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SPENDING CLAUSE—GRAVE DECEPTIONS: REMEDYING CEMETERY MISFEASANCE THROUGH CONGRESS'S CONDITIONAL SPENDING POWER IN THE AFTERMATH OF AFFORDABLE CARE ACT LITIGATION

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> Good friend, for Jesus' sake forbeare
> To digg the dust enclosed heare;
> Blest be the man that spares these stones,
> And curst be he that moves my bones.[1]

INTRODUCTION

The excavation and desecration of sepulchral remains were common practices among grave-robbers in Shakespeare's era.[2] However, many are unaware that these nefarious practices continue today at the behest of profit-driven cemetarians.[3] In 1978, Matthew Williams,[4] a loving father, was laid to rest in Burr Oak Cemetery.[5]

1. SCOTT FREDERICK SURTEES, WILLIAM SHAKESPEARE, OF STRATFORD-ON-AVON: HIS EPITAPH UNEARTHED AND THE AUTHOR OF THE PLAYS RUN TO GROUND 11 (1888) (denoting William Shakespeare's Epitaph); *see* CHRISTY DESMET & ROBERT SAWYER, SHAKESPEARE AND APPROPRIATION 16 (2002) (noting the bard's fear of grave robbers: "[S]hakespeare was acutely aware of the ironic and violent fate a poet's [grave] might suffer . . . .").

2. *See* KEVERNE SMITH, SHAKESPEARE AND SON: A JOURNEY IN WRITING AND GRIEVING 97 (2011) (explaining that in Renaissance England, "[i]t was not uncommon for bones to be moved when a new grave was being dug; in most cases it seems that bones that were in the way were put to one side . . . while the new grave was being dug, and then reburied." Thus, Shakespeare, in his final mark, cursed all those who wished to move his bones).

3. For purposes of this Note, a cemetarian is one who owns, operates, or apparently controls a cemetery.

4. *Oversight of Cemeteries and Other Funeral Services: Who's in Charge? Hearing on H.R. 3655 Before the Subcomm. on Commerce, Trade, and Consumer Protection of the Comm. on Energy and Commerce*, 111th Cong. 16 (2009) (Statement of Roxie Williams) [hereinafter Statement of Roxie Williams], *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Final-Transcript-CTCP-Oversight-Cemetaries-Funeral-Services-2009-7-27.pdf; *see also Company Overview of Perpetua-Burr Oak Holdings of Illinois LLC*, BLOOMBERG BUSINESSWEEK (Jan. 31, 2014, 10:31 AM), http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=106785066 (explaining that Burr Oak Cemetery is owned by Perpetua-Burr Oak Holdings and is a limited liability company located in Alsip, Illinois). The memorial garden is known as one of the few cemeteries that targets the burial needs of the African-American community and is renowned as the final resting place of many notable and historic figures including Emmitt Till, among others. *See Burr Oak History*, BURR OAK CEMETERY, http://theburroakcemetery.com/burr-oak-history/ (last visited May 6, 2014).

Matthew's death was unexpected and shocked his wife and young children.[6] In hopes of paying final respects, his family selflessly scraped together enough money to purchase a beautiful headstone.[7] But, when Matthew's children visit his grave today, the headstone that his family struggled to purchase in 1978 is missing, and Matthew's plot no longer exists.[8]

A 2009 investigation into the sprawling 159-acre cemetery revealed that groundskeepers had uprooted more than 300 bodies from their final resting places to make room for new graves.[9] To carry out this plan, employees destroyed expensive caskets and sentimental headstones—and most egregiously—discarded beloved human remains into a mass grave known as the "cemetery dump."[10] Cook County Sheriff and lead investigator, Tom Dart, noted "we found femurs, skulls, parts of jaws, just lying out in the open."[11] For five years, cemetery officials had been removing remains from burial plots and reselling them to unsuspecting consumers—for profit.[12] Burr Oak officials were unable to provide authorities with adequate records and had no knowledge of which remains had been moved.[13] As a result, families have been searching the burial grounds for their loved ones for years.[14]

In the United States, seventy-three percent of deaths each year result in traditional casket burials,[15] yet the cemetery industry remains unregulated at the federal level.[16] When a tragedy occurs, bereaved

5. *See* Statement of Roxie Williams, *supra* note 4, at 16.

6. *See* Statement of Roxie Williams, *supra* note 4, at 18-19.

7. *See* Statement of Roxie Williams, *supra* note 4, at 18-19.

8. *See* Statement of Roxie Williams, *supra* note 4, at 20.

9. *Cemeteries Draw Complaints*, CBS NEWS-60 MINUTES (May 17, 2012), http://www.cbsnews.com/8301-18560_162-57436612/cemeteries-draw-complaints/.

10. *Id*.

11. *Id*.

12. On other occasions, groundskeepers were ordered to "double stack" remains to maximize burial space. *Id*.

13. *Id*.

14. *See* Ryan Mark et. al., *Burr Oak Cemetery: Browse the headstones*, CHI. TRIB., July 30, 2009, http://archive.is/HQQkE (listing pictures of all the unclaimed headstones found in the aftermath of the Burr Oak scandal).

15. U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-12-65, DEATH SERVICES: STATE REGULATION OF THE DEATH CARE INDUSTRY VARIES AND OFFICIALS HAVE MIXED VIEWS ON NEED FOR FURTHER FEDERAL INVOLVEMENT 7 (2011) [hereinafter GAO, DEATH SERVICES] (denoting that the National Center for Health Statistics preliminary data shows that there were approximately 2,473,018 deaths in 2008 and 2,436,682 deaths in 2009).

16. *See generally* 16 C.F.R. § 453 (2013) (setting forth the "Funeral Rule," but failing to include independent cemetery operations unrelated to the direct operation of a funeral home).

consumers have little time to investigate cemeteries or bargain-shop for reasonably priced burial goods and services.[17] As a result, consumers are denied the opportunity to use the same diligence traditionally practiced in more usual transactions.[18]

Congress recognized the unique characteristics of the death care trade and conferred upon the Federal Trade Commission the authority to regulate *funeral* providers through the *Funeral Rule*.[19] While the Funeral Rule affords comprehensive consumer price protections for consumers who patronize the funeral industry,[20] it affords no such protections to consumers in the cemetery industry.[21] This lack of oversight has led to the possibility of misfeasance and negligent mismanagement.[22]

This Note argues that the federal government should intervene using its constitutional power to spend, and encourage states to adopt "Minimum Grieving Consumer Protection Guidelines."[23] These guidelines seek to ensure that cemetery operations—like other trades—

17. An AARP Report explains that, at most, people who purchased burial plots may have looked at *one* other plot before making the final selection. *See* RACHELLE CUMMINS, AARP KNOWLEDGE MANAGEMENT, AARP FINANCIAL PROTECTION: NOT-FOR-PROFIT AND FOR-PROFIT CEMETERIES SURVEY 4 (2000), *available at* http://assets.aarp.org/rgcenter/consume/cemetery_survey.pdf.

18. *See Grief*, N.Y. TIMES HEALTH GUIDE, http://health.nytimes.com/health/guides/disease/grief/overview (last visited May 14, 2014).

19. *See Funeral Rule* 16 C.F.R. § 453.1 (2013).

20. For the purposes of this Note the *funeral industry* provides *funeral services*. The term "funeral services" is defined as any service which may be used to: "(1) [c]are for and prepare deceased human bodies for burial, cremation or other final disposition; and (2) [a]rrange, supervise or conduct the funeral ceremony or the final disposition of deceased human bodies." *Id.* § 453.1(j). A "funeral provider" is defined as any "person, partnership or corporation that sells or offers to sell funeral goods and funeral services to the public." *Id.* § 453.1(i).

21. "Traditionally, the Rule has not applied to cemeteries because while cemeteries often offer funeral goods and a funeral ceremony, as a general matter, they do not prepare deceased bodies for burial and so do not meet the definition of 'funeral provider.'" *See* Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 73 Fed. Reg. 13740, 13744 (Mar. 14, 2008).

22. "Misfeasance is commonly defined as the improper performance of an act that one may lawfully do." Andrew L. Weitz, *Contractor Duty to Third Parties Not in Privity: A Quasi-Tort Solution to the Vexing Problem of Victims of Nonfeasance*, 63 BROOK. L. REV. 593, 627 n.40 (1997). For the purposes of this Note, misfeasance is highlighted by cemetarians mismanaging burial grounds, overcharging bereaved consumers for goods and services, or intentionally failing to disclose itemized pricing information. Burr Oak is an extreme example offered to depict the severity of the abuses in the cemetery industry and is an example of *malfeasance* as the cemetery provider(s) in question had no legal right to remove remains from entombed graves.

