amount of federal money at stake and the relationship of that money to the state’s overall budget. If the amount at stake in Title I is itself not coercive, then it would not matter for coercion purposes how much the state would have to spend to fulfill the Title I conditions, since it could just turn down the Title I funds.

The joint dissent did discuss at some length the amount of state funds that the Medicaid expansion required as relevant to its conclusion that the expansion was coercive.³¹⁶ But, as I indicated above, it is unclear that such an increase would, on its own, lead the joint dissent to find coercion where the overall federal grant was not itself troublesomely large.³¹⁷ To be sure, if the joint dissent would take the increase in expected state contributions as independently supporting a finding of coercion, the amount of additional state spending expected by NCLB is similar, under some calculations, to the amount of additional state spending expected by the Medicaid expansion.³¹⁸

Even so, I doubt that the amount of additional state spending associated with NCLB would lead to a finding of coercion, for two reasons. First, the calculations about increased state spending are rooted in so-called “adequacy studies”³¹⁹ from school finance litigation that the political right tends to treat as anathema, on the grounds that the calculations themselves are not rooted in anything meaningful and that money is not the key factor in schools’ ability to provide quality education.³²⁰ Taking these studies seriously in the context of a coercion inquiry would give them an imprimatur that

315. *NFIB*, 132 S. Ct. at 2605 n.12 (plurality opinion).

316. *Id.* at 2665–66 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

317. *See supra* notes 192–93 and accompanying text.

318. *Compare NFIB*, 132 S. Ct. at 2666 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (calculating increased state administrative costs at \$12 billion between 2014 and 2020 and increased substantive costs at somewhere between \$20 billion and \$43.2 billion through 2019 plus \$60 billion from 2019 through 2021), *with Mathis, supra* note 239, at 114 (calculating increased administrative costs at \$11.3 billion, offset by \$4.6 billion in federal funds, and increased substantive costs of \$137.8 billion, in order to achieve NCLB’s goals of making all students “proficient” by 2014).

319. Mathis, *supra* note 239, at 103–04.

320. *Id.* (explaining five methods of conducting adequacy studies). *See generally* Williamson M. Evers & Paul Clopton, *High-Spending, Low-Performing School Districts*, in *COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES’ GOOD INTENTIONS AND HARM OUR CHILDREN* 103, 103–04 (Eric A. Hanushek ed., 2006); E.D. Hirsch Jr., *Adequacy Beyond Dollars: The Productive Use of School Time*, in *COURTING FAILURE, supra*, at 313, 326.

they currently lack for school finance cases. It therefore seems unlikely to me that either litigants or judges sympathetic to the views of the joint dissent would find these adequacy studies reliable, persuasive, or desirable.

Moreover, there is a more than colorable claim that a good deal of the spending prompted by NCLB is already required by state constitution, at least in those states where courts have held the education provision in the state constitution to require the provision of an adequate education.³²¹ Unlike the increased state spending required by the Medicaid expansion, then, it is possible to see the increased state spending required by NCLB as the result of a federal incentive for states to meet their own constitutional obligations.

A final potential objection to NCLB on coercion grounds might point to the joint dissent's concern that the loss of Medicaid funds would subject states to additional burdens, whether in the loss of federal funding tied to Medicaid eligibility or in other federal obligations that assume the existence of Medicaid funding.³²² As the Department of Education explained to Utah in 2004, because NCLB uses Title I funding as part of the formula for calculating a state's share of certain other NCLB funding programs, turning down Title I funds would have the practical consequence of losing more than simply those funds.³²³

But even assuming that the Title I formula underlay all of the other programs in NCLB such that turning down Title I money jeopardized all NCLB money—which is not the case—the size of the funds and the percentage of the states' overall budgets at stake do not come close to the circumstances the Court found coercive with respect to Medicaid. In 2003, the fiscal year that was the subject of Utah's correspondence with the Department of Education, Utah received approximately \$107 million in total NCLB funds (of which approximately \$46 million was Title I money).³²⁴ These total NCLB funds constituted barely 1.4% of Utah's state expenditures of over

321. See James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 299 (2003) (suggesting that the requirements of NCLB will reinvigorate lawsuits under state education clauses by providing more concrete ways to define adequacy); see also Mathis, *supra* note 239, at 106–12 tbl.3 (showing that some of the adequacy studies under review were conducted for state litigation).

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

323. See Letter from Eugene W. Hickok to Steven O. Laing, *supra* note 241 (explaining that although a state may feel free to opt out of receiving Title I funds with no repercussion, other funds are inherently tied to Title I funding streams, which may result in secondary and tertiary losses of funding for the refusing state).

324. *Id.*

\$7.5 billion that year.³²⁵ As a conservative Utah-based think tank commented in 2010, turning down NCLB funds “would not be insurmountable and could even prove to be quite manageable over time,” especially because Utah increased its own state education spending, completely separate from NCLB funds, by \$125 million per year since 2002, “nearly double the amount needed to cover per pupil expenditures for increased enrollment.”³²⁶

Utah’s experience is not unique. Total funds granted to the states under NCLB were about \$24.9 billion in fiscal year 2010,³²⁷ just 1.5% of the overall state expenditures of \$1.6 trillion.³²⁸ While a little higher than the percentage of the state budget at stake in *Dole*, these figures are nowhere near the minimum loss of 10% of the state budget that concerned the Court in *NFIB*. And these sums are on the high end, as this money represents all ESEA funds, while only some ESEA grant programs rely on the amount a state receives under Title I, and even those grant programs count Title I money for only part of the grant formula.³²⁹

In sum, none of the indicia of economic dragooning that existed with respect to Medicaid are present here. Especially if the joint dissent’s suggestion that the “coercive nature of an offer [must be] *unmistakably clear*”³³⁰ is taken seriously, NCLB overall and Title I in particular should survive any coercion challenge under *NFIB*.

I turn next to the other major source of federal funding for education: the Individuals with Disabilities Education Act.

B. *The Individuals with Disabilities Education Act*

1. *Background and history of coercion analysis*

In the years immediately following the passage of the ESEA of 1965, Congress passed a few minor funding programs to support the

325. Calculated by dividing \$107 million in NCLB funds, *see id.*, by \$7.5 billion in overall state expenditures, *see* NAT’L ASSOC. OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT 2003, at 6 tbl.1 (2004), *available at* http://www.nasbo.org/sites/default/files/ER_2003.pdf (listing overall state expenditures for fiscal year 2003).

326. Matthew C. Piccolo, *NCLB: Selling Utah’s Schools for a Mess of Pottage*, SUTHERLAND INST. 3 (Mar. 18, 2010), http://www.sutherlandinstitute.org/uploaded_files/sdmc/NCLB-Selling_Utahs_Schools.pdf.

327. U.S. DEP’T OF EDUC., SUMMARY OF DISCRETIONARY FUNDS, FY 2008–FY 2013 PRESIDENT’S BUDGET (2012) [hereinafter DOE SUMMARY OF DISCRETIONARY FUNDS], *available at* <http://www.ed.gov/about/overview/budget/budget13/summary/appendix1.pdf>.

328. Calculated by dividing \$24.9 billion in overall NCLB funds, *see id.*, by \$1.6 trillion in overall state expenditures, *see* NASBO, *supra* note 30, at 7 tbl.1.

329. Letter from Eugene W. Hickok to Steven O. Laing, *supra* note 241.

330. Nat’l Fed’n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2662 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (emphasis added); *see also supra* note 202–04.

education of children with disabilities.³³¹ These programs eventually blossomed into a major new piece of legislation, the Education for All Handicapped Children Act of 1975,³³² renamed the Individuals with Disabilities Education Act in 1990.³³³ Most programs to support elementary and secondary education are reauthorized as part of the ESEA, but the IDEA remains its own separate legislation and is reauthorized on a different schedule.³³⁴

The IDEA consists of three different funding programs. The main one, Part B, provides grants to states to support the education of school-aged children with disabilities.³³⁵ Part C provides smaller grants to support states' efforts to aid infants and toddlers with disabilities,³³⁶ and Part D provides other small grants for a variety of national activities.³³⁷ In recent years, Part B has been funded at around \$11.5 billion each year, making it the second largest federal education program, after Title I.³³⁸ Parts C and D together have recently been funded at approximately \$1 billion each year.³³⁹

While the ESEA was primarily driven and drafted by the White House, Congress and the states were much more active in the genesis of the IDEA.³⁴⁰ The law grew out of nationwide state-level lawsuits in the late 1960s and early 1970s that challenged, as violations of the Fourteenth Amendment, the segregation of children with disabilities from their non-disabled classmates or the outright exclusion of children with disabilities from school at all.³⁴¹ As states all over the country prepared to face these lawsuits or found themselves dealing with their repercussions, they turned to Congress for financial assistance.³⁴²

With this federal financial assistance came conditions that paralleled the remedies in the first two lawsuits.³⁴³ All children with disabilities were to have the right to a "free appropriate public education," which would consist of special education and related

331. R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 151–52 (1994).

332. Pub. L. No. 94-142, 89 Stat. 773. *See generally* MELNICK, *supra* note 331, at 149–57.

333. Pub. L. No. 101-476, 104 Stat. 1103 (1990).

334. RICHARD N. APLING & NANCY LEE JONES, CONG. RESEARCH SERV., RL32716, *THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): ANALYSIS OF CHANGES MADE BY P.L. 108-446*, at 1 (2005).

335. IDEA tit. I, pt. B, 20 U.S.C. §§ 1411–1419 (2006).

336. IDEA tit. I, pt. C, 20 U.S.C. §§ 1431–1444.

337. IDEA tit. I, pt. D, 20 U.S.C. §§ 1450–1482.

338. *See* DOE SUMMARY OF DISCRETIONARY FUNDS, *supra* note 327.

339. *Id.*

340. *See* MELNICK, *supra* note 331, at 148–57.

341. *See id.* at 141–47.

342. *See id.* at 148–49.

343. MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 729 (5th ed. 2012).

services.³⁴⁴ Children were to be educated in the “least restrictive environment”—in other words, to be mainstreamed as much as possible with their non-disabled peers.³⁴⁵ The special education and related services to be provided to each child for a school year would be specified in a collaboratively designed “individualized education program.”³⁴⁶ Parents had the right to challenge the school district’s decisions through an “impartial due process hearing” and then in federal court.³⁴⁷ These features remain at the core of the law even as it has been reauthorized and expanded over the years, most recently in 2004, when some of its provisions were aligned with NCLB’s requirements.³⁴⁸

The argument that the IDEA is coercive has arisen in several different contexts. The most general argument is that the IDEA is effectively an unfunded mandate, imposing detailed and onerous conditions but providing nowhere near enough money to pay for them, trapping cash-strapped states and districts into staying in the program in exchange for necessary, but insufficient, federal funds.³⁴⁹ More specific versions of this argument have been made in litigation with respect to particular provisions of the IDEA. Several cases have considered whether the requirement that participating states waive their sovereign immunity as a condition of participation is coercive.³⁵⁰ These arguments have not been successful, but *NFIB* potentially opens the door for their reconsideration. The same is true for the

344. 20 U.S.C. §§ 1401(16)–(18), 1413(a)(2) (1976).

345. *Id.* § 1418(d)(2)(A).

346. *Id.* § 1414(a)(5).

347. *Id.* § 1415(b)(2).

348. See generally ROBERT SILVERSTEIN, CONSORTIUM FOR CITIZENS WITH DISABILITIES, A USER’S GUIDE TO THE 2004 IDEA REAUTHORIZATION (P.L. 108-446 AND THE CONFERENCE REPORT) (2005), available at http://www.c-c-d.org/task_forces/education/IdeaUserGuide.pdf (identifying modifications to the IDEA).