23. *See infra* App. A.

are legally bound to provide the most basic consumer protections.[24]

Part I of this Note introduces the Funeral Rule and explains why the FTC does not have jurisdiction to regulate the cemetery industry. Part II examines the patchwork of state regulations that currently exist and emphasizes the need for uniformity within the industry. Part III sets forth a conditional spending proposal under the confines of *National Federation of Independent Businesses v. Sebelius*, (*NFIB*).[25] This section recommends Congress condition an appropriate percentage of the Medicaid grant on states' compliance with the proposed Minimum Guidelines. Part IV applies the test set forth in *NFIB* to this proposal. Finally, Part V offers an alternative proposal, contending that Congress should condition the individual receipt of the Medicaid burial set-aside on state compliance with the above-mentioned guidelines.

I. THE FEDERAL TRADE COMMISSION CANNOT UNDERTAKE CEMETERY REGULATION

In the United States, the FTC is the enforcement body responsible for regulating *unfair and deceptive trade practices*.[26] While the FTC has the authority to respond to consumer complaints against businesses and trade associations,[27] its authority does not extend to the cemetery industry.[28] Part A of this Section provides a comprehensive history of the FTC's Funeral Rule and emphasizes the absence of the cemetery industry from the Rule. Part B sets forth the limitations of the FTC's agency authority and argues that the FTC does not have jurisdiction to regulate the cemetery industry or other large non-profit markets.

24. "Tom Dart . . . observe[d] that manicurists and barbers must endure more regulatory hurdles than most cemetery operators, including . . . managers and groundskeepers." Steven Gray, *Outside Chicago, a Grim Tale of Unearthed Graves*, TIME U.S., July 11, 2009, http://www.time.com/time/nation/article/0,8599,1910036,00.html#ixzz2AAADvZsY (explaining that many states have oversight bodies for trades such as manicurists, but "there is no single agency, government or independent, that keeps up-to-date records of how many human bodies are buried or cremated on a cemetery's grounds or the names of the buried").

25. Nat'l Fed'n of Indep. Bus v. Sebelius, 132 S. Ct. 2566, 2662 (2012) [hereinafter "*NFIB*"]. This case is also known as the "Obamacare" case.

26. *See generally* 15 U.S.C. §§ 41-58 (2012) (showing the establishment of the FTC and its jurisdictional authority); 15 U.S.C. § 45(a)(2) (noting the FTC is empowered to prevent "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce"); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 227-30 (1980).

27. *See supra* note 26 and statutes cited therein.

28. *See supra* note 26 and statutes cited therein.

A. *The History of the Funeral Rule*

In the 1980s, many complaints began to surface from bereaved consumers alleging that unscrupulous funeral providers were deceiving and overcharging consumers resulting in profiteering[29] and mismanagement.[30] Many consumers were coerced into paying excessive prices for funeral services due to funeral providers who refused to deliver adequate pricing information.[31] Further, grieving consumers are easy prey for providers seeking to sell an abundance of goods. For example, pre-Funeral Rule, providers were adding unnecessary goods and services into bundled funeral packages and were misrepresenting the need for particular goods under state and federal laws.[32] These practices were causing consumers "to pay higher than competitive prices for the items they purchase[d]."[33]

Aware of these complaints, the FTC conducted an extensive investigation into the funeral industry. The Commission found that patrons of the industry "are often unable to make careful, informed decisions regarding funeral transactions."[34] The investigation further revealed that bereaved consumers are "highly vulnerable to unfair and deceptive trade practices, and that many funeral providers were unlawfully taking advantage of their customers."[35] In 1984 The FTC promulgated the Funeral Rule to counteract these consumer abuses and encourage transparent pricing and management. Amended in 1994,[36] the rule seeks to protect consumers from funeral industry profiteering and

29. Jim Abrams, *Report Says Government Lacks Control of Funeral Industry*, SARASOTA-HERALD TRIB., Oct. 22, 1999, at 7D; *see also Profiteer*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/profiteer (last visited May 14, 2014) (defining the term *profiteer* as "one who makes what is considered an unreasonable profit especially on the sale of essential goods during times of emergency").

30. *See* Fred S. McChesney, *Consumer Ignorance and Consumer Protection Law: Empirical Evidence from the FTC Funeral Rule*, 7 J.L. & POL. 1, 7 (1990) (noting the refusal of many funeral homes to provide price information to consumers and the use of lump-sum pricing makes it impossible for patrons to discern the hidden cost of the components of complex funeral package).

31. *Id.*

32. *Id.*

33. *Id.* (citing Funeral Industry Practices, 47 Fed. Reg 42,260, 42,269 (Sept. 24, 1982)); *see also The Bereaved Consumer Bill of Rights: Hearing on H.R. 3655 Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 111th Cong. 1-2 (2010) (statement of Representative Bobby Rush), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg76005/pdf/CHRG-111hhrg76005.pdf.

34. Funeral Consumer Alliance, Inc. v. F.T.C., 481 F.3d 860, 861 (D.C. Cir. 2007) (citing Funeral Industry Practices, 47 Fed. Reg. 42,260, 42,265-66 (Sept. 24, 1982)).

35. *Id.*

36. Funeral Industry Practices Trade Regulation Rule, 59 Fed. Reg. 1592, 1611 (Jan. 11, 1994) (codified at 16 C.F.R. pt. 453).

deceptive trade tactics by imposing a series of regulations on funeral providers in areas such as fraud and misrepresentation, required vs. non-required services, open price disclosures, and retention of documents.[37] Pursuant to the Rule, it is an unfair or deceptive act for funeral providers to:

> [F]ail to furnish accurate price information disclosing the cost to the purchaser for each of the specific funeral goods and funeral services used in connection with the disposition of deceased human bodies, including at least the price of embalming, transportation of remains, use of facilities, caskets, outer burial containers, immediate burials, or direct cremations, to persons inquiring about the purchase of funerals.[38]

This applies whether the consumer inquires via telephone or in person.[39] Consumers are encouraged to pick and choose the services they *need* as opposed to services providers may hide in bundled sales packages in an attempt to mask the cost of individual funeral goods.[40] To encourage this transparency, the Funeral Rule also mandates that consumers be given a General Price List,[41] which must, in a "clear and conspicuous manner," list the prices of all available goods and services.[42] This aids consumers in making informed decisions when patronizing funeral homes. Further, providers are not allowed to refuse services to a consumer because he or she has contracted with a third-party vendor for goods such as caskets or burial containers.[43]

To ensure that consumers receive the goods contracted for, the Funeral Rule orders that funeral homes provide a *written* itemized receipt showing exactly what was purchased and the price of each item.[44] By providing this receipt, consumers are able to review and have record of their purchase. While the government saw the need to prevent the above mentioned abuses, consumers who patronize the *cemetery*

37. 16 C.F.R. § 453.1(i) (2013); Elizabeth Howell Boldt, Note, *Nail in the Coffin: Can Elderly Americans Afford to Die?*, 21 ELDER L.J. 149, 161 (2013).

38. 16 C.F.R. § 453.2(a).

39. *Id.* § 453.2(b)(1).

40. *Id.*

41. For the purposes of this Note, a General Price List is "a printed or typewritten price list for retention to persons who inquire in person about the funeral goods, funeral services or prices of funeral goods or services offered by the funeral provider." *Id.* § 453.2(4)(iA)(1)-(3).

42. *Id.* § 453.2(b)(4). This list must also be provided to consumers who inquire about prices via telephone.

43. *Id.* § 453.4(b)(10).

44. *Id.* § 453.2 (b)(5)(i).

industry and who face the exact hardships[45] are excluded from the rule and left with no federal protection against these abuses.[46]

In 2011, Representative Bobby Rush of Illinois introduced the Bereaved Consumer Bill of Rights Act to the United States House of Representatives.[47] The Bill sought to extend FTC oversight to prevent unfair and deceptive trade practices in the cemetery industry.[48] Ultimately, after its introduction, the bill was sent to the House Committee on Energy and Commerce where it died by the close of the 112th Congress. To date, no similar bills have been proposed.[49] While the bill sought to extend the Funeral Rule to the cemetery industry, the FTC is not the ideal agency to take on this task.[50]

B. *Why the FTC Cannot Regulate the Cemetery Industry*

The abuses in the cemetery industry are similar to those that once existed in the funeral industry. As a result, lawmakers and industry professionals argue that the Funeral Rule should be expanded to account for the cemetery industry.[51] This expansion would include adequate price lists, itemized bills, and organized record keeping.[52] Further, cemetarians are now selling goods and services outside of the traditional scope of business and should be regulated in some capacity.[53] In particular, cemeteries have transformed from "sellers of burial plots to one-stop, full-service funeral providers, competing against funeral homes for sales of every conceivable funeral good."[54] Funeral industry professionals argue that excluding cemetarians from federal regulation

45. As mentioned above, these hardships include the inability to make informed purchasing decisions, emotional distress, lack of familiarity with the industry, and time constraints. Since the funeral industry and the cemetery industry are so similar, these hardships are consistent for both.

46. *See generally* Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 73 Fed. Reg. 13740 (Mar. 14, 2008).

47. Bereaved Consumer's Bill of Rights, H.R. 3655, 111th Cong. (2009) *reintroduced as* Bereaved Consumer's Bill of Rights Act of 2011, H.R. 900, 112th Cong. (2011).

48. *Id.*

49. H.R. 900, 112th Cong. (2011).

50. *See* Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 73 Fed. Reg.13740 (Mar. 14, 2008).

51. *Id.* at 13741-2.

52. *See* 16 C.F.R. § 453.2 (2013).

53. *See, e.g.*, *Services*, SPRINGFIELD CEMETERY & CREMATORY, http://www.rocheinternet.com/~spce/design/?lv=8 (last visited May 14, 2014) (noting that this Springfield, Massachusetts cemetery offers a number of services including cremation, graveside, and chapel services).

54. Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 73 Fed. Reg. at 13744 (quoting National Selected Morticians (NSM), Comment A-54, at 6-8).

promotes unfair market conditions.[55]

Since the Funeral Rule's inception, there has been a steady increase in national conglomerates acquiring private cemeteries.[56] This has resulted in an influx of cross-competitors that are not subject to industry regulation.[57] As a result, nearly all of the funeral providers and other industry participants who partook in the FTC's notice and comment period "urged the Commission to 'level the playing field.'"[58]

1. The FTC Has Limited Jurisdiction

In 2008, during the most recent notice and comment period for the Funeral Rule, the FTC rebuffed hundreds of comments vying for the expansion of the Rule.[59] The FTC reasoned that it could not create a new cemetery rule or expand the Funeral Rule because of jurisdictional limitations.[60] The FTC Act extends the FTC's jurisdiction only to corporations "organized to carry on business for [their] own profit or that of [their] members. . . ."[61] Since a vast majority of cemeteries are organized as non-profits, any extension of the FTC's jurisdiction "would raise serious jurisdictional issues concerning the status of nonprofit entities under FTC regulation."[62]

2. Ramifications of Expanding the FTC's Jurisdiction

Extending the FTC's jurisdiction to cover non-profit organizations would be problematic. According to the IRS, "[t]here are reported to be between 75,000 and 100,000 cemeteries in the United States. Most of [which] are tax exempt organizations."[63] These entities are predicted to outnumber the nation's estimated 7,500 for-profit cemeteries by at least

55. *Id.* For example, NSM, a not-for-profit, international trade association of independent, privately owned and operated funeral homes, has argued that they are operating in an uneven playing field.

56. Michael B. Sauter & Jon Ogg, *10 Companies that Control the $15 Billion Death Industry in America*, TOPSTOCKANALYSTS (Jan. 17, 2011, 9:58 AM), http://www.topstockanalysts.com/index.php/2011/01/17/10-companies-that-control-the-15-billion-death-industry-in-america/.

57. *See* Irwin W. Shipper, Request for Comments Concerning the Trade Regulation Rule on Funeral Industry Practices 16 CFR Part 453, International Cemetery and Funeral Association (ICFA), Comment A-38, [hereinafter ICFA Comment].

58. 73 Fed. Reg. at 13744 (noting cemetarians provide almost identical goods and services, yet are given a distinct market advantage).

59. *Id.* at 13741-2.

60. *Id.*

61. 15 U.S.C § 44 (2012).

62. *See* ICFA Comment, *supra* note 57.

63. *See* ICFA Comment, *supra* note 57.

three to one.[64] To further this point, some states strictly prohibit for-profit cemetery entities from operating within state borders.[65] The FTC and various industry participants reasoned that regulating only for-profit cemeteries would not accomplish the major premise of the Act.[66] Only a relatively small number of cemeteries would be affected and there would be substantial confusion in distinguishing non-profit from for-profit entities.[67]

Further, expanding the scope of the FTC Act or Funeral Rule would bestow upon the FTC over 400,000 new entities to regulate.[68] This would spread the FTC's enforcement capabilities very thin.[69] As a result, the effectiveness of the Funeral Rule might be compromised. This, along with the jurisdictional dilemma, makes the FTC an inappropriate regulatory body for the cemetery industry.

II. A PATCHWORK OF STATE REGULATION HAS LED TO GRAVE ABUSES WITHIN THE CEMETERY INDUSTRY

Currently the cemetery industry is regulated (if at all) solely at the state level.[70] However, states vary dramatically in the laws and regulations that they implement and enforce.[71] This Section argues that the lack of uniformity and industry oversight has led to a disparity in consumer protections across the U.S.[72] Scandals, like Burr Oak, sparked the interest of the Government Accountability Office (GAO),[73] which conducted a nationwide survey concerning current state regulation of the

64. *See* ICFA Comment, *supra* note 57.

65. *See* Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 73 Fed. Reg. at 13745; *see also* GAO, DEATH SERVICES, *supra* note 15, at 11-12 (noting that these states include Connecticut, Massachusetts, Maine, New Jersey, New York, and Wyoming).

66. *See* Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 73 Fed. Reg. at 13745.

67. *Id.*

68. *See* Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 73 Fed. Reg. at 13740.

69. *See generally id.*

70. GAO, DEATH SERVICES, *supra* note 15, at 1.

71. GAO, DEATH SERVICES, *supra* note 15, at 1.

72. *Cemeteries Draw Complaints*, *supra* note 9.

73. *See About the GAO*, GAO, http://www.gao.gov/about/index.html (last visited May 7, 2014) ("The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress . . . . [the] GAO investigates how the federal government spends taxpayer dollars . . . . [the mission of the GAO] is to support . . . Congress in meeting its constitutional responsibilities and to help improve . . . performance and ensure the accountability of the federal government for the benefit of the American people.").

death care industry.[74] This federal inquiry is prima facie evidence that the unregulated cemetery industry has been, and continues to be a problem of federal concern.

Part A of this Section analyzes the hardships states face in attempting to regulate cemeteries within state borders and highlights inconsistencies among state regulators.[75] Part B draws comparisons between Iowa, which has a comprehensive regulatory scheme, and Colorado, which has no comprehensive state regulatory body. This Part seeks to show the varying levels of cemetery regulation across the fifty states and calls for uniformity among them.

A. *The 2011 GAO Report Unearthed Inconsistencies Among State Regulators*

Widespread media coverage of cemetery mismanagement led the GAO to review federal involvement within the death care industry.[76] The focus of this report was how states regulate the industry and whether there is a need for additional regulation.[77] The GAO found that while most states reported having regulations in place for *some* cemeteries, no state reported regulating *all* cemeteries within its borders.[78] One problem is that the number of cemeteries operating within a particular state is not always known, and often no records are kept at either the state or municipal levels.[79] Further, there are limited licensing requirements across the nation.[80] While all funeral providers are required to be licensed by federal law, twenty of the thirty-seven states surveyed reported that they do not require cemetery operators to be licensed and no annual inspections were necessary of cemetery premises.[81]

74. GAO, DEATH SERVICES, *supra* note 15, at 1.

75. GAO, DEATH SERVICES, *supra* note 15, at 1

76. GAO, DEATH SERVICES, *supra* note 15, at 1

77. GAO, DEATH SERVICES, *supra* note 15, at 1

78. GAO, DEATH SERVICES, *supra* note 15, at 16.

79. GAO, DEATH SERVICES, *supra* note 15, at 17. To highlight this point, "18 of the 37 states surveyed noted that they did not maintain data on the number of cemeteries that operate within the state's borders." GAO, DEATH SERVICES, *supra* note 15, at 17. Further, "only five states were able to provide comprehensive data on the number of cemeteries within their state. The report explained that the states contained a number of cemeteries ranging from 124 to 3,600." GAO, DEATH SERVICES, *supra* note 15, at 17.

80. GAO, DEATH SERVICES, *supra* note 15, at 17 Noting, "11 [states] reported that some but not all cemetery operators are required to be licensed, 1 reported that all are required to be licensed, and 5 checked 'No response.' State regulators reported that licenses were required to be renewed at various frequencies, if at all." GAO, DEATH SERVICES, *supra* note 15, at 17.

81. GAO, DEATH SERVICES, *supra* note 15, at 17. With respect to inspection, "21 of

With lack of inspections in many states, consumer protection issues go unnoticed and violations become difficult to track.[82] Of the thirty-four states that responded to this issue on the GAO's survey, only eighteen reported tracking violations of cemeteries.[83] Of those states that track cemetery misconduct, the most frequent violations included those related to "(1) record keeping, (2) maintenance, (3) unprofessional conduct, and (4) licensing."[84] The GAO, concluded, "[t]he extent to which the federal and state governments regulate . . . cemeteries . . . varies."[85] This variance demonstrates the need for regulatory unity within the industry.