349. See, e.g., PIETRO S. NIVOLA, TENSE COMMANDMENTS: FEDERAL PRESCRIPTIONS AND CITY PROBLEMS 38–43, 151–52 (2002) (discussing the IDEA as an unfunded mandate); Paul T. Hill, *The Federal Role in Education*, 2000 BROOKINGS PAPERS ON EDUC. POL’Y 11, 22–23 (describing the expensive requirements that came with the IDEA).

350. See, e.g., *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 287 (5th Cir. 2005) (en banc) (holding that the waiver of sovereign immunity in the IDEA is not unconstitutionally coercive because a “state can avoid suit under the IDEA merely by refusing IDEA funds”); *A.W. v. Jersey City Pub. Schs.*, 341 F.3d 234, 255 (3d Cir. 2003) (“We do not deny the considerable pressures placed on states to accept federal special education funds, but we cannot conclude that the IDEA, recognized as a model of cooperative federalism, gives rise to unconstitutional compulsion.” (citation omitted) (internal quotation marks omitted)); *Bd. of Educ. v. Kelly E.*, 207 F.3d 931, 935 (7th Cir. 2000) (holding that the IDEA waiver of sovereign immunity requirement is valid under the Spending Clause); see also Eloise Pasachoff, *Block Grants, Early Childhood Education, and the Reauthorization of Head Start: From Positional Conflict to Interest-Based Agreement*, 111 PENN. ST. L. REV. 349, 387–88 (2006) (discussing the IDEA waiver of sovereign immunity provision).

argument that threatening to withhold a state's entire IDEA grant for noncompliance with one particular application is coercive.³⁵¹ Six of thirteen judges in the Fourth Circuit sitting en banc found this argument persuasive.³⁵² *NFIB* could lead to efforts to turn this conclusion into a majority opinion.

The rest of this section demonstrates that these efforts are not likely to be successful. Careful application of the *NFIB* coercion analysis to the IDEA shows that, as with NCLB, the IDEA simply does not rise to the level of concern presented by the Medicaid expansion.

Before turning to this analysis, it is important to consider the possibility that the IDEA was enacted under Congress's authority pursuant to Section 5 of the Fourteenth Amendment, as well as Congress's authority under the Spending Clause. If IDEA were enacted under Section 5 authority, the coercion inquiry would be less relevant because, within certain limits, Congress can impose conditions on the states through its Section 5 power without offering states a genuine choice in the matter.³⁵³ In the 1980s, the Supreme Court twice suggested that the IDEA had Fourteenth Amendment roots.³⁵⁴ More recently, Justice Ginsburg, writing only for herself, made the same suggestion.³⁵⁵

The issue has not been decided, but given the current state of Section 5 doctrine, it does not seem likely that a majority of the Roberts Court would accept the premise that the IDEA is valid Section 5 legislation. Under this doctrine, Congress may enact prophylactic legislation that goes beyond the substantive requirements of Section 1 of the Fourteenth Amendment, which contains the Equal Protection and Due Process Clauses, only if there is "congruence and proportionality" between the legislation and the constitutional violations that gave rise to the legislation.³⁵⁶ Using its Section 5 powers, Congress could presumably order states to give

351. *Va. Dep't of Educ. v. Riley*, 106 F.3d 559, 569–70 (4th Cir. 1997) (en banc).

352. *Id.* at 560–61, 569–70.

353. *See, e.g.,* Ryan, *supra* note 76, at 48.

354. *Dellmuth v. Muth*, 491 U.S. 223, 227, n.1 (1989) (noting that the petitioner conceded that the law was enacted under Congress's Section 5 authority and saying that the Court would "decide the case on these assumptions"); *Smith v. Robinson*, 468 U.S. 992, 1009 (1984) (explaining that the law was "set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children").

355. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 305 (2006) (Ginsburg, J., concurring in part and concurring in the judgment) (questioning the Court's "repeated references to a Spending Clause derived 'clear notice' requirement" on a number of grounds, including that the "IDEA was enacted not only pursuant to Congress's Spending Clause authority, but also pursuant to § 5 of the Fourteenth Amendment").

356. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

children with disabilities access to public education, but it is difficult to imagine a majority of this Court concluding that the entirety of the IDEA passed this congruent and proportional test.³⁵⁷ Therefore, whether the IDEA can survive a Spending Clause challenge on coercion grounds is of great importance to its future.

2. *Old funding conditioned on compliance with a new program*

Like NCLB and Title I, the IDEA as reauthorized in 2004 cannot fairly be read as a new program against which funds for the old program are conditioned. The law is better seen as a “modification of the existing program.”³⁵⁸ Part B contains the same key features that have been present since 1975: the focus on providing special education and related services;³⁵⁹ the requirement that all children with disabilities are entitled to a “free appropriate public education,”³⁶⁰ in the least restrictive environment,³⁶¹ as detailed in an individualized education program,³⁶² the attention to the rights of both children with disabilities and their parents,³⁶³ and the same focus on parental enforcement.³⁶⁴

Of course, as is common for legislation that is periodically reauthorized, there have been some significant changes over time as the program has expanded. Some changes have expanded the population of children eligible to be served by the statute. For example, the list of eligible disability categories has grown to include autism and traumatic brain injuries,³⁶⁵ and children between the ages

357. See, e.g., Ryan, *supra* note 76, at 48, 70 n.16 (concluding that the IDEA could not “be justified as a legitimate exercise of Congress’s Section 5 powers”); see also *Bd. of Educ. v. Kelly E.*, 207 F.3d 931, 935 (7th Cir. 2000) (“Having enacted [the IDEA] under its spending power, Congress did not need to rely on § 5.”); *Bradley v. Ark. Dep’t of Educ.*, 189 F.3d 745, 758 (8th Cir. 1999) (concluding, based on the Supreme Court’s new § 5 doctrine, that the IDEA is not valid § 5 legislation, and overruling *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816 (8th Cir. 1999), on this ground), *aff’d en banc sub nom. Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000).

358. *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2605 (2012) (plurality opinion).

359. Compare 20 U.S.C. § 1401(1), (16)–(17) (1976), with 20 U.S.C. § 1401(3), (26), (29) (2006).

360. Compare 20 U.S.C. § 1413(a)(2) (1976), with 20 U.S.C. § 1412(a)(1)(A) (2006).

361. Compare 20 U.S.C. § 1418(d)(2) (1976), with 20 U.S.C. § 1416(a)(3)(A) (2006).

362. Compare 20 U.S.C. § 1401(1) (1976), with 20 U.S.C. § 1401(14) (2006).

363. Compare 20 U.S.C. § 1401 note (1976), with 20 U.S.C. § 1400(d)(1)(B) (2006); see also *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 535 (2007) (holding that parents have individually enforceable rights under the IDEA).

364. Compare 20 U.S.C. § 1415 (1976), with 20 U.S.C. § 1415 (2006). For an analysis of the way the IDEA’s reliance on parental enforcement systematically shortchanges disabled children in poverty, see Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1424–29 (2011).

365. Compare 20 U.S.C. § 1401(1) (1976), with 20 U.S.C. § 1401(3)(A)(1) (2006).

of three and nine are also eligible to be identified with “developmental delays.”³⁶⁶ The original legislation included a cap on the number of children with “specific learning disabilities” at 2% of the overall population of school-aged children,³⁶⁷ but this cap has since been removed,³⁶⁸ leading to a dramatic expansion in the proportion of children with this diagnosis served by the statute.³⁶⁹ Additionally, a subset of IDEA funds may now be used to provide early intervention services to children who have not yet been identified with a disability but who nonetheless may need some extra support in the classroom.³⁷⁰

Other changes have broadened the substantive obligations placed on states and districts receiving money under the statute. For example, the list of services that might be included under “related services” has expanded to include social work services and interpreting services alongside the counseling services, psychological services, and physical and occupational therapy that were originally included in the list of “other supportive services” that might qualify for coverage.³⁷¹ The legal and reporting obligations placed on states and districts have also grown over time, so that (for example) the law now requires participating states to waive their sovereign immunity³⁷² and submit certain data on participating students and their placements,³⁷³ provides that prevailing parents may have their attorneys’ fees reimbursed,³⁷⁴ and requires that states and districts provide parents with an option to mediate disputes about their child’s education.³⁷⁵ The 2004 reauthorization also brought the IDEA into conformity with some aspects of NCLB, such as requiring that special education teachers be “highly qualified” and that

366. 20 U.S.C. § 1401(3)(B) (2006).

367. Pub. L. No. 94-142 sec. 5(a), § 611(a)(5)(A), 89 Stat. 773, 777.

368. Procedures for Evaluating Specific Learning Disabilities, 42 Fed. Reg. 65,082, 65,085 (Dec. 29, 1977).

369. Children with specific learning disabilities now constitute around 4% of the population of school-aged children, almost 45% of all children served by the IDEA. See U.S. DEP’T OF EDUC., 30TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 2008, at 44 fig.11, 45 tbl.10 (2011), available at <http://www.ed.gov/about/reports/annual/osep/2008/parts-b-c/30th-idea-arc.pdf> (showing the percentage of students ages six through twenty-one under IDEA, Part B, by disability category).

370. 20 U.S.C. §§ 1413(a)(4)(i), (f) (2006).

371. Compare 20 U.S.C. § 1401 (1976), with 20 U.S.C. § 1401(26)(A) (2006).

372. 20 U.S.C. § 1403 (2006).

373. *Id.* § 1418(a).

374. *Id.* § 1415(i)(3).

375. *Id.* § 1415(e).

children with disabilities be generally included in assessments for accountability purposes.³⁷⁶

But none of the changes to the IDEA Part B over time have altered the fundamental responsibilities of the districts that serve children with disabilities and the states that oversee the districts. The addition of legal and service obligations do not constitute “a shift in kind, not merely degree.”³⁷⁷ For example, the social work services specified in a later amendment are comparable to counseling services in the original Act.³⁷⁸ The requirement that prevailing parents may have their attorneys’ fees reimbursed merely adds a remedy to an enforcement regime that already existed.³⁷⁹ The additions of a mediation option and the sovereign immunity waiver simply broaden the scope of enforcement options.³⁸⁰ And the requirements for special education teachers and inclusion of children with disabilities in state testing regimes easily connect to a purpose of the Act that has been in place since 1975—“to assess, and ensure the effectiveness of, efforts to educate children with disabilities.”³⁸¹ None of these modifications leads to the conclusion that these features constitute a new and separate program on top of the old one.

Nor does the expansion of program beneficiaries represent a “change in kind.” The addition of some disability categories seems akin to the pre-ACA changes to Medicaid that, the plurality explained, “merely altered and expanded the boundaries of [eligibility] categories.”³⁸² The removal of the statutory cap on the percentage of children diagnosed with “specific learning disabilities”³⁸³ was anticipated in the original legislation, thus giving states notice of the likely expansion of this category.³⁸⁴ And while diagnosing children with “specific learning disabilities” is difficult, the boundaries of the category remain policed, for better or for

376. *Id.* §§ 1401(10), 1412(14)(C).

377. *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2605 (2012) (plurality opinion).

378. *Compare* 20 U.S.C. § 1401 (1976), *with* 20 U.S.C. § 1401(26)(A) (2006).

379. *Compare* 20 U.S.C. § 1415(i)(3) (2006), *with* 20 U.S.C. § 1415 (1976).