B. *Contrasting State Cemetery Laws: From Comprehensive to Non-Existent*

States have proven unsuccessful in regulating cemeteries. This patchwork level of regulation has resulted in some states that have comprehensive control over the industry, while others have no regulations at all.

1. Comprehensive Regulations: The Iowa Cemetery Act

Iowa is one of the few states to enact comprehensive state cemetery law.[86] For example, the Iowa Cemetery Act[87] mandates widespread cemetery inspections.[88] Under the Act, inspectors examine "the books, accounts, papers, correspondence, memoranda, purchase agreements, files, or other documents or records of the cemetery."[89] If it is found that a cemetarian "is engaged or about to be engaged"[90] in an activity prohibited under the Act, the cemetarian may be required to cease and desist from engaging in such practice and is subject to civil penalties.[91]

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the 37 state regulators who responded to this issue . . . reported that inspections of cemeteries were not required, and those that did require them reported that the frequency of the required inspections varied." GAO, DEATH SERVICES, *supra* note 15, at 17. "The 12 state inspectors who responded to our survey question regarding the number of inspectors available to inspect cemeteries reported having between zero and nine inspectors." GAO, DEATH SERVICES, *supra* note 15, at 18.

82. *See generally* Statement of Roxie Williams, *supra* note 4.
83. GAO, DEATH SERVICES, *supra* note 15.
84. GAO, DEATH SERVICES, *supra* note 15 at 18.
85. GAO, DEATH SERVICES, *supra* note 15, at 18.
86. *See generally* IOWA CODE § 523I.101 (2011).
87. *Id.*
88. *Id.*
89. *Id.* § 523I.202(1)(d).
90. *Id.* § 523I.203.
91. *Id.*

Unlike other states that focus on land based regulations for cemeteries,[92] Iowa focuses on consumer protection.[93]

In-line with the above assertion, the Act deems it unlawful for a cemetarian to misrepresent state or federal law.[94] This occurs when a cemetarian implies that services such as embalming are *required* by law. This is typically an attempt to coerce consumers into making unnecessary purchases. Further, the Act prohibits cemetarians from conspiring to defraud consumers in connection with "the sale of memorials, memorialization, opening and closing services, scattering services, interment rights, or a combination thereof."[95] In states lacking similar provisions, cemetarians are more likely to misrepresent services to consumers because they remain unchecked by law.[96]

The Act also encourages full disclosure of records and burial plot placements. For example, there is a record keeping provision, which requires cemeteries to record the name, addresses, and date of purchase associated with each plot.[97] Further, each cemetery is responsible for establishing, "[a] unique numeric or alphanumeric identifier that identify the location of each interment space sold by the cemetery."[98] Along with this, a cemetarian must fully disclose all fees required for services such as inurnment,[99] interment,[100] and entombment[101] of human remains.[102] While Iowa's statutory scheme is exemplary, many states are very far behind in implementing these types of measures, leaving consumers to fend for themselves in purchasing burial goods.[103]

2. No State Regulation: Colorado

Colorado is one state that has historically lacked cemetery

92. *See generally id.*

93. *Id.*

94. *Id.* § 523I.209-.211.

95. *Id.* § 523I.211.

96. *Id.*

97. *Id.* § 523I.311.

98. *Id.*

99. *Funeral Terms and Contact Information*, FTC (July 2012), http://www.consumer.ftc.gov/articles/0306-funeral-terms-and-contact-information (defining inurnment as "[t]he placing of cremated remains in an urn").

100. *See id.* (defining internment as "[t]he burial of a corpse in a grave or tomb, typically with funeral rites").

101. *See id.* (defining entombment as "[b]urial in the ground, inurnment or entombment").

102. IOWA CODE § 523I.301.

103. GAO, DEATH SERVICES, *supra* note 15, at 61.

regulation.[104] While it has full consumer protection provisions within its "Mortuary Science Code,"[105] no provision extends to cemeteries.[106] Because Colorado state law allows residents to care for the dead with very few limitations,[107] cemetarians who operate in the state are less restricted than those operating in other states.[108] For example, Service Corporation International (SCI)[109] owns and operates over seventeen cemeteries in the state.[110] This is because the only regulations specific to the cemetery industry are local and municipal zoning ordinances.[111] There are no laws addressing record keeping or inspections of cemeteries. In fact, the Funeral Board for the State of Colorado no longer exists.[112]

In late 2012, Colorado enacted a statute to address grievances made at *non-profit* cemeteries.[113] The law aims to make non-profit cemetery boards transparent and accountable to bereaved consumers.[114] The statute requires non-profit cemetery operators to keep records of any "grave space, niche, or crypt."[115] These records must include an annual written report "setting forth the number of interments, internments and entombments maintained by the non-profit cemetery."[116] The corporation must maintain a copy of the minutes of all board meetings for three preceding years, a copy of periodic corporate filings for the

104. GAO, DEATH SERVICES, *supra* note 15, at 61.

105. *See* COLO. REV. STAT. § 12-54-106 (2011). The Colorado Mortuary Sciences Code seeks consumer protection for the funeral industry. The given protections include: full disclosure of prices and services offered, itemized general price lists, and prohibition of legal misrepresentations.

106. GAO, DEATH SERVICES, *supra* note 15, at 62 (noting in Colorado, "[c]emeteries are not regulated at the state level").

107. *See* COLO. REV. STAT. § 12-54-106.

108. *Id.*

109. *Find A Local Provider*, SERV. CORP. INT'L, http://www.sci-corp.com/SCICORP/FindLocalProvider.aspx?alias=0201 (last visited May 9, 2014).

110. *Id.*

111. *See generally id.*

112. *See* Karen E. Crummy, *Trinidad Cemetery's Actions and Finances Under Investigation*, DENVER POST, Feb. 5, 2012, http://www.denverpost.com/investigations/ci_19895937. The public was outraged when Trinidad Catholic Cemetery was caught dumping headstones and memorial flags behind its facility. It was further discovered that the board of the Catholic cemetery filed inaccurate tax documents. In another case, the Roselawn Cemetery allegedly extorted over $800,000 from it perpetual care fund and then told bereaved consumers that the sum was lost in the stock market. *Id.*

113. *See generally* COLO. REV. STAT. § 7-47-101 (2012) (amended by Laws 1012, Ch. 229, § 1 eff. Aug. 8, 2012).

114. *Id.*

115. *Id.* § 7-47-101 (1).

116. *Id.* § 7-47-101 (1)(a).

preceding three years, and a copy of the corporation's Internal Revenue Form 990 for the preceding three years.[117] Further, under the law, the non-profit cemetery boards must include at least one person who owns or has a property interest in a grave or burial space.[118] This gives appointed consumers the ability to attend meetings, review minutes, and inspect the otherwise confidential financial records of the subject cemetery.[119] If the board denies access to the property or the records then a court order may be obtained and the cemetery will be held accountable for attorney's fees.[120] This enforcement mechanism will encourage non-profit cemetarians to operate in an open and obvious manner, significantly diminishing the likelihood of mismanagement. At the very least, the records will be open to the public.

Iowa and Colorado are two examples of states with vastly different regulatory schemes for the cemetery industry. This inconsistency and unpredictability of state laws across the United States is evidence that a uniform scheme is needed. Because cemetery regulation at the state level has proven ineffective, the federal government must intervene through its Spending Clause authority to regulate the industry.

III. CONDITIONAL SPENDING THROUGH THE MEDICAID GRANT: IMPLEMENTING MINIMUM GRIEVING CONSUMER PROTECTION GUIDELINES

Congress's conditional spending power is enumerated in the United States Constitution[121] and allows Congress to tax and spend, so long as the end result furthers the "general welfare" of the United States.[122] Historically, Congress has used this authorization to attach conditions to funding—even when the Constitution itself does not delegate express authority to do so.[123] For example, Congress has used its spending

117. *Id.* § 7-47-101(1)(b)-(f).

118. *Id.*

119. *Id.*

120. *Id.*

121. U.S. CONST. art. I, § 8, cl. 1. The Constitution empowers Congress "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." *Id.*

122. *See* United States. v. Butler, 297 U.S. 1, 66 (1936) (holding "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution").