380. *Compare* 20 U.S.C. § 1415 (2006), *with* 20 U.S.C. § 1415 (1976).

381. *Id.* § 1400(d)(4) (2006); Education of All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 3(a), 89 Stat. 773, 775.

382. *NFIB*, 132 S. Ct. at 2605.

383. *See* Procedures for Evaluating Specific Learning Disabilities, 42 Fed. Reg. 65,082 (Dec. 29, 1977).

384. 89 Stat. 794 (directing Commissioner of Education to prescribe regulations that “establish specific criteria for determining whether a particular disorder or condition may be considered a specific learning disability” and providing for the deletion of the statutory cap limiting the percentage of children diagnosed with learning disabilities as of the date the regulations become effective).

worse,³⁸⁵ so it is not a “universal” category in the way the plurality deemed the ACA’s expansion of Medicaid was.³⁸⁶ Not even the ability to use a subset of IDEA funds for children *without* disabilities as part of an “early intervention” strategy³⁸⁷ can fairly be called a move to “universal” services. Those funds are still limited to children who need extra support to succeed in the classroom,³⁸⁸ and such services are intended to aid in the diagnosis of learning disabilities.³⁸⁹ Early intervention services are also supposed to *narrow* eligibility for the category of learning disability by separating out those students who respond to early interventions and who thus need no further services under the IDEA.³⁹⁰ And, most importantly, whether to use IDEA funds to support children not identified as disabled is completely discretionary.³⁹¹ Districts may choose to use up to 15% of their IDEA funds for this purpose, but need not do so in order to get IDEA funds.³⁹² This choice further distinguishes the expansion of beneficiaries via early intervention from the Medicaid expansion in the ACA, under which funds were only available to states that chose to serve the new eligibility group.³⁹³

Regardless of these expansions, then, the IDEA remains a program devoted to “the neediest among us” with respect to disabilities that require additional services in school. It is not “an element of a comprehensive national plan to provide universal” educational support to low-performing children in general.³⁹⁴

385. For thoughtful examinations of this effort, see generally MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* (1998); and James E. Ryan, *Poverty as Disability and the Future of Special Education Law*, 101 *GEO. L.J.* (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152557.

386. *NFIB*, 132 S. Ct. at 2606 (plurality opinion).

387. 20 U.S.C. § 1413(f)(1) (2006).

388. *Id.* (limiting such services to those “who have not been identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment”).

389. *Id.* § 1414(a)(6)(B); see also Angela A. Ciolfi & James E. Ryan, *Race and Response-To-Intervention in Special Education*, 54 *How. L.J.* 303, 310 (2011) (explaining that Response-To-Intervention is a form of early intervention services on which school districts can rely “as a diagnostic tool to identify children with specific learning disabilities”).

390. Ciolfi & Ryan, *supra* note 389, at 305 (explaining that Response-To-Intervention was intended to “reduce the overall numbers of students found eligible for special education”).

391. 20 U.S.C. § 1413(a)(4) (calling the use of funds for early intervention services “permissive”).

392. *Id.* § 1413(f)(1) (providing that a district “may not use more than 15%” of its IDEA funds on early intervention services, rather than mandating that it use any of its funds in this way).

393. *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2606 (2012) (plurality opinion) (describing mandatory requirements under the Medicaid expansion).

394. *Id.* at 2606.

Moreover, as with Title I, the funding for Part B of the Act remains unified. Unlike the Medicaid expansion, there is no separate funding stream to cover newly eligible beneficiaries, nor are they subject to different requirements or benefits.³⁹⁵ The same is true for the addition of service requirements, the mediation option, and the like—no separate funds are allocated specifically to certain programs.³⁹⁶ There is one separate funding stream in Part B that did not exist when the IDEA was first passed in 1975—funding to provide preschool for children with disabilities, a program that dates back to 1986.³⁹⁷ But this funding is not tied to the other Part B requirements, and states need not accept this additional preschool program if they want regular Part B funding.³⁹⁸ This preschool program is thus unlike the Medicaid expansion as well.

For all of these reasons, the changes to the IDEA over time are not comparable to the ACA's expansion of Medicaid. The conditions in the IDEA govern the use of IDEA funds. They do not threaten to remove funds for noncompliance with an independent program.

3. *Notice to the states*

Because the IDEA contains no independent program conditioning funds on compliance with another program, the plurality's notice requirement does not apply. If a court were, however, to determine that the IDEA did contain independent programs conditioned on each other, it is hard to see how proper notice would exist, as with NCLB and Title I. But, as I have explained, that would not make the

395. There are two different funding formulas for elementary and secondary education under Part B. The formula for the maximum amount a state *may* receive in any given year appears at 20 U.S.C. § 1411(a)(2). The formula for the actual amount that a state *will* receive in any given year appears at 20 U.S.C. § 1411(d). These different formulas still represent only one funding stream, as the states actually receive money only under § 1411(d). This is therefore different from the different funding streams provided in the ACA: one for beneficiaries eligible for pre-ACA Medicaid, and one for beneficiaries newly eligible under post-ACA Medicaid. *See NFIB*, 132 S. Ct. at 2606 (plurality opinion) (contrasting different funding streams at 42 U.S.C. § 1396d(b) with § 1396d(y)).

396. Of course, the independent grants specified in Parts C and D have their own funding streams, *see* 20 U.S.C. §§ 1443–1444 (funding formula and authorization under Part C); *id.* § 1451(c)–(d) (funding for distinct competitive and formula grants under Part D), but they are quite obviously different grants, and funding for the different Parts are not tied together. *See, e.g.*, Thomas Hehir, *IDEA and Disproportionality: Federal Enforcement, Effective Advocacy, and Strategies for Change*, in *RACIAL INEQUITY IN SPECIAL EDUCATION* 219, 227–28 (Daniel J. Losen & Gary Orfield eds., 2002) (discussing instance in which several states considered opting out of only some IDEA programs).

397. Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, sec. 303, § 623, 100 Stat. 1145, 1161.

398. 20 U.S.C. § 1412(a)(1)(B).

law coercive; it would simply require analysis of whether the financial terms of the program constitute economic dragooning.

There is one additional notice issue for the IDEA, not present with NCLB, that could be conceivably raised in light of *NFIB*'s reinvigoration of the coercion doctrine: the issue of so-called "full funding."³⁹⁹ It is often said that when the law was originally passed in 1975, Congress promised to provide 40% of the extra cost of educating a child with a disability,⁴⁰⁰ as reflected in the formula for determining the maximum state entitlement under the Act.⁴⁰¹ Yet over the decades, the federal government has never come close to providing this amount. For most of the 1980s and 1990s, the federal share stayed at around 8%.⁴⁰² A sizeable increase in funds in the last decade more than doubled the federal share, but it remains under 20%,⁴⁰³ although a one-time grant under the American Recovery and Reinvestment Act temporarily brought federal funding close to the 40% goal for one year.⁴⁰⁴ One could imagine an argument that states originally accepted funds under the IDEA on the understanding that they were taking on a financial burden of a particular size and that the current IDEA, funded at this lower level, thus improperly imposes post-acceptance, retroactive conditions. Under this reading, while "the size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden" from the perspective of economic dragooning,⁴⁰⁵ it could theoretically still hold some relevance with respect to whether the states had adequate notice about the scope of the program's conditions.

This argument is not likely to be successful. Even assuming that the state's financial burden is relevant to the issue of notice, the

399. Note, however, that this argument would fall under the standard clear statement rule for Spending Clause legislation, not under anything new in *NFIB*.

400. Richard N. Apling, *Individuals with Disabilities Education Act (IDEA): Issues Regarding "Full Funding" of Part B Grants to States*, in *INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): BACKGROUND AND ISSUES* 103, 104 (Nancy Lee Jones et al. eds., 2004).

401. 20 U.S.C. § 1411 (1976).

402. Pasachoff, *supra* note 238, at 27.

403. *Id.*

404. See 20 U.S.C. § 1411(i) (2006) (showing that the authorization for full funding at 40% is approximately \$26 billion); DOE SUMMARY OF DISCRETIONARY FUNDS, *supra* note 327 (listing Recovery Act funds of \$11.3 billion and regularly appropriated funds of \$11.5 billion); *American Recovery and Reinvestment Act of 2009: IDEA Recovery Funds for Services to Children and Youths with Disabilities*, U.S. DEP'T OF EDUC. (Apr. 1, 2009), <http://www.ed.gov/policy/gen/leg/recovery/factsheet/idea.html> (explaining that Recovery Act funds are additional to regularly appropriated funds).

405. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2605 n.12 (2012) (plurality opinion).

statutory text provides no tenable basis for the states to say that they relied on a promise of federal funding at 40% in making the decision to sign onto the program. The provision in which the 40% so-called full funding is specified is titled “maximum State entitlement,” not “eventual state entitlement.”⁴⁰⁶ The word “maximum” indicates that it is the most a state could hope for, not anything to which a state has a legal claim. Further, the original law provided for a ratable reduction in the amount actually given to each state if the actual sums appropriated for any given fiscal year were less than the maximum state entitlement for that year,⁴⁰⁷ a provision that should have made clear to any state the real possibility that funding would not reach the 40% level. Whatever moral obligation may attend the 40% goal, it presents no problem with respect to notice.

4. *Economic dragooning*

If the sums involved in Title I cannot constitute economic dragooning, neither can the sums involved in the IDEA, which is second to Title I in federal funding. Of the total \$552 billion dollars in federal funds provided to the states in 2010,⁴⁰⁸ \$11.5 billion came from IDEA Part B, with another \$1 billion coming from Parts C and D⁴⁰⁹—around 2% of all federal allocations to the states⁴¹⁰ (as compared to 42% for Medicaid).⁴¹¹ Whereas cutting off federal Medicaid funding would jeopardize state budgets by over 10%,⁴¹² IDEA Part B spending constitutes only 0.7% of the average state budget,⁴¹³ while the smaller Parts C and D constitute only 0.06%.⁴¹⁴ Even with the temporary \$11.3 billion increase in IDEA Part B spending under ARRA in 2009⁴¹⁵ added to the regularly appropriated amount of \$11.5 billion, the funding constitutes only 1.4% of all state

406. 20 U.S.C. § 1411(a) (1976).

407. *Id.* § 1411(g).

408. NASBO, *supra* note 30, at 7 tbl.1.

409. DOE SUMMARY OF DISCRETIONARY FUNDS, *supra* note 327.

410. Calculated by dividing \$11.5 billion, *see id.*, by \$552 billion, *see* NASBO, *supra* note 30, at 7 tbl.1.

411. Calculated by dividing \$233 billion in federal Medicaid funding by \$552 billion in overall federal funding. *See* NASBO, *supra* note 30, at 7 tbl.1.

412. *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2605 (2012) (plurality opinion).

413. Calculated by dividing \$11.5 billion in IDEA Part B funds for fiscal year 2009, *see* DOE SUMMARY OF DISCRETIONARY FUNDS, *supra* note 327, by \$1.558 trillion in overall state expenditures for fiscal year 2009, *see* NASBO, *supra* note 30, at 7, tbl.1.

414. Calculated by dividing \$1 billion in IDEA Parts C and D Funds for fiscal year 2009, *see* DOE SUMMARY OF DISCRETIONARY FUNDS, *supra* note 327, by \$1.558 trillion in overall state expenditures for fiscal year 2009, *see* NASBO, *supra* note 30, at 7, tbl.1.

415. DOE SUMMARY OF DISCRETIONARY FUNDS, *supra* note 327.

expenditures.⁴¹⁶ And “full funding” of the IDEA Part B—\$26 billion in 2011⁴¹⁷, a sum that has never been provided—would still be only 1.5% of all state expenditures.⁴¹⁸ All of these figures are far closer to the amount approved in *Dole* than to the amount disapproved in *NFIB*.

A possible counterargument might suggest that, like Medicaid, the IDEA is a federal program imposed on states and districts because of their failure to act in support of the program’s beneficiaries. This argument would attempt to distinguish the IDEA from NCLB, saying that while state constitutions contain the right to education, those constitutional rights would not likely encompass the detailed substantive and procedural requirements set forth in the IDEA.⁴¹⁹ Therefore, this argument would go, far from merely assisting the states in their own task of educating students, the IDEA effectively “conscript[s] state [agencies] into the national bureaucratic army,” as the *NFIB* plurality declares the Medicaid expansion would do.⁴²⁰

But even assuming that the extent to which a program is truly federal is relevant to the question of economic dragooning, and even assuming a court would be competent to make that determination, this argument would implicate the IDEA from its inception in 1975, not only the law’s current iteration. Because neither the *NFIB* plurality nor the joint dissent would have upset the original Medicaid program as coercive, the original IDEA would survive as well. Moreover, upsetting the IDEA from its inception would also ignore the genesis of the IDEA as a historical matter, since the states were instrumental in both calling upon Congress to enact the legislation and participating in the design of the program.⁴²¹ It is hard to see how the states could have been economically dragooned into a

416. Calculated by dividing \$22.8 billion in IDEA Part B funds and Recovery Act IDEA Part B funds, *see id.*, by \$1.558 trillion in overall state expenditures for fiscal year 2009, *see* NASBO, *supra* note 30, at 7, tbl.1.

417. 20 U.S.C. § 1411(i)(7) (2006).

418. Calculated by dividing \$26 billion in IDEA Part B funds authorized for fiscal year 2011, *see id.*, by \$1.687 trillion in estimated overall state expenditures for fiscal year 2011, *see* NASBO, *supra* note 30, at 7 tbl.1.

419. *See* Ryan, *supra* note 76, at 48–49 & 70–71 nn.16–17, 55–56 (observing that state constitutions guaranteeing education “provide little detail as to how a state’s system of education should be organized” and lack rights specified in the IDEA).

420. *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2606–07 (2012) (plurality opinion) (second alteration in original) (quoting *FERC v. Mississippi*, 456 U.S. 742, 775 (1982) (O’Connor, J., concurring in the judgment in part and dissenting in part)).

421. *See* MELNICK, *supra* note 331, at 148–57 (highlighting the various efforts taken by states regarding the legislation, and declaring that “State and local education agencies and the two major teachers’ unions supported the effort to increase the federal authorization substantially”).

program they themselves requested, and which some states took their time in joining, apparently having had time to make a reasoned decision about its pros and cons.⁴²² The states might prefer federal funding in the form of a block grant with little specification on the use of that money. But as the *NFIB* plurality underscored, Congress may “condition the receipt of funds on the States’ complying with restrictions on the use of those funds.”⁴²³

Another potential argument that the IDEA represents economic dragooning would look to the heightened enforcement mechanisms in that law. The law involves far more than simply the theoretical threat of withholding funds, the enforcement mechanism used by Medicaid and NCLB. The IDEA designates three possible labels for noncompliant states—“Needs assistance,” “Needs intervention,” and “Needs substantial intervention”—with progressively more intrusive federal involvement and progressively less discretion offered to the Secretary to make the choice of whether and how to penalize a noncompliant state.⁴²⁴ Once the Secretary finds that a state needs substantial intervention, for example, she *must* either recover funds already issued, withhold funds “in whole or in part,” or refer the case either to the Office of the Inspector General at the Department of Education or to the Department of Justice for appropriate legal action.⁴²⁵

But *NFIB* gives no indication that these additional measures are material. If the threat of withholding 100% of funds could on its own constitute economic coercion because of the size of the funds at

422. See *id.* (describing state support); Alan Gartner & Dorothy Kerzner Lipsky, *Beyond Special Education: Toward a Quality System for All Students*, in SPECIAL EDUCATION FOR A NEW CENTURY 165, 169 (Lauren I. Katzman et al. eds., 2005) (documenting gradual implementation). To be sure, the states also sought federal involvement in disposing of the low-level radioactive waste that was the subject of constitutional dispute in *New York v. United States*. See 505 U.S. 144, 150–51 (1992) (describing the role of the National Governors’ Association in developing the Low-Level Radioactive Waste Policy Act); Richard C. Kearney, *Low-Level Radioactive Waste Management: Environmental Policy, Federalism, and New York*, *PUBLIUS*, Summer 1993, at 57, 60–61 (describing the role of the states more generally in developing that Act). Yet such state initiative did not keep the “take title” requirements of the federal Act in question from being struck down as “commandeering” under the Tenth Amendment. *New York*, 505 U.S. at 175–77. There is an important difference between the two types of state requests, however. In *New York*, the states had asked for help and were given a choice between two federal mandates, which the Court called “no choice at all.” *Id.* at 176. In contrast, with respect to the IDEA, the states had asked for help and were given a choice between accepting that help, under certain conditions, or declining that help, in which case the status quo of state control would remain in place. No federal mandate was at issue.

423. *NFIB*, 132 S. Ct. at 2603–04 (plurality opinion).

424. 20 U.S.C. § 1416(e) (2006).

425. *Id.* § 1416(e)(3).

stake, there is no reason to think that the threat becomes more coercive just because other enforcement mechanisms are also available, especially where the plurality and joint dissent both seemed to discount the fact that the Secretary had discretion about whether and how much to withhold in Medicaid funds.⁴²⁶ In other words, because the plurality and joint dissent treated withholding discretion as if it were mandatory, the fact that the IDEA involves some mandatory enforcement mechanisms upon certain findings would not likely raise any further concerns. And again, the *NFIB* opinions suggest no problem with the basic conclusion that Congress can impose conditions in exchange for its funds, and if it can impose conditions, it can surely enforce those conditions in some way. Not even the joint dissent suggested that the mere availability of a threat to withhold funds was coercive; it was the amount at stake that the joint dissent found so troubling.⁴²⁷

As with NCLB, then, the *NFIB* analysis does not undermine the sufficiency of the IDEA as Spending Clause legislation.

C. Conditions Applying to All Federal Education Funding

1. Background and history of coercion analysis

NCLB and the IDEA are the main federal education laws that govern public schools, providing funding for states and districts in exchange for the states' and districts' agreement to fulfill the laws' conditions. There is another set of federal education laws that do not provide any funding on their own, but instead apply to any institution receiving federal funding (what Professor Bagenstos calls "cross-cutting conditions"⁴²⁸). The civil rights laws that govern public schools (and private schools accepting federal money) fall into this category, prohibiting discrimination on the basis of race (under Title VI of the Civil Rights Act of 1964⁴²⁹), sex (under Title IX of the Education Amendments of 1972⁴³⁰), and disability status (under

426. *Cf. NFIB*, 132 S. Ct. at 2641 n.27 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Total withdrawal is what the Secretary *may*, not *must*, do. She has discretion to withhold only a portion of the Medicaid funds otherwise due a noncompliant State.")

427. *Id.* at 2661–64 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (evaluating the serious financial burdens that states would endure if federal funds were withheld under the Medicaid expansion program).

428. Bagenstos, *supra* note 109 (manuscript at 53).

429. Pub. L. No. 88-352, tit. VI, §§ 601–605, 78 Stat. 241, 252–53 (codified as amended at 42 U.S.C. §§ 2000d–2000d-7 (2006)).

430. Pub. L. No. 92-318, tit. IX, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688 (2006)).

Section 504 of the Rehabilitation Act of 1973⁴³¹). Also falling into this category is the Family Educational Rights and Privacy Act (FERPA), which governs the disclosure of “education records.”⁴³² Another example of this type of law is the Act providing for the observation of Constitution Day, requiring every educational institution receiving federal money to “hold an educational program on the United States Constitution” each September.⁴³³ Failure to comply with these laws may result in a loss of federal funding,⁴³⁴ although in practice, such funding is almost never terminated.⁴³⁵

In recent years, courts have begun to consider the extent to which these laws are coercive under the Spending Clause, on the grounds that the amount of federal money at stake for noncompliance is so large as to leave the recipients with no actual choice but to comply.⁴³⁶

431. Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794 (2006)). Title IX is limited to educational programs and activities receiving federal funding, but Title VI and Section 504 apply to any program and activity receiving federal funding. Compare 20 U.S.C. § 1681(a), with 42 U.S.C. § 2000d, and 29 U.S.C. § 794(a). Because of the similarities in their language, these statutes are often interpreted in tandem. See, e.g., U.S. Dep’t of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 600 n.4 (1986) (explaining that because “Title VI is the congressional model for subsequently enacted statutes prohibiting discrimination in federally assisted programs or activities . . . [w]e have relied on caselaw interpreting Title VI as generally applicable to later statutes”).

432. Pub. L. No. 93-380, § 513, 88 Stat. 484, 571–74 (codified as amended at 20 U.S.C. § 1232g (2006)).

433. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 111, 118 Stat. 2809, 3344 (2004).

434. In addition to enforcement through agency action to withhold federal funds, the civil rights laws may be enforced through judicially implied private rights of action. No such private lawsuit may be brought to enforce FERPA, however. See *Gonzaga v. Doe*, 536 U.S. 273, 283–85 (2002) (contrasting Title VI and Title IX with FERPA). There is no enforcement language attached to the Act requiring the observation of Constitution Day, leading some commentators to suggest that any attempt to cut off funds for failure to comply could lead to a successful Spending Clause challenge on notice grounds. See, e.g., Nelson Lund, *Is Constitution Day Unconstitutional?*, 9 GREEN BAG 2D, 247, 251–52 (2006) (noting that “the statute does not seem to specify any penalty for noncompliance” and questioning the outcome if the government tried to enforce the statute).

435. See Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure To Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 64 n.30 (2008) (noting that the Department of Education has never terminated a school district’s federal funds for failure to comply with FERPA); see also Julie A. Davies & Lisa M. Bohon, *Reimagining Public Enforcement of Title IX*, 2007 BYU EDUC. & L.J. 25, 69–70 (“Title VI and Title IX possessed a very strong enforcement mechanism from the outset—funding cut-off—but its draconian nature has meant that the enforcing agencies are reluctant to use it.”).

436. See, e.g., *Lovell v. Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002) (rejecting the argument that Section 504 of the Rehabilitation Act of 1973 is coercive); see also *Jim C. v. United States*, 235 F.3d 1079, 1081–82 (8th Cir. 2000) (en banc) (concluding that Section 504 is not coercive because states may choose to “either give up federal aid to education, or agree that the Department of Education can be sued under Section 504”); see also Brief of Amici Curiae in Support of the Defendant-Appellant University of Illinois Board of Trustees and Reversal of the District Court at 6–7, Chi.

NFIB will surely reinvigorate these arguments.⁴³⁷ Because there is a more plausible case to be made that at least some of these laws represent separate programs for which no adequate notice was given, and because the amount of money involved is much higher than for Title I or the IDEA individually, *NFIB* presents a more serious issue for the cross-cutting conditions than it does for those narrower laws.

As I show below, however, I do not think that any of the laws will ultimately be doomed to failure under *NFIB*. Even the higher amount of money involved by adding together all federal education programs pales in comparison to the amount of federal money at stake in the Medicaid expansion. This argument thus underscores my larger conclusion that conditional spending in the regulatory state after *NFIB* will remain essentially unscathed.