123. *See* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 32 (1994); *see also* Amanda Staples, Note, *Another Small Step in America's Battle Against Drunk Driving: How the Spending Clause Can Provide More Uniform Sentences for Drunk-Driving Fatalities*, 46 NEW ENG. L. REV. 353, 357 (2012).

power to set national drinking ages,[124] old age benefits,[125] and to establish a uniform system for collecting child support.[126] Today the government spends over 600 billion dollars per-year in federal funding, requiring states to comply with attached conditions before disbursement.[127]

The Supreme Court has continuously upheld "the use of federal dollars to promote various policies amongst and within the states."[128] In 1987, the Court established a permissive test interpreting the spending power.[129] However, the confines of this test were recently redefined in the 2012 term. Until *National Federation of Independent Businesses v. Sebelius*[130] (*NFIB*), "no Supreme Court decision since the New Deal had struck down an act of Congress as exceeding the federal spending power."[131]

This Section proposes that since both the FTC and individual states are inadequate regulatory bodies, the federal government should intervene to encourage states to adopt "Minimum Grieving Consumer Protection Guidelines"[132] utilizing Congress's spending power. The goal of these Guidelines is to prevent price misrepresentations and deceptive or misleading sales practices within the industry.[133] This proposal seeks to condition the receipt of an appropriate percentage of Medicaid,[134] on the adoption of the mentioned Guidelines.[135] This means if a certain percentage of cemeteries within a state are non-compliant with the Guidelines, the state will "opt-out" of a portion of its Medicaid funding. This proposal is similar to the plan set forth in *NFIB* and tests the bounds of that case.[136]

124. *See* Staples, *supra* note 123, at 357 (citing South Dakota v. Dole, 483 U.S. 203, 207 (1987)).

125. *See* Staples, *supra* note 123, at 357 (citing Helvering v. Davis, 301 U.S. 619, 639 (1937)).

126. *See* Staples, *supra* note 123, at 357 (citing Kansas v. United States, 24 F. Supp. 2d 1192, 1195-97 (D. Kan. 1998)).

127. *See* Douglas A. Wick, Note, *Rethinking Conditional Federal Grants and the Independent Constitutional Bar Test*, 83 S. CAL. L. REV. 1359, 1364 (2010).

128. *See* Staples, *supra* note 123, at 357.

129. South Dakota v. Dole, 483 U.S. 203, 203 (1987).

130. 132 S. Ct. 2566, 2566 (2012).

131. Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Businesses v. Sebelius*, 93 B.U. L. REV. 1, 2 (2013).

132. *See infra* App. A.

133. *See infra* App. A.

134. *See* 42 U.S.C. § 1396 (2010).

135. *See infra* App. A.

136. 132 S. Ct. 2566, 2607 (2012) (noting "nothing in [this] opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care,

Part A of this Section explains how the above mentioned proposal—like most spending proposals—easily falls within the confines of the permissive test set forth in *South Dakota v. Dole*.[137] It particularly stresses the importance of the "germaneness prong"[138] and seeks to emphasize the *broad* rationale of the *Dole* Court. Part III.B analyzes the new test established in *NFIB* and highlights the substantive similarities and differences between the proposed plan and the plan at issue in *NFIB*.

A. *Overcoming the Broad Limitations of the Federal Spending Power: South Dakota v. Dole*

While the Supreme Court has interpreted the Spending Clause permissively, there are important restrictions to take into consideration. These limitations were first developed in *Dole*. In *Dole*, the State of South Dakota brought an action challenging the constitutionality of a federal statute conditioning states' receipt of federal highway funds on the adoption of a state drinking age of twenty-one years.[139] South Dakota, at the time, allowed people over the age of nineteen years to purchase alcohol.[140] The state's argument, which was rejected by the Court, was that the statute violated "the constitutional limitations on congressional exercise of the spending power under Art. I § 8, cl. 1 of the Constitution."[141] The Court reasoned "[i]ncident to the spending power, Congress may attach conditions on the receipt of federal funds."[142] However, the exercise of Congress's spending power is subject to certain restrictions.[143]

In determining these restrictions, Chief Justice Rehnquist combined prior case law to establish an enumerated test for the constitutionality of conditions on spending.[144] The test set-forth four prongs meant to limit federal spending powers.[145] First, the spending must be in pursuit of the general welfare.[146] Second, the condition must be unambiguous and

and requiring that States accepting such funds comply with the conditions on their use").

137. *See generally* 483 U.S. 203, 207 (1987) (explaining that "[t]he spending power is of course not unlimited . . . but is instead subject to several general restrictions").

138. *See infra* Part A, Section 1 and 2.

139. *See Dole*, 483 U.S. at 203.

140. *Id.* at 205.

141. *Id.* at 203.

142. *Id.*

143. *Id.*

144. *See also* Huberfeld, *supra* note 131, at 5 n.26; *see also Dole*, 483 U.S. at 207-08 (setting forth said enumerated test).

145. *Dole*, 483 U.S. at 207-08.

146. *Id.* at 207 (citing Helvering v. Davis, 301 U.S. 619, 640-41 (1937)); United States v. Butler, 297 U.S. 1, 65 (1936)).

provide the states with clear notice "of the consequences of their participation."[147] In other words, the states must have the tools to make a knowledgeable choice whether to accept or reject federal grant money. Third, the conditions placed on the funds must be related or germane to the federal goals of the grant affected.[148] This means there must be a rational connection between the purpose of the grant and the conditions attached to the grant. Finally, "other constitutional provisions may [not] provide an independent bar to the conditional grant of federal funds."[149]

While this test may seem comprehensive, it has been interpreted leniently.[150] Until *NFIB*, no court had invalidated funding proposals under the *Dole* test.[151] Today, the outer limits of the requirements remain undefined by the courts.[152] For example, courts have consistently viewed three of the four prongs as implicit,[153] while the "germaneness" or "relatedness" prong has received *some* scrutiny by the courts.[154] The Supreme Court has reasoned, "[c]onditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs."[155] However, since *Dole*, the prong has been held "toothless, even nonjusticiable."[156] Further, "[i]n most instances in which the requirement has been a focus of litigation, the court has done little more than assert, without analysis or elaboration, that the challenged condition is 'reasonably related to the federal interest

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

148. *Id.* at 208 (stating "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel"). The rationale behind this connection is that "[a]chieving uniformity in minimum legal drinking ages would . . . induce[] young people to drive to border states with lower drinking ages and because, even within a single state, the higher the minimum drinking age, the fewer the accidents per mile driven." Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 31 (2001).

149. *Dole*, 483 U.S. at 208.

150. The Court in *Dole* spoke of a coercion limitation on the government's spending power in dicta but never adopted a rule. Chief Justice Rehnquist noted "[o]ur decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion" but he did not extend a bright line rule as to when this occurs and did not include it in the four-pronged Dole test. *Dole*, 483 U.S. at 211; Huberfeld, *supra* note 131, at 5.

151. Huberfeld, *supra* note 131, at 2.

152. Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 466 (2002).

153. *Id.*

154. *Id.*

155. *Dole*, 483 U.S. at 207-08 (1987) (citing Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

156. Baker & Berman, *supra* note 152, at 466.

in the national program.'"[157] This has resulted in the Court upholding a wide range of federal spending programs without establishing a clear correlation.[158]

1. Rationalizing the "Germaneness Prong" of the *Dole* Test

The proposed condition—state compliance with Federal Minimum Grieving Consumer Protection Guidelines—would easily satisfy the relaxed nature of the *Dole* test. In utilizing the *Dole* analysis, the only prong of the test that needs further clarification is the above mentioned germaneness prong. In *Dole*, the Court refused to set the outer bounds of this limitation.[159] For the scope of this proposal, the Medicaid grant must be at least rationally related to the cemetery industry.[160] While this is the most restrictive of the *Dole* requirements, the Court does not expect a perfect means-end fit in deriving the relationship.[161]

Medicaid is a federal categorical grant,[162] which has a narrow scope of eligible state expenses.[163] Since its inception in 1965, it has been a necessary and important form of assistance for families requiring long-term care.[164] The Medicaid grant is substantially related to the cemetery industry under two theories. First, Medicaid offers eligibility set-asides for burial services. Second, Medicaid funds a state-run hospice program that offers after-death and end-of-life services.

157. Baker & Berman, *supra* note 152, at 466.

158. Baker & Berman, *supra* note 152, at 469.

159. *See Dole*, 483 U.S. at 208-09.

160. *Id.* at 207-08 (noting that case law has indicated "that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs'") (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

161. *Id.*

162. *Advanced Funeral Planning for Baby Boomers: Medicaid Considerations*, DIGNITY MEMORIAL, http://www.dignitymemorial.com/dm20/en_US/main/dm/library/article/name/preplanning-medicaid (last visited May 14, 2014).

163. BEN CANADA, CONG. RES. SERV., RS20669, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: OVERVIEW AND CHARACTERISTICS 3-4 (2002), *available at* http://digital.library.unt.edu/ark:/67531/metacrs1102/m1/1/high_res_d/RS20669_2000Sep07.pdf (explaining "[c]ategorical grants have a narrow range of eligible activities, permitting funds to be used only for specific, narrowly defined purposes. Discretion over the awarding of grants remains at the federal level since Congress defines the categories and federal agencies review applications").