2. *Old funding conditioned on compliance with a new program*

The question of whether the civil rights laws, FERPA, and the Constitution Day law merely govern the use of federal funds or instead constitute independent programs that threaten to take away other funds for noncompliance poses a different challenge than this question does for NCLB and the IDEA. For NCLB and the IDEA, the

Tribune Co. v. Bd. of Trs. of Univ. of Ill., 680 F.3d 1001 (7th Cir. 2012) (No. 11-2066), 2011 WL 3283769, at *6-7 (arguing that compliance with FERPA is not a choice because of the amount of federal funding involved).

Some cases additionally consider whether Section 504 can be justified under Section 5 of the Fourteenth Amendment. See *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1175-77 (D.C. Cir. 2004) (Sentelle, J., dissenting); *Bradley v. Ark. Dep't of Educ.*, 189 F.3d 745, 756 (8th Cir. 1999). As with the IDEA, see *supra* notes 353-57 and accompanying text, the fate of Section 504 under the Spending Clause is particularly important to its continued existence, as only Title VI and Title IX are likely to be separately sustained under Section 5 of the Fourteenth Amendment. Section 504 is likely not, at least not in all of its applications. See Bagenstos, *supra* note 109 (manuscript at 55-58). And in the absence of a protected class or a fundamental right, there is no credible case that FERPA or Constitution Day could be valid Section 5 legislation, just as NCLB could not be. See Ryan, *supra* note 76, at 48-49 & 70 nn.16 (explaining that NCLB cannot be sustained under the Fourteenth Amendment).

Commentators have raised a separate question about the constitutionality of Constitution Day, asking whether the requirement to celebrate the Constitution is an unconstitutional condition under the First Amendment. See, e.g., Kent Greenfield, Op-Ed., *Happy Illegal Holiday!*, N.Y. TIMES, Sept. 17, 2011, at A21. As *NFIB* adds nothing to this discussion, I do not explore it here.

437. See Bagenstos, *supra* note 109 (manuscript at 55) (stating that *NFIB* will provoke a new round of challenges to Section 504); see also Linda Greenhouse, Op-Ed., *Happy (Un)constitution(al) Day*, N.Y. TIMES OPINIONATOR BLOG (Sept. 19, 2012, 9:00 PM), <http://opinionator.blogs.nytimes.com/2012/09/19/happy-unconstitutional-day> (asking whether *NFIB* renders Constitution Day unconstitutional); Frank D. LoMonte, *Federal Privacy Law Should Be Deemed Unconstitutional*, INSIDE HIGHER ED (Sept. 13, 2012, 2:59 AM), <http://www.insidehighered.com/views/2012/09/13/federal-privacy-law-should-be-deemed-unconstitutional-essay> (arguing that FERPA is "indistinguishable" from the Medicaid expansion and should be struck down as coercive).

question is whether anything internal to those laws is separate enough to be considered an independent program, like the Medicaid expansion's relationship to pre-ACA Medicaid. For these cross-cutting conditions, the question is whether they are best understood as governing the use of federal funds even though they exist externally to the programs on whose funds they are justified. In other words, may they be considered conditions that govern the use of these funds even though they appear in different places in the U.S. Code, are reauthorized (if at all) on different schedules from the laws that provide funding, and so on?

One might be tempted to conclude that these laws are independent programs because they are pressuring the states to make policy changes. But this causal connection cannot be right; as I indicated above, even conditions governing the use of spending can be framed as pressuring the states to make policy changes, while these laws could just as well be framed as designed to promote the general welfare (in ensuring nondiscrimination, protecting student privacy, and developing civics education). The *NFIB* plurality's distinction between ensuring the general welfare and pressuring the states to make policy changes is hard to sustain, but that distinction was offered as a justification, not a definition of the difference between conditions that govern the use of federal funds and conditions that threaten to take away funds from an independent program. The mere possibility that these laws encourage the states to make policy changes cannot on its own be enough to make them a separate program.

One might instead argue that these laws are independent programs because they have goals that are different from the sources of funding on which they rely. NCLB is about ensuring access to a high-quality education, for example, not about antidiscrimination or student privacy;⁴³⁸ the IDEA is about providing appropriate education to children with disabilities, not about celebrating the Constitution.⁴³⁹ But this is a level-of-generality game; one could just as easily respond that Congress believed that one way to ensure access to a high-quality education, or appropriate education for children with disabilities, was to ensure that schools operate free from discrimination, children's

438. See 20 U.S.C. § 6301 (2006) ("The purpose of this title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education . . .").

439. See *id.* § 1400(d)(4) (establishing that the IDEA's purpose is "to assess, and ensure the effectiveness of, efforts to educate children with disabilities").

privacy is protected, and children learn something about the Constitution.

A better reading, it seems to me, is that these conditions do, in fact, constitute conditions on the use of federal dollars. These conditions tell states that when they spend federal education money, they should do so in non-discriminatory ways, and some of this money should be spent to protect student privacy and teach about the Constitution.⁴⁴⁰ Any of these Acts could be revised and included as part of at least some federal education programs without difficulty, and there is nothing in *NFIB* that suggests that it would be necessary for Congress to do so in order for them to be sustained.⁴⁴¹ Of course separate funds could be attached to these conditions, and, like the Medicaid expansion, or like the different programs under the aegis of NCLB, then they would be independent programs. But without separate funding, these conditions are best read as governing the use of the funds on which they rely for their existence.

It is helpful in this regard to consider cross-cutting conditions that might be placed on all federal education funding without additional money that *would* constitute independent programs, like the condition at issue in *Dole*. Imagine, for example, a law providing that federal education money may not flow to jurisdictions in which bus depots are located within 500 feet of a school (in order to limit child asthma), or that federal education money may flow only to jurisdictions that include in their zoning laws an examination of the percentage of children receiving free or reduced-price school lunch in determining where to zone supermarkets (in order to promote child nutrition). Neither of these laws would govern the use of the education dollars and therefore would, under the *NFIB* plurality's analysis, constitute a condition threatening to take away funds from independent programs. The cross-cutting conditions at issue in the civil rights laws, FERPA, and Constitution Day are quite different from these two examples, in that the conduct they require uses the federal dollars in question in some way.

If the cross-cutting conditions at issue here are like the conditions within NCLB and the IDEA in that they govern the use of education dollars, then the next question is whether these conditions themselves have been so significantly modified that they constitute a

440. See Bagenstos, *supra* note 109 (manuscript at 56) (agreeing that the conditions are "best understood as merely governing the use of the funds that Congress has provided to the states under particular spending programs").

441. *Id.* (manuscript at 57) (recognizing that the legal effect of these cross-cutting conditions would remain the same if implemented in individual acts).

different program from their original instantiation, as the significant transformation of the Medicaid expansion did with respect to pre-ACA Medicaid.⁴⁴² Very few changes to the civil rights laws have been made over the years, however. One addition dating to 1986 provides that states lack sovereign immunity from suit in federal court for violation of these and other acts banning discrimination by recipients of federal funding.⁴⁴³ But this expansion of remedy seems less “a shift in kind” and more like an “expan[sion of] the boundaries” of the law’s categories.⁴⁴⁴ FERPA has been subject to a number of modifications, but they have largely tweaked definitions and added exceptions.⁴⁴⁵ And the law providing for Constitution Day has never been modified. The cross-cutting conditions should therefore not even proceed to the rest of the plurality’s coercion analysis, because as conditions governing the use of funds, they should survive on their own.

3. *Notice to the states*

If I am wrong that the cross-cutting conditions are more properly understood as conditions on the use of federal dollars rather than independent programs conditioned on other programs’ funds, then the question arises of whether the states had sufficient notice that they would have to comply with these other programs when they first took education funding.

For the civil rights laws and FERPA, the answer should be yes. The ESEA of 1965 postdates the Civil Rights Act of 1964 and therefore Title VI, while the IDEA of 1975 additionally postdates Title IX, Section 504, and FERPA. Therefore, the states signed onto the two largest sources of federal education money with the knowledge that they would also have to comply with these other laws.

The Constitution Day law is another matter. The provision requiring that schools observe Constitution Day dates only to 2005, when Senator Byrd included this requirement as an attachment to a consolidated appropriations bill.⁴⁴⁶ If Constitution Day is, like the

442. See *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2605–07 (2012) (plurality opinion) (comparing the modifications in the Medicaid expansion with pre-ACA Medicaid).

443. Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (codified as amended at 42 U.S.C. § 2000d-7(a) (2006)).

444. *NFIB*, 132 S. Ct. at 2605–06 (plurality opinion); *cf. supra* note 379 and accompanying text.

445. See generally *Legislative History of Major FERPA Provisions*, U.S. DEP’T OF EDUC. (June 2002), <http://www.ed.gov/policy/gen/guid/fpco/pdf/ferpaleghistory.pdf> (describing statutory changes to FERPA over time).

446. See Greenhouse, *supra* note 437.

Medicaid expansion, an independent program requiring its acceptance upon the threat of losing other federal funding, then the notice required by the *NFIB* plurality clearly does not exist.⁴⁴⁷ Then the question becomes whether the financial terms of the deal constitute economic dragooning.

4. *Economic dragooning*

Federal education funding plays a significantly smaller role in state budgets than does federal Medicaid funding. As the joint dissent noted, “[t]he States are far less reliant on federal funding for any other program,” including “aid to support elementary and secondary education,” which, the joint dissent recognized, is “[a]fter Medicaid, the next biggest federal funding item.”⁴⁴⁸ Of the \$552 billion the federal government provided to the states in 2010, over \$233 billion, or 42%, went to Medicaid.⁴⁴⁹ A much smaller figure, \$70 billion, or 12.8%, of this \$552 billion went to elementary and secondary education.⁴⁵⁰ Medicaid spending accounts for over 20% of the average state’s annual budget, of which the federal share ranges from 50 to 83%, with an average of 64%.⁴⁵¹ Elementary and secondary education spending also constitutes about 20% of the average state’s annual budget, but the federal share of this spending is only about 21%.⁴⁵² While federal funding provides an average of 64% of all Medicaid dollars, because Medicaid is a joint federal-state program, federal funding only provides around 9.6% of all spending on elementary and secondary education, because localities provide significant amounts of all spending on education.⁴⁵³ Finally, as the plurality explained, federal Medicaid dollars represent a minimum of 10% of the states’ overall budgets⁴⁵⁴; federal education spending represents significantly less.

447. To be sure, there is also a colorable argument that a threat to withhold such funds would fail the typical rule for notice in Spending Clause programs, completely aside from any coercion inquiry, because there is no clear enforcement mechanism for this law. See Lund, *supra* note 434, at 251–52 (“The Amendment says that schools that receive federal funding ‘shall hold’ a Constitution Day program, but the statute does not seem to specify any penalty for noncompliance.”).

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

449. *Id.*

450. *Id.*; NASBO, *supra* note 30, at 16 tbl.7.

451. *NFIB*, 132 S. Ct. at 2604 (plurality opinion); *id.* at 2663 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

452. NASBO, *supra* note 30, at 5, 14.

453. See THOMAS D. SNYDER & SALLY A. DILLOW, U.S. DEP’T OF EDUC., NCES 2012-001, DIGEST OF EDUCATION STATISTICS 2011, at 258 tbl.181 (2012) [hereinafter DIGEST].

454. See *NFIB*, 132 S. Ct. at 2604–05 (plurality opinion) (calling this 10% “economic dragooning”).

How much less? In fiscal year 2010, the year whose data the *NFIB* Court examined for Medicaid spending,⁴⁵⁵ when the state least affected by federal Medicaid funds still relied on these funds for 10% of its state expenditures,⁴⁵⁶ the state least affected by federal funds for elementary and secondary education relied on these funds for only 1.2% of its state expenditures.⁴⁵⁷ In that same year, the average state relied on federal Medicaid dollars for 14% of its state expenditures,⁴⁵⁸ while the average state relied on federal dollars for elementary and secondary education for 4.4% of its state expenditures.⁴⁵⁹ And in that same year, the state most affected by federal Medicaid dollars relied on those dollars for over 16.6% of its state expenditures,⁴⁶⁰ while the state most affected by federal dollars for elementary and secondary education relied on those dollars for 7.5% of its state expenditures.⁴⁶¹

455. See *id.* at 2604–05 (citing NASBO, *supra* note 30); see also *id.* at 2663 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (same).

456. *Id.* at 2604–05 (plurality opinion). I use the 10% figure here—the minimum of 50% of federal funding of the 20% of the average state’s budget devoted to Medicaid—because the plurality found it of constitutional significance. In fact, in 2010, the state that relied on federal Medicaid spending the least faced a 4.7% loss of its budget if that amount were lost (calculated by dividing \$363 million in federal Medicaid funds to Wyoming, see NASBO, *supra* note 30, at 47 tbl.28, by \$7.657 billion in Wyoming’s annual state overall expenditures, see *id.* at 7 tbl.1). Even if this minimum number is lower than the figure the plurality discussed, though, the fact remains that federal Medicaid spending overall plays a crucially different role in state budgets than does federal education funding, as the next few paragraphs make clear.

457. Calculated by dividing \$93 million in federal education funds to Wyoming, see NASBO, *supra* note 30, at 16 tbl.7, by \$7.657 billion in Wyoming’s annual state overall expenditures, see *id.* at 7 tbl.1.

458. Calculated by dividing 20% in the average state budget that Medicaid spending represents by the average of 64.6% that is the federal share nationwide. See *NFIB*, 132 S. Ct. at 2663 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (providing these figures). The NASBO report for 2010 reaches a similar figure of 14.4%. Calculated by dividing \$233.633 billion in federal Medicaid funds to the states, see NASBO, *supra* note 30, at 47 tbl.28, by \$1.621 trillion in the states’ combined annual expenditures, see *id.* at 7 tbl.1.

459. Calculated by dividing \$70.768 billion in federal education funds to all of the states, see NASBO, *supra* note 30, at 16 tbl.7, by \$1.621 trillion in annual state overall expenditures, see *id.* at 7 tbl.1.

460. Calculated by dividing 20% in the average state budget that Medicaid spending represents by the statutory high of 83% that is the federal government’s share. See *NFIB*, 132 S. Ct. at 2604–05 (plurality opinion) (providing these figures). The actual percentages for federal Medicaid spending provided in the NASBO Report are even higher, with five states relying on federal Medicaid funds for over 20% of their budgets. See NASBO, *supra* note 30, at 7 tbl.1, 47 tbl.28 (reporting figures that place Maine, New York, Missouri, Tennessee, and Arizona in this category).

461. Calculated by dividing \$7 billion in federal education funds to Texas and \$3 billion in federal education funds to Georgia, see NASBO, *supra* note 30, at 16 tbl.7, by, respectively, \$93 billion in Texas’s annual state overall expenditures and \$40 billion in Georgia’s annual state overall expenditures, see *id.* at 7 tbl.1.

Even this high figure (relevant to only two states) is less than the 10% of state expenditures that so concerned the *NFIB* Court.⁴⁶²

Moreover, fiscal year 2010 was an outlier year, a year of particularly high federal spending as a result of the short-term funds provided in the Recovery Act.⁴⁶³ In fiscal year 2009, when Recovery Act funds first started to make their way through state budgets,⁴⁶⁴ the average percentage of state expenditures represented by federal funds for elementary and secondary education was lower: 3.6%,⁴⁶⁵ with a high of 6.8%.⁴⁶⁶ And in fiscal year 2008, a year that typified pre-recession federal-state spending relationships, the average was still lower, at 3.1%,⁴⁶⁷ with a high of 5.2%.⁴⁶⁸

To be sure, the average of 3% or 4% is not nothing, and it is certainly higher than the percentage of the state budget at stake in *Dole*, as approved by both the plurality and joint dissent in *NFIB*.⁴⁶⁹ But the differences with Medicaid are stark.

Indeed, the joint dissent—representing the four justices who would be most likely to push the coercion doctrine further—seemed quite taken with the significant difference in the amount of federal education funding as compared to federal Medicaid funding. The joint dissent several times referred to federal education funding and its percentage of state budgets as “only” what it represented overall or in a particular state.⁴⁷⁰ In emphasizing what an outlier Medicaid is, the joint dissent further noted that “even in States with less than average federal Medicaid funding, that funding is at least twice the size of federal education funding as a percentage of state expenditures.”⁴⁷¹

462. See *NFIB*, 132 S. Ct. at 2604–05 (plurality opinion).

463. See NASBO, *supra* note 30, at 2 (describing effect of the Recovery Act on federal and state spending).

464. *Id.*

465. Calculated by dividing \$56.437 billion in federal education funds to all of the states, see NASBO, *supra* note 30, at 16 tbl.7, by \$1.558 trillion in annual state overall expenditures, see *id.* at 7 tbl.1.

466. Calculated by dividing \$6233 billion in federal education funds to Texas, see NASBO, *supra* note 30, at 16 tbl.7, by \$92.296 billion in Texas’s annual state overall expenditures, see *id.* at 7 tbl.1.

467. Calculated by dividing \$45.401 billion in federal education funds to the states, see NAT’L ASS’N OF STATE BUDGET OFFICERS, FISCAL YEAR 2009 STATE EXPENDITURE REPORT 16 tbl.7 (2010), available at <http://www.nasbo.org/sites/default/files/2009-State-Expenditure-Report.pdf>, by \$1.478 trillion in annual state overall state expenditures, see *id.* at 6 tbl.1.

468. Calculated by dividing \$4.189 billion in federal education funds to Texas, see *id.* at 16 tbl.7, by \$81.097 billion in Texas’s annual state overall expenditures, see *id.* at 6 tbl.1.

469. See *supra* notes 176–77 and accompanying text.

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

471. *Id.* at 2664.

Moreover, federal education dollars occupy a different space in the political landscape than do federal Medicaid dollars. The *NFIB* plurality and joint dissent essentially focused on the devastation that the loss of federal Medicaid dollars would mean to the average state's budget. Yet calls to abolish the federal Department of Education, and with that abolition all or most federal education dollars, are a common rallying cry for conservatives.⁴⁷² It would be difficult to suggest that federal education dollars are too large for states to turn down and at the same time suggest that the states would be fine without federal education dollars. This reality—while obviously not a matter of legal doctrine—would likely affect the size of a politically inflected legal movement to undermine the civil rights laws as unconstitutional, and might therefore influence the Court.⁴⁷³

There are thus very good reasons to think that the laws conditioned on all federal education funding fall within “the outermost line where persuasion gives way to coercion.”⁴⁷⁴

III. IMPLICATIONS FOR THE FUTURE OF CONDITIONAL SPENDING IN FEDERAL EDUCATION LAW AND MORE

The previous analysis demonstrates why *NFIB* is not likely to spell the undoing of federal education law and with it the rest of conditional spending in the regulatory state. There are, nonetheless, some broader implications of *NFIB* for the future of federal education law and, by extension, other similar spending programs. In this Part, I consider these implications in three different domains: federal courts, Congress, and federal agencies. I suggest that the largest effects are not likely to be doctrinal but instead legislative (in the size and design of spending programs) and administrative (in the implementation and enforcement of these programs).

A. Courts

I have already explained why I think application of the tests set forth in the plurality and joint dissent is unlikely to affect many other

472. See Alyson Klein, *Romney's VP Pick Puts K-12 Spending on Campaign Stage*, EDUC. WK., Aug. 28, 2012, at 24, 24–27 (discussing U.S. Rep. Paul Ryan's controversial budget blueprint and his position on federal education funding); see also Morgan Smith, *What Would Happen if Dept. of Education Were Closed?*, TEX. TRIB. (Nov. 11, 2011), <http://www.texastribune.org/texas-education/public-education/what-would-it-mean-abolish-education> (highlighting popular Republicans who have expressed support for abolishing the Department of Education).

473. Cf. *NFIB*, 132 S. Ct. at 2666 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (noting that “more than half the States [have] brought this lawsuit, contending that the offer is coercive”).

474. *Id.* at 2606 (plurality opinion) (internal quotation marks omitted).

existing federal-state programs if states were to challenge them on coercion grounds in court. The plurality would find coercion only where acceptance of a new program is belatedly tied to an older program, the loss of which funding would constitute a significant burden on the state budget.⁴⁷⁵ The joint dissent would go further, finding coercion either in the threat to withdraw significant amounts of federal funding from the state budget or in offers of new money in such high amounts that states would be practically limited in their ability to pay for replacement programs with their own taxes.⁴⁷⁶ As I have argued, Medicaid funding is so far beyond other spending programs that neither of these tests is likely to affect much other funding to the states.

One way that courts could conceivably push the coercion doctrine further is to apply it to entities other than the states—for example, at the school district or city level, or to private universities, research labs, health clinics, or individuals receiving federal funds.⁴⁷⁷ Will lower courts extend the coercion inquiry to these entities by, say, examining the percentage of their budgets that federal funding represents?

There are several reasons why I think this is unlikely. First, the rationales offered in *NFIB* for finding coercion were strongly rooted in the idea that the states are sovereign entities with independent constitutional rights under the Tenth Amendment.⁴⁷⁸ The concerns about commandeering,⁴⁷⁹ “our system of federalism,”⁴⁸⁰ “invad[ing] the states’ jurisdiction,”⁴⁸¹ “the unique role of the States in our system,”⁴⁸² respect for “the legislative processes of the States,”⁴⁸³ the

475. See *supra* Part I.C.

476. See *supra* Part I.C.3.

477. Compare Bagenstos, *supra* note 6, at 382–83 (suggesting that it would be difficult to limit a more stringent version of the coercion test to states alone and that any such test would likely apply to private entities as well), LoMonte, *supra* note 437 (suggesting that *NFIB*'s coercion analysis should apply to private universities), and Feder & Samuelsohn, *supra* note 16 (suggesting that school districts may bring coercion claims in the wake of *NFIB*), with Emily J. Martin, *Title IX and the New Spending Clause*, AM. CONST. SOCIETY FOR L. & POL'Y 7 (Dec. 2012), http://www.acslaw.org/sites/default/files/Martin_-_Title_IX_and_the_New_Spending_Clause_1.pdf (questioning whether coercion claims are available to local governments).

478. *NFIB*, 132 S. Ct. at 2602 (plurality opinion); *id.* at 2659 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

479. *Id.* at 2602 (plurality opinion); *id.* at 2660 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

480. *Id.* at 2602 (plurality opinion).

481. *Id.* at 2659 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

482. *Id.* at 2660 (internal quotation marks omitted).

483. *Id.*

accountability of state officials,⁴⁸⁴ the dangers of “coopt[ing] the States’ political processes,”⁴⁸⁵ “the practical ability of States to collect their own taxes,”⁴⁸⁶ and so on were crucial to the articulation of the justification for a robust coercion inquiry. These concerns simply do not have the same traction with entities other than the states, whose existence is not part of the core constitutional compact on which the country’s existence depends.