164. *See* ROBERT STEVENS & ROSEMARY STEVENS, WELFARE MEDICINE IN AMERICA: A CASE STUDY OF MEDICAID 51-53 (1974).

a. *The Medicaid Eligibility Set-Aside for Burials and Burial Services*

To be eligible for Medicaid, applicants over a set income level must spend-down their assets until they reach a qualifying level.[165] However, certain assets are considered *allowances* or *set-asides* under the Medicaid program rules.[166] The federal Medicaid statute requires that financial eligibility rules correspond to the Social Security Administration's Supplemental Security Income Program (SSI).[167] SSI explicitly excludes, "the value of any burial space or agreement."[168] The program regulations require that burial funds up to $1,500 be excluded from assets.[169]

For the purposes of Medicaid, a "burial fund"[170] is a sum of money set-aside and clearly designated to pay for an eligible individual's burial expenses or the burial expenses[171] of that individual's spouse.[172] The fund must be held separate from other household accounts and labeled for its purpose.[173] The limit to this fund is $1,500; however, states may allow more than this amount to be excluded.[174] Payments are made directly to the cemetarian upon the submission of particular forms.[175] Burial items covered usually include goods such as "casket[s], urn[s], mausoleum[s], vault[s], headstone[s] or plaque[s] . . . [and] the cost of opening and closing of the gravesite."[176]

In addition to the burial fund allowance, a Medicaid recipient may

165. *Id.*

166. *See* 20 C.F.R. § 416.1231 (2012) (stating, "[i]n determining the resources of an individual, the value of burial spaces for the individual, the individual's spouse or any member of the individual's immediate family will be excluded from resources").

167. Todd A. Krichmar, *Prepayment of Funeral Expenses for Medicaid and SSI Recipients*, 69 N.Y. ST. B. J. 42, 43 (1997).

168. *See* 42 U.S.C. § 1382b (a)(2)(B) (2012); *see also* § 1382a(b)(16) (requiring disregard from SSI income calculation any interest accrued on a burial arrangement).

169. *See id* § 1382b (a)(2)(B).

170. 20 C.F.R. § 416.1231 (2012).

171. *See id.* (defining "burial spaces to include, burial plots, gravesites, crypts, mausoleums, urns, niches and other customary and traditional repositories for the deceased's bodily remains provided such spaces are owned by the individual or are held for his or her use." Further, the term also includes improvements upon burial spaces "including, but not limited to, vaults, headstones, markers, plaques, or burial containers and arrangements for opening and closing the gravesite for burial of the deceased").

172. *See id.*

173. *Id.*

174. *Id.*

175. Evelyn Frank Legal Resources Program, *Paying for Burial— Tips for Qualifying for Medicaid or SSI Despite "Excess Resources*," (Aug. 16, 2010), http://wnylc.com/health/afile/46/34/.

176. *Id.*

also own a burial space without consequence to eligibility. This is typically calculated at free market value.[177] Thus, by the Government allowing a set-aside for burial expenses, it is allowing eligible members to maintain or hold in trust, funds that would otherwise disqualify them from Medicaid.

b. *The Medicaid Hospice Benefit and "After Death" Services*

Under the *Dole* germaneness prong,[178] the inquiry into the relatedness of the condition and the grant is highly deferential to Congress.[179] Thus, "if any reasonable relationship between the policy goals of a program and the policy goals of the grant condition can be discerned, then the grant condition will be upheld."[180] The federal Medicaid statute allows states to provide Hospice services for terminally-ill patients.[181] To date, nearly every state has elected to provide the Hospice Benefit.[182] Traditionally, Hospice care offers "a team-oriented approach to expert medical care, pain management, and emotional and spiritual support expressly tailored to the patient's needs and wishes."[183] The concept was developed to ensure that patients die with respect and dignity.[184] Among other services, Hospice care offers bereavement services and after-death planning.[185]

As part of the Hospice Benefit provided by Medicaid, the regulations provide that a team will care for and comfort the Medicaid

177. *Id.*

178. South Dakota v. Dole, 483 U.S. 203, 208-09 (1987).

179. Baker & Berman, *supra* note 152, at 463.

180. KENNETH R. THOMAS, CONG. RESEARCH SERV., R42367, THE CONSTITUTIONALITY OF FEDERAL GRANT CONDITIONS AFTER *NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS* 12 (2012).

181. Lainie Rutkow, *Optional or Optimal?: The Medicaid Hospice Benefit at Twenty*, 22 J. CONTEMP. HEALTH L. & POL'Y 107, 108 (2005).

182. Jane Tilly & Joshua M. Weiner, *End-of-Life Care in the United States*, 3 INT. J. INTEGR. CARE 3 (2003) *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1483949/#r6 (noting "Every state but Connecticut, Nebraska, New Hampshire, Oklahoma, and South Dakota covered hospice under Medicaid [by] 2001").

183. NATIONAL HOSPICE AND PALLIATIVE CARE ORGANIZATION, HOSPICE CARE: A CONSUMER'S GUIDE TO SELECTING A HOSPICE PROGRAM 2 (2009) *available at* http://www.caringinfo.org/files/public/brochures/Hospice_Care.pdf (noting that Hospice care "[s]upport is extended to the patient's loved ones, as well. At the center of hospice is the belief that each of us has the right to die pain-free and with dignity").

184. *Id.* Hospice is generally used for "End-of-life care—the period of time when patients are seriously ill with the condition that will cause their death." *See* Tilly & Weiner, *supra* note 182, at 1.

185. Dianne Rosen, *A Hospice Primer*, N.J. LAW, Mar.-Apr. 1998, at 12 (noting that hospice care includes bereavement counseling for family members after the patient dies).

patient.[186] The team consists of a primary physician who is responsible for overseeing medical care and identifying signs of death; a Hospice physician who controls pain and provides end of life care; a nurse who visits the patient daily and provides on-call services; a home health aide; a social worker who makes funeral and burial arrangements and acts as a liaison for the patient and the Department of Health and Human Services; and a chaplain who provides after-death grief counseling to the patient's family.[187]

Since Medicaid allows states to use federal funds for a Hospice Benefit, and the Hospice team is expected to support a patient during his or her final moments by preparing for burial services and grief counseling, there is a substantial relationship between the funds covered by Medicaid and the cemetery industry. Since Medicaid covers this expense, withholding funds for state non-compliance with the proposed Guidelines is reasonably connected to the original purpose of the grant. Further, it is directly in line with the mission of Hospice: to ensure that patients die with respect and dignity. Federal coverage of the Hospice Program shows that Medicaid is already covering services that extend into the death care and cemetery industries.

In similar cases where the Supreme Court has analyzed the "substantial relation" of federal conditions to a funding source, the relationships have been much more attenuated, but faced no scrutiny from the Court. For example, *American Civil Liberties Union v. Mineta*[188] held that "under the case law . . . the connection between the funding restriction and the purpose of the funding does not have to be . . . closely related to withstand a challenge."[189] Similar to the relationship between the conditions at question in *Dole*, a requirement that states lose a portion of the benefits they enjoy from federal programs is permissible since it is related to the federal interest in maintaining the health and welfare of bereaved consumers.

B. *Conceptualizing the Federal-State Relationship: Limitations to Conditional Spending Established in NFIB v. Sebelius*

While the proposed Grieving Consumer Protection Guidelines fit

186. *See* 42 U.S.C § 1395x (2013) (stating that the Medicaid Hospice Benefit has an interdisciplinary group of personnel which—"includes at least— one physician . . . one registered professional nurse, and . . . one social worker . . . and also includes at least one pastoral or other counselor").

187. *Id.*

188. 319 F. Supp. 2d 69, 79 (D.D.C. 2004).

189. *Id.* at 80.

squarely within the limitations set forth in *Dole*,[190] the fractured opinion in *NFIB* established that the government's spending power is greatly limited when the terms of pre-existing spending programs are "substantially and unforeseeably altered."[191] Under this new approach, the Court focuses on coercion rather than compulsion.[192] This is a dramatic re-conceptualization of the prior anti-commandeering doctrine and essentially redefines what constitutes a federal *command* to the states.[193]

Looking through the lens of the Tenth Amendment[194] and the anti-commandeering principle, the plurality determined the Medicaid expansion provision at issue in *NFIB* to be unconstitutional.[195] The Medicaid expansion provision aimed to cover individuals not included in existing Medicaid coverage groups including "the entire nonelderly population with income below 133 percent of the poverty level."[196] The ultimate goal of the expansion was to reduce the number of uninsured Americans by expanding overall access to affordable healthcare.[197]

In an attempt to entice states to participate in the conditional expansion provision, section 1396c of the Act gave the Secretary of Health and Human Services the express authority to "penalize States that choose not to participate in [the Medicaid expansion] . . . by taking away their existing Medicaid funding."[198] In other words, a state's failure to adopt the provision would result in the complete withdrawal of all Medicaid funding. While the expansion provision was upheld, the Court struck the condition that states adopt the provision or lose *all* Medicaid funding.[199]

190. *See supra* Section III.A; South Dakota v. Dole, 483 U.S. 203 (1987).

191. James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, CATO SUP. CT. REV. 67 (2012).

192. Margaret Hu, *Reverse Commandeering*, 46 U.C. DAVIS L. REV. 535, 554 (2012) (nothing "even when Congress does not compel states to act, a law can be struck on anti-commandeering grounds if the practical impact of the law is one that coerces another sovereign's power").

193. *Id.* at 554-55 (noting that after *NFIB* the anti-commandeering principle has transformed into an "anti-coercion" principle).

194. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, no prohibited by it to the States, are reserved to the States respectively, or to the People.").

195. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2575 (2012).

196. *Id.*

197. John K. DiMugno, *Navigating Health Care Reform: The Supreme Court's Ruling and the Choppy Waters Ahead*, 24 No. 6 CAL. INS. L. & REG. REP. 1 (2012).

198. *NFIB*, 132 S. Ct. at 2574-75. *See also* 42 U.S.C. § 1396c (2012).

199. *NFIB*, 132 S. Ct. at 2574-75.

NFIB invites a vast array of new coercion challenges to federal conditional spending programs, yet the Court refused to articulate a bright line test for identifying the level of command that would constitute coercion. Chief Justice Roberts set out key factors to determine whether a Spending Clause action is repugnant to the Tenth Amendment. According to Professor Eloise Pasachoff,[200] *factor one* has two inquiries.[201] Under the first inquiry, the government must identify whether the proposed condition is a new and independent program.[202] Under the second, a determination must be made as to whether states had *clear notice* of any modifications made to an existing conditional spending program.[203] This means the federal government cannot unexpectedly alter a grant program by conditioning the receipt of existing funds on compliance with a "new" program. Finally, factor two posits whether the condition is so coercive as to hold "a gun to the head[s]" of states.[204] This means the threat of withdrawing the funds cannot be so significant as to constitute "economic dragooning."[205] According to the plurality, these factors destroy any "real choice" a state may have in accepting a grant condition and, as a result, commandeer state authority under the Spending Clause.[206]

This Note argues that the most effective reading of the *NFIB* test is not to read the above factors as independently operative, but as conjunctive.[207] For example, Professor Pasachoff describes the *NFIB* Test as follows:

> 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? [If no, the inquiry stops and the condition is upheld.][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? [If yes, the inquiry stops.][If not,] . . . is the amount of funding at stake so significant

200. Eloise Pasachoff is an Associate Professor of Law at the *Georgetown University Law Center*. Her academic profile is available at: http://www.law.georgetown.edu/faculty/pasachoff-eloise.cfm.

201. Eloise Pasachoff, *Conditional Spending After* NFIB v. Sebelius*: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 593 (2013).

202. *Id.*

203. *Id.*; *see also NFIB*, 132 S. Ct. at 2605 (plurality opinion).

204. *NFIB*, 132 S. Ct. at 2604; Pasachoff, *supra* note 202 at 593.

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

206. *Id.*

207. Pasachoff, *supra* note 201, at 593.

that the threat to withdraw it constitutes "economic dragooning?"[208]

The below sections analyze each prong of the *NFIB* test and reiterates Professor Pasachoff's rationale as it relates to the cemetery industry.

1. New Programs and Independent Grants

While it is clear from the *NFIB* plurality that conditioning the receipt of existing federal funding on compliance with a new program may be coercive, there is little guidance from the Court as to when a condition ultimately transforms an existing program into a "new program."[209] In *NFIB*, Chief Justice Roberts and the plurality reasoned that the Medicaid expansion provision was "a shift in kind, not merely degree."[210] This shift sought to establish "a comprehensive national plan to provide universal health insurance coverage"[211] rather than a program to cover only four categories of individuals as originally established.[212]

Under this rationale, the proposed expansion to Medicaid was extremely broad and transformed the program by making it almost universal.[213] However, mere alterations or expansions on a smaller level may not rise to a "shift in kind."[214] For example, in *Dole* the condition "was imposed on a separate, independent program, and there were no new funds attached to that condition."[215] The Court reasoned that in *Dole*, the condition was reasonably foreseeable and did not expand the program in such a transformative way.[216]

Upon a determination that a condition threatens to terminate existing funds, the next inquiry "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."[217] If adequate notice was provided, then the anti-commandeering principle does not apply and there is no Tenth Amendment violation.[218] However, "[i]f the states did not have proper notice, then the question becomes whether the terms of

208. Pasachoff, *supra* note 201, at 594.
209. *NFIB*, 132 S. Ct. at 2603-05; Pasachoff, *supra* note 201, at 596.
210. *NFIB*, 132 S. Ct. at 2605.
211. *NFIB*, 132 S. Ct. at 2606.
212. *NFIB*, 132 S. Ct. at 2606.
213. Pasachoff, *supra* note 201, at 599 (quoting *NFIB*, 132 S.Ct at 2605-06).
214. *NFIB*, 132 S. Ct. at 2575; *see also* Pasachoff, *supra* note 202, at 600.
215. Pasachoff, *supra* note 201, at 600.
216. Pasachoff, *supra* note 201, at 600.
217. Pasachoff, *supra* note 201, at 600-01.
218. Pasachoff, *supra* note 201, at 600-01.

the financial inducement constitute economic dragooning."[219]

2. Clear Notice of Contractual Terms

Many legal scholars support the notion that the Spending Clause establishes a contractual relationship between the federal government and each individual state.[220] In this situation, the government is the offeror and the state is the offeree, bound only by acceptance of the terms.[221] This contractual framework serves as a protective measure to safeguard states' ability to opt out or refrain from participating in federal programs.[222] *NFIB* reaffirmed that "[t]he legitimacy of Congress' exercise of the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the contract."[223] Thus, states must have reasonable notice of the terms of the new condition.

However, the Court makes little inquiry as to what satisfies this "reasonable notice" requirement. In *NFIB*, the plurality reasoned that the states lacked clear notice of the Medicaid expansion provision because states could not reasonably expect the program to be modified or expanded in such a broad manner.[224] In coming to this rationale, Chief Justice Roberts strictly interpreted the rule of *Pennhurst State School & Hospital v. Halderman*.[225] He reasoned, when states first enroll in a federal grant program, Congress must provide reasonable notice of conditions that might later be imposed.[226] Professor Pasachoff contends that Chief Justice Roberts' notice requirement hinges on the conclusion that the Medicaid expansion was a separate program from the existing grant.[227]

Thus, "[t]he 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."[228] There was no indication from the plurality that a state *must* be aware of all future

219. Pasachoff, *supra* note 201, at 600-01. "Economic dragooning" is discussed *infra* Part III.B.3.

220. *See* Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 391 (2008); *see also* Staples, *supra* note 122, at 358.

221. *Id.* at 386.

222. *Id.* at 386.

223. Pasachoff, *supra* note 201, at 591 (quoting *NFIB*, 132 S. Ct. at 2602).

224. Pasachoff, *supra* note 201, at 591.

225. *See* 465 U.S. 89 (1984).

226. Nat'l Fed'n of Indep. Bus v. Sebelius, 132 S. Ct. 2566, 2606-07 (2012).

227. Pasachoff, *supra* note 201, at 602.

228. Pasachoff, *supra* note 201, at 602.

conditions that could be placed on the grant at the time the program is first implemented.[229]

At the inception of the Medicaid Act, states "signed on" with the knowledge that Congress reserved "[t]he right to alter, amend, or repeal any provision of [Medicaid]."[230] In fact, the Medicaid program has been altered on numerous occasions without facing viable constitutional challenges.[231] For example, new conditions have been imposed on the existing grant money in the past, yet no immense questioning was warranted by the Court.[232] Said amendments were viewed as mere modifications. Under the authorization provision above, Justice Ginsburg argued that the federal government gave notice that "mere alterations" could be made to the existing program.[233]

3. State Participation in Cooperative Federalism: Economic Dragooning and the "Real Choice" Test

The second prong of the *NFIB* test establishes yet another limitation on Congress's spending power.[234] Here the Court considered the ramifications of the government inducing states' compliance with federal spending programs through financial enticement.[235] Under Professor Pasachoff's reasoning, this prong is triggered "only if the condition in question threaten[s] to take away funds from an independent program

229. Pasachoff, *supra* note 201, at 602. Professor Pasachoff draws a comparison between *NFIB* and *Dole*. Concerning *Dole* she notes:

> 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 NFIB funding under the Act. Yet the plurality did not conclude that the subsequent amendment was therefore coercive.