In the context of education law, this point seems particularly important, as the other most relevant entity—local school districts—have no meaningful constitutional authority over education, whether at the state level or at the federal level. As Professor Ryan explains:

There is a popular belief that public schools are locally controlled. As a legal matter, this has always been something of a myth. Local control exists only insofar as states are willing to delegate authority, and even then localities can control only what a state lets them control. As a practical matter, it is becoming more difficult to identify many, if any, areas over which local school boards retain exclusive or significant control.⁴⁸⁷

In fact, “states have absolute authority over education” under state constitutions.⁴⁸⁸ The question of whether the federal government is coercing local school districts by offering them money or by threatening to take away money, then, seems something of a sideshow. It is perfectly consistent to be concerned about the federal government coercing the states and not worried about the federal government coercing local school districts, because local school districts answer to the states through whose coffers most federal education money flows.⁴⁸⁹

Second, the “endless difficulties” traditionally associated with the coercion inquiry seem particularly trenchant in this context.⁴⁹⁰ When the question is whether the states are being coerced, there is a rationale for looking at the effect of the federal funds on the state budget as a whole to assess whether states have a practical choice

484. *Id.* at 2603 (plurality opinion); *id.* at 2660 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

485. *Id.* at 2661 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

486. *Id.* at 2662 n.13.

487. Ryan, *supra* note 76, at 60.

488. *Id.*; *see also* Heise, *supra* note 60, at 130–32 (discussing the “illusion of local control” that has “not accurately described the reality of American education policy for decades”).

489. *See, e.g.*, 20 U.S.C. § 6312(a) (2006) (describing process for states to issue subgrants to local educational agencies under NCLB); *id.* § 1411(f) (describing process for states to issue subgrants to local education agencies under the IDEA).

490. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589–90 (1937)).

whether to accept funds or new conditions. When the question is whether school districts are being coerced, it is much less clear whose budget is the proper denominator. Is it the school district's own budget? The budget of the jurisdiction in which the school district sits? The state budget? The answer to this question would matter a great deal as to the percentage of the budget the federal funds represents, but there are reasons to argue for the appropriateness of each possibility. And with over 13,000 school districts in the country,⁴⁹¹ with varying relationships to larger sub-state jurisdictions and their states, as well as with varying relationships to federal funds—even assuming one denominator is selected—there is likely to be a wide variety of answers,⁴⁹² resulting in a very messy set of inconsistent outcomes that judges may be loathe to invite.

As for other non-state entities, there is no more reason to focus on the relationship of federal funding to the entities' own bottom-line budgets, which are to some extent malleable and within the entities' control, and as to which judges are likely to be less deferential than to the budgets of sovereign states. A health clinic facing the loss of federal funds may step up its fundraising from private parties. A university may, in addition to increasing fundraising, draw down a higher percentage of an endowment, delay capital projects, trim back expensive but tangential programs, increase tuition, or admit more students. A voucher recipient may get another job. There is therefore a rational reason to limit the *NFIB* coercion inquiry to the state level.

Finally, there is reason to think that more conservative judges who might be inclined to be sympathetic to the joint dissent's analysis as applied to the states will nonetheless want to seek limits on the coercion inquiry. Federal conditional spending often promotes substantive goals that are traditionally conservative in nature—requiring the military to be permitted to recruit on college campuses, limiting abortions in health clinics, placing work requirements on welfare recipients, and the like—that judges may wish not to undercut.⁴⁹³ And, as Professor Bagenstos has noted, taking metaphysical notions of coercion seriously is more in keeping with a liberal doctrinal approach than a conservative one.⁴⁹⁴

491. DIGEST, *supra* note 453, at 135 tbl.91.

492. See Jennifer Cohen Kabaker, *Ryan Proposed Budget Cuts Could Mean Millions Lost for Some Districts*, ED MONEYWATCH (Sept. 5, 2012), http://edmoney.newamerica.net/blogposts/2012/ryan_proposed_budget_cuts_could_mean_millions_lost_for_some_districts-70939 (describing wide variety in districts' reliance on federal education funding).

493. Bagenstos, *supra* note 6, at 383.

494. *Id.* at 383–84.

Keeping the focus on states as the locus of concern for the revitalized coercion doctrine, because of the constitutional status of the states, thus seems both likely and principled.

B. Congress

Four types of legislative responses to the new coercion doctrine seem likely to me. First, the willingness of the Court to find coercion in the terms of the Medicaid expansion should dampen any effort for the federal government to provide significantly more education funding to the states. The greater the share of federal funding and the greater the effect on the states' budgets, the more likely it is that a program could be deemed to constitute economic dragooning under *NFIB*, at least under the joint dissent's more expansive analysis. This implication thus weakens the call to fully fund the IDEA, for an estimated increase of around \$15 billion annually.⁴⁹⁵ It weakens the justification to provide sufficient federal funding to cover the increased expectations under NCLB, for an estimated increase of around \$28 billion annually.⁴⁹⁶ And it weakens the argument to expand the federal role in education in order to reduce inter-state spending disparities, which one estimate placed at \$30 billion in new annual spending.⁴⁹⁷ Even if these increases individually would not approach the figures found coercive in *NFIB*,⁴⁹⁸ collectively they could start to jeopardize the cross-cutting conditions, which rely on the sum of all federal education dollars combined. It is unlikely Congress will want to take this risk, and scholars and advocates (myself included) who have previously argued in favor of more federal funding for education should think seriously before reiterating those arguments. Ironically, then, one legislative effect of *NFIB* may be to encourage the underfunding of cooperative spending programs.

495. See, e.g., Pasachoff, *supra* note 364, at 1482–83 (discussing the bi-partisan movement to fully fund special education programs); Pasachoff, *supra* note 238, at 28 (pointing out the bi-partisan effort to increase federal special education funding by 40%).

496. See, e.g., Mathis, *supra* note 239, at 96 (analyzing what full funding of NCLB would mean); *No Child Left Behind Funding*, FED. EDUC. BUDGET PROJECT (Apr. 4, 2012, 3:06 PM), <http://febp.newamerica.net/background-analysis/no-child-left-behind-funding> (discussing the difference between authorization levels and appropriation levels in determining full funding of NCLB).

497. See, e.g., Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2119–24 (2006) (recommending a “power-equalizing foundation program” using the formula for federal Medicaid spending as a model); see also MAKING MONEY MATTER: FINANCING AMERICA’S SCHOOLS 261 (Helen F. Ladd & Janet S. Hansen eds., 1999) (making a similar proposal).

498. See, e.g., *supra* note 418 (noting that full funding of the IDEA would still constitute only 1.5% of average state expenditures).

In the current economic and political climate, however, it is unlikely that an increase of tens of billions of dollars in new federal education money was on the immediate horizon.⁴⁹⁹ This first implication may therefore be of more rhetorical than practical relevance, at least in the short term. The second legislative implication of *NFIB* is of greater practical relevance, then: Because large federal grant programs—particularly those of an ongoing duration on which states have come to rely—are more likely to be subject to challenge, smaller, more time-limited grant programs might begin to proliferate. In this respect, the Race to the Top program—the Obama administration’s signature education program⁵⁰⁰—provides one model of what the future might bring⁵⁰¹: a competitive grant program of explicitly limited duration that nonetheless requires significant state action in exchange for new funds, for which the states have already demonstrated they are capable of deciding whether to apply.⁵⁰²

Because the *NFIB* joint dissent expressed disquiet about forcing nonparticipating states to have their citizens fund through tax dollars the rejected program in other states,⁵⁰³ these competitions are not without coercion potential. But the size of the program mattered significantly to the joint dissent,⁵⁰⁴ so keeping these competitive programs relatively small should allay those concerns.⁵⁰⁵ So, too, should a focus on funding entities smaller than states. For example, after the first round of Race to the Top applications for states, the next round of Race to the Top applications was for districts.⁵⁰⁶ This

499. This climate is why I do not think that complete federalization of education and other programs that fit the cooperative federalism model is a likely congressional response, although, as Justice Ginsburg pointed out, Congress could have established Medicaid as “an exclusively federal program” in 1965 just as it did Medicare. *Nat’l Fed’n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2633 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); see also Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 464 (2011) (arguing that Congress has the power to federalize programs like Medicaid).

500. See, e.g., Metzger, *supra* note 97, at 590–92 (describing Race to the Top).

501. Cf. Mike Johnston, *From Regulation to Results: Shifting American Education from Inputs to Outcomes*, 30 YALE L. & POL’Y REV. 195, 206–07 (2011) (proposing that reauthorization of NCLB include more competitive grants like Race to the Top that are, among other things, “entirely voluntary”).

502. See, e.g., Michele McNeil, *All But 10 States Throw Hats Into Race to Top Ring*, EDUC. WK. (Jan. 19, 2010), http://www.edweek.org/ew/articles/2010/01/20/19rtt_ep.h29.

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

504. *Id.* at 2662–63.

505. Race to the Top, for example, provides only around \$5 billion overall, spread over several years and different rounds of competition. Metzger, *supra* note 97, at 591–92.

506. Press Release, U.S. Dept. of Educ., Education Department Invites Districts To Apply for \$400 Million Race to the Top Competition To Support Classroom-Level Reform Efforts (Aug. 12, 2012), available at <http://www.ed.gov/news/press-releases/education-department-invites-districts-apply-400-million-race-top-competition-su>.

move, too, plausibly represents the wave of the future, as the federal government bypasses the states out of concern (or respect) for their sovereignty.⁵⁰⁷

The adoption of these new types of grant programs will not end Congress's need to attend to its large spending programs of long duration, however. The third legislative implication of *NFIB*, then, is that Congress should structure new funding conditions carefully when reauthorizing laws such as the IDEA or NCLB, or when considering a new cross-cutting law such as the Student Non-Discrimination Act, which would prohibit discrimination on the basis of sexual orientation.⁵⁰⁸ It would be a mistake to think that any new condition on spending or modification of old conditions will be stopped in its tracks as necessarily coercive; indeed, the nonpartisan Congressional Research Service issued a report after the opinion came down advising members and committees of Congress that *NFIB* does not affect Congress's ability to attach or modify conditions to its spending.⁵⁰⁹ Instead, Congress will likely simply try to ensure that its reauthorizations do not condition sums of money for one program on compliance with another.

Congress could do this in a number of ways. When introducing a new condition that is arguably significant enough to be considered a separate program, it could attach a separate funding stream and make applying for it entirely discretionary. The preschool grants introduced to the IDEA in 1986 provide one example of this model.⁵¹⁰ Alternatively, Congress could introduce a significant new condition as part of the older program without providing a new funding stream, instead making formal findings about why the new condition does not represent a shift in kind but merely an expansion of the boundaries of the already existing conditions. Here, the example is the type of findings courts examine to determine if legislation enacted under Section 5 of the Fourteenth Amendment is "congruent and proportional" to the substantive wrong under

507. See, e.g., Metzger, *supra* note 97, at 592–93 (describing how Race to the Top and other Recovery Act programs "break open state governments" by targeting localities instead of states); cf. *NFIB*, 132 S. Ct. at 2632 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (observing that "[t]he alternative to conditional federal spending . . . is not state autonomy but state marginalization").

508. Student Non-Discrimination Act of 2011, H.R. 998, 112th Cong. (2011).

509. KENNETH R. THOMAS, CONG. RESEARCH SERV., R42367, THE CONSTITUTIONALITY OF FEDERAL GRANT CONDITIONS AFTER NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS 14 (2012).

510. See *supra* notes 397–98 and accompanying text.

Section 1.⁵¹¹ Another possibility would be for Congress to formally repeal the older version of a program and to reenact a new version with the significant new condition included as one unified program. The *NFIB* plurality indicated that such a formal repeal-and-reenactment might be satisfactory, though impractical.⁵¹² Of course, where the entire underlying program is modified, as with NCLB, or where modifications are minor, more akin to pre-ACA amendments to Medicaid, Congress need jump through no special *NFIB* hoops, for those modifications should continue to pose no coercion problem.

The fourth type of legislative response that seems likely to me involves new attention placed on statutory enforcement mechanisms for spending programs. *NFIB* teaches that the threat to withdraw 100% of a very large grant can, under certain circumstances, constitute coercion. So in addition to keeping its grants smaller, Congress might also adjust the percentage of an award at stake for noncompliance. Congress could also implement a variety of other enforcement mechanisms, considering whether private litigation might be effective;⁵¹³ whether government litigation to obtain specific performance might be an option;⁵¹⁴ how voluntary or self-regulation might be integrated into an enforcement regime;⁵¹⁵ whether short-term federal take-over of failing programs would be possible;⁵¹⁶ and so on.

511. Cf. William D. Araiza, *ENDA Before It Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees Under the Proposed Employment Non-Discrimination Act*, 22 B.C. THIRD WORLD L.J. 1, 50–58 (2002) (recommending congressional findings to support Employment Non-Discrimination Act).

512. Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 132 S. Ct. 2566, 2606 n.14 (2012) (plurality opinion); see also Bagenstos, *supra* note 109 (manuscript at 24–26) (suggesting that the plurality opinion would permit, although not require, a repeal-and-reenactment alternative).

513. See generally, e.g., J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012) (discussing the importance of private enforcement mechanisms in regulatory regimes); Pasachoff, *supra* note 364, at 1488–92 (discussing limitations of reliance on such private enforcement mechanisms).

514. See, e.g., BRIAN K. LANDSBERG, *ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE* 2, 5 (1997) (discussing litigation as an enforcement tool as implemented by the Department of Justice).

515. See, e.g., Jodi L. Short & Michael W. Toffel, *Making Self-Regulation More Than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN. SCI. Q. 361, 361–63, 365–66 (2010) (discussing self-regulation within the context of corporate entities).

516. See, e.g., WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* § 4:40 (Dec. 2012), available at Westlaw ENVLAW (describing a statutory provision for federal takeover of certain functions granted to the states under the Clean Water Act while explaining unlikelihood of its use); Joseph F. St. Cyr, *OSHA and Federalism in Times of Crisis: Issues in Federal and State Relations*, 30 S. ILL. U. L.J. 273, 278–79 (2006) (describing a provision in the Occupational Safety and Health Act under which the

None of these outcomes would seriously constrict Congress's ability to enact or reauthorize legislation in support of the general welfare. Some may even promote the general welfare more than continuing in the same vein would. For example, requiring congressional findings on the links between conditions could facilitate more precise and targeted solutions for problems. Implementing shorter-term programs may be an easier way of promoting new understandings of the general welfare, as older ways of doing business may become politically entrenched and therefore hard to unwind. And implementing a variety of different enforcement mechanisms may lead to better implementation and enforcement of the laws overall, and thus fewer wasted federal dollars. All of these outcomes could conceivably find political support along the political spectrum (although of course they would not change politically motivated debate about the content of any such change).

C. Agencies

Professor Bagenstos has argued that *NFIB* will give states a tool in their arsenal to extract waivers of particular statutory obligations from agencies with oversight authority.⁵¹⁷ He suggests that states may threaten to challenge conditions as unconstitutionally coercive if their waiver requests are not met, and that agencies may simply comply, either because they will not want to run the risk of losing in court or may wish to avoid spending the time or resources on the litigation.⁵¹⁸ He also thinks it possible that agencies will stop seeking to enforce statutory violations that would lead to funding cut-offs in order to avoid a constitutional challenge.⁵¹⁹

Both of these scenarios are certainly plausible. But it is important to note that how to respond to *NFIB* in waiver negotiations and enforcement actions is a choice for the executive to make. One can also imagine an executive decision to stay the course—both with respect to waiver negotiations and enforcement—on the theory that uncertainty surrounding the constitutionality of spending provisions is worse than the risk that the provisions will be found unconstitutional. It was in a similar vein that the federal government

federal government may withdraw approval of a state safety and health plan and exercise federal jurisdiction instead).

517. Samuel R. Bagenstos, *Federalism By Waiver After the Health Care Case*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* (Gillian Metzger, Trevor Morrison & Nathaniel Persily, eds., forthcoming 2013); Bagenstos, *supra* note 109 (manuscript at 52–53).

518. *Id.* at 53.

519. *Id.* at 62.

sought Supreme Court review of the constitutionality of the Affordable Care Act in the first place.⁵²⁰

Indeed, an executive decision might also be made to do more than merely stay the course, but instead to more affirmatively enforce conditional spending statutes. Somewhat counter-intuitively for a decision rooted in the coercive possibility of a threat to withhold funds, *NFIB* could actually be used as a spur to increased enforcement. After all, if the federal government is going to be on the hook for coercion because of its theoretical ability to withhold 100% of its large grants, regardless of the likelihood of its invoking that option,⁵²¹ perhaps it should start taking its withholding ability seriously—whether by invoking that potential as a real threat or by actually withholding funds from persistently noncompliant recipients. After a brief period in the 1960s, during which time the threat to withhold ESEA money from southern school districts effectively contributed to the desegregation of those districts,⁵²² the Department of Education has almost never taken steps to withhold funds, even in the face of significant noncompliance with various programs.⁵²³ This Department is not alone in this reluctance; it is a trans-agency reality.⁵²⁴

The reason for the Department's failure to use this enforcement power is partly structural; as with many agencies overseeing grants-in-aid programs, its primary role is cooperative, designed to work with states to implement the programs.⁵²⁵ Enforcement is both second in time and second in priority. Another reason is a substantive one:

520. Petition for Writ of Certiorari at 31–32, *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566 (2012) (No. 11-398), 2011 WL 5025286, at *31–32; Consolidated Brief for Respondents at 8–9, *NFIB*, 132 S. Ct. 2566 (Nos. 11-303 and 11-400), 2011 WL 4941020, at *8–9 (asking the Court to decide the constitutionality of the individual mandate).

521. *Cf. NFIB*, 132 S. Ct. at 2641 n.27 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (noting that agencies experience political pressures that may make them reluctant to cut off funds).

522. See STEPHEN C. HALPERN, *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* 44–46 (1995) (illustrating the steps taken by the federal government to desegregate school districts in the south).

523. See, e.g., *supra* note 435 and accompanying text; see also NAT'L COUNCIL ON DISABILITY, *BACK TO SCHOOL ON CIVIL RIGHTS* 6–7 (2000), available at http://www.ncd.gov/rawmedia_repository/7bf3c01_5c95_4d33_94b7_b80171d0b1bc?document.pdf (describing limited federal enforcement of the IDEA over two decades).

524. See, e.g., Bagenstos, *supra* note 109, at 62 (describing the EPA as hesitant to cut off funding); Brigham Daniels, *When Agencies Go Nuclear: A Game Theoretic Approach to the Biggest Sticks in an Agency's Arsenal*, 80 GEO. WASH. L. REV. 442, 456 (2012) (calling “[r]evocation of federal funding . . . a political taboo”).

525. See, e.g., Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure To Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS L. REV. 283, 292 (1996) (indicating that federal agencies' primary role incorporates cooperative efforts with state governments).

Funding cutoffs hurt the very beneficiaries whom the money is supposed to aid, so the Department may be reluctant to worsen the plight of beneficiaries already facing ineffective state implementation by withdrawing federal funds.⁵²⁶ Yet a third reason is political: The Department may be reluctant to jeopardize its own authority if state officials appeal to Congress or the courts and win against an effort to withdraw funds.⁵²⁷ In fact, the closest a court had come to declaring an Act unconstitutionally coercive before *NFIB* arose in just such a rare circumstance, when the Department took steps to cut off IDEA funds from Virginia for noncompliance, and the state protested and eventually won in court (on clear notice grounds, but a plurality of the en banc Fourth Circuit would also have found coercion).⁵²⁸

These reasons may help explain why the funding cut-off is rarely invoked, but they need not justify it. The first two reasons are matters for administrative regime design. As to the first, the roles of program officer and enforcer might be more thoroughly separated and independent to encourage a less biased review of the need for enforcement.⁵²⁹ As to the second, a funding cut-off need not be a sledgehammer where a scalpel would be more useful; a targeted cut-off with funds set up to assist the beneficiaries in other ways has the potential to be a scalpel if skillfully employed.⁵³⁰

As to the third, political, reason, *NFIB* teaches that it is not the actual use of the withholding power that has the potential to designate a law coercive but the mere statutory existence of that power, rendering less valid the incentive for the Department not to act.⁵³¹ Moreover, one wonders whether the Department actually has the authority it claims on paper if everyone knows the chances of its following through are slim. A political showdown could have the

526. See, e.g., Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 200 (describing funds cutoff as a “blunderbuss weapon” whose “effects will ultimately be felt by the people whom federal funding was intended to benefit”).

527. See, e.g., Hehir, *supra* note 396, at 224–28 (describing such jockeying in the context of the IDEA).

528. See *supra* note 80 (discussing *Va. Dep’t of Educ. v. Riley*, 106 F.3d 559, 559–61 (4th Cir. 1997) (en banc)); see also Hehir, *supra* note 396, at 224–25 (discussing broader political context of *Riley*).

529. Cf. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 873–74 (2009) (proposing the separation of functions within the prosecutor’s office).

530. For example, federal funds withdrawn from public schools could be provided instead to private providers of supplemental education services under No Child Left Behind, or to other neighboring schools to educate the children in question.

531. See *supra* note 186 and accompanying text.

beneficial effect of clarifying what the law is, one way or the other.⁵³² And from the Department's standpoint, the worst that could happen is that Congress or the courts would remove or limit a tool from its arsenal that it never actually used and that no one thought it was likely to use anyway.

If these implications are, in fact, what lie in store for conditional spending programs like federal education law in the wake of *NFIB*—no large funding increases, but a proliferation of smaller competitive grant programs, with all programs, large and small, subject to increased enforcement and a wider variety of enforcement mechanisms—*NFIB* hardly represents the end of the federal regulatory state. Instead, *NFIB* could contribute to invigorating its potential.

CONCLUSION

NFIB's conclusion that the Medicaid expansion exceeded the scope of Congress's spending power is important for its recognition that a conditional spending program may be unconstitutionally coercive in fact and not just in theory. But this conclusion is unlikely to apply much more broadly, given the incomparable scope and structure of the Medicaid program and its expansion. The major federal education programs are likely to withstand future coercion challenges under *NFIB*—and if the education programs survive, other conditional spending programs likely will, too, given education's status as the second largest source of federal funds to the states. Nonetheless, Congress should take heed of *NFIB*'s lessons and pay close attention to the size and structure of both new and reauthorized conditional spending programs. Agencies, too, should take heed of *NFIB*'s lessons, and—somewhat counterintuitively for a decision that treats an enforcement provision as coercive—could use the decision to justify increased enforcement of the conditional spending laws they oversee.

532. See, e.g., Hehir, *supra* note 396, at 225–26 (noting that, after the showdown in the Fourth Circuit about the threat to withdraw IDEA funds, Congress resolved the “Virginia problem” statutorily in favor of the Department's position).