Pasachoff, *supra* note 201, at 603.

230. *NFIB*, 132 S. Ct. at 2639 (Ginsburg, J., concurring in part); 42 U.S.C. § 1304 (2013).

231. *See* Thomas, *supra* note 180, at 13 (noting "[m]any of the amendments to Medicaid imposed grant conditions that, if not met, would result in the loss of all Medicaid funding . . . . [for example] the various Social Security Amendments of 1972, 86 Stat. 1381–1382, 1465 (extending Medicaid eligibility, but partly conditioning only the new funding); Omnibus Budget Reconciliation Act of 1990, § 4601, 104 Stat. 1388–166 (extending eligibility, and conditioning old and new funds)").

232. Thomas, *supra* note 180, at 13.

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

234. Huberfeld, *supra* note 131, at 46 (noting the "anti-coercion principle operates as a limit on Congress's power to spend for the general welfare when conditions are placed on states' acceptance of that spending. The Court has previously recognized structural limits on other federal powers, but NFIB was the first clear articulation of a federalism-based limit on Congress's spending power" (citation omitted)).

235. *NFIB*, 132 S. Ct. at 2604 (quoting South Dakota v. Dole, 483 U.S. 203, 211 (1987)).

and if that condition [was] added after the state[] first joined the original program."[236] While previous case law has *recognized* challenges based on coercion—the language was left only in dicta.[237] The plurality's decision in *NFIB* marked the first time in history the Court acknowledged coercion as more than a "theoretical possibility"[238] under the Spending Clause. As a result, a new framework for coercion analysis was established.[239] This framework sets forth a series of interconnected factors that the Court used to find the all-or-nothing condition attached to the Medicaid expansion provision coercive.

First, as independent sovereigns, states must be given a *real choice* whether or not to accept a government condition on a federal grant.[240] In the plurality opinion, Chief Justice Roberts determined "[t]he threatened loss of over 10 percent of a State's overall budget is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."[241] Roberts further stated "[i]n this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head."[242] If states do not have a true choice to refrain from the imposed condition, then the spending condition is in violation of the Tenth Amendment and is coercive.[243]

Second, the Court looked at the percentage of individual state budgets that would be affected by the condition. After *NFIB*, it is clear that "all-or-nothing" provisions, under which states stand to lose all

236. Pasachoff, *supra* note 201, at 605.

237. *See* Huberfeld, *supra* note 131, at 46-47 (noting "[t]he Rehnquist Court bypassed several opportunities to recognize a Tenth Amendment [coercion] limit in direct Spending Clause challenges such as Dole and New York v. United States"). For example, "Rehnquist recognized that 'in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" Huberfeld, *supra* note 131, at 46-47.

238. Pasachoff, *supra* note 201, at 577; *see also NFIB*, 132 S. Ct. at 2630 (Ginsburg, J., concurring in part).

239. Pasachoff, *supra* note 201, at 577. The *Dole* Court spoke of coercion noting, "[b]ut to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible." *Dole*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S 548, 590 (1937)).

240. Pasachoff, *supra* note 202, at 592.

241. *NFIB*, 132 S. Ct at 2604 (plurality opinion) (comparing the five percent condition accepted in *Dole* as mere "mild encouragement" to the threatened loss of *all* Medicaid funds, which constitutes over 10% of some states' overall budgets).

242. *Id.*

243. *Id.*

existing funding, will be labeled as coercive.[244] However, what is less clear is what percentage of affected funding rises to the level of coercion. For example, no case conditioning less than "all-or-nothing" has ever been struck down by the Court for being coercive.[245] Professor Pasachoff notes, "the effect of the federal funding on the state budget is key."[246] However, Chief Justice Roberts and the plurality did not give bright line numbers or levels under which conditions on funding would rise to coercion.

In fact, the only direction for future cases is based on an amalgamation of case law beginning with *Dole*.[247] In *Dole*, only one-percent of South Dakota's budget was affected.[248] There, the inducement was characterized explicitly as "relatively mild encouragement."[249] At the other end of the spectrum, in *NFIB*, many states would have faced a ten percent state budget cut. Thus, Professor Pasachoff explains, "[f]or both the plurality and joint dissent, . . . the line for financial inducement that crosses the line to coercion is a threatened loss [to state budgets of] somewhere between less than 1% and as much as 10% of a state's overall annual expenditures."[250]

Chief Justice Roberts stated, "[t]he size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden. 'Your money or your life' is a coercive proposition, whether you have a single dollar in your pocket or $500."[251] This statement posits that it is a judicial decision as to whether a particular grant condition is coercive and in violation of the Tenth Amendment.[252] The focus is on the bottom line and not the actual dollar amount.

Finally, the Court looks at political accountability in limiting

244. *Id.*

245. *Id.*

246. Pasachoff, *supra* note 201, at 605 (referring to the plurality opinion and noting that 20% of the average state's budget goes to Medicaid payments, "with the federal government covering 50 to 83% of those payments").

247. Pasachoff, *supra* note 201, at 606 (quoting the plurality in *NFIB*, 132 S. Ct. at 2604).

248. South Dakota v. Dole, 483 U.S. 203, 204 (1987).

249. *Id.* at 211.

250. Pasachoff, *supra* note 201, at 606 (quoting *NFIB*, 132 S. Ct. at 2605).

251. *NFIB*, 132 S. Ct. at n.12.

252. *Id.* at 2606-07. The Roberts plurality relies on *Steward Mach. Co. v. Davis* in its decision to refrain from establishing a bright line test to determine what constitutes coercion. 301 U.S. 548, 591 (1937). In that case, the Court determined that it did not know where the line fell, but the statute in question was well within it. Similarly, Chief Justice Roberts also refrained from establishing a bright line rule.

expansive congressional authority.[253] For example, "[w]here all Congress has done is to 'encourag[e] state regulation rather than compe[l] it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people. [But] where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.'"[254]

Even after the *NFIB* decision, distinguishing enticement versus coercion is difficult. The dissent stated, "[c]ourts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear."[255]

IV. ANALYSIS OF THE PROPOSED MINIMUM GRIEVING CONSUMER PROTECTION GUIDELINES UNDER THE *NFIB* TEST

It is likely the proposed condition would survive a facial constitutional challenge. Both the plurality and the joint dissent reaffirmed that Congress can use its spending power to entice states to enact certain government policies or programs. However, the government may not compel or coerce states to act.[256] This proposal seeks to condition an "appropriate percentage" of the Medicaid grant on state compliance with the Minimum Guidelines. This Section applies the *NFIB* analysis (as presented by Professor Pasachoff) to this proposal and demonstrates there are no Tenth Amendment limitations barring the implementation of the Guidelines.

A. *Does the Implementation of Federal Minimum Grieving Consumer Protection Guidelines "Threaten to Take Away Funds for a Program That Is Separate and Independent from the Program to Which the Condition in Question is Attached?"*[257]

As mentioned above, "the plurality [in *NFIB*] 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."[258] The latter type of condition is now considered

253. Huberfeld, *supra* note 131, at 65.

254. *NFIB*, 132 S. Ct. at 2660 (quoting New York v. United States, 505 U.S. 144, 168 (1992)).

255. *Id.* at 2662 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

256. *See* New York v. United States, 505 U.S. 144, 178 (1992).

257. Pasachoff, *supra* note 201, at 583.

258. Pasachoff, *supra* note 201, at 596.

"constitutionally suspect" under *NFIB* and warrants a coercion analysis.[259] The implementation of Minimum Grieving Consumer Protection Guidelines cannot fairly be read as a "new and independent"[260] program under the *NFIB* rationale. While the implementation of the Guidelines *does* condition the receipt of existing Medicaid funds on state acceptance of the Guidelines, the proposed implementation mirrors the condition at stake in *Dole*.[261]

Further, the implementation would not jettison the ultimate purpose of Medicaid—to provide healthcare "to the neediest among us."[262] Instead, the proposed Guidelines would merely modify the grant in ways no more expansive than other historical modifications.[263] For example, the plurality noted "[t]he original [Medicaid] 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."[264] Chief Justice Roberts found the Affordable Care Act (ACA) expansion went beyond a mere expansion and was an attempt to provide "a comprehensive national plan to provide universal health insurance coverage."[265]

The proposed Guidelines, on the other hand, simply seek to expand upon services for the Medically Needy and the Aged categories.[266] The Medicaid program would remain unified even after the implementation of the Guidelines. The burial eligibility exception[267] and the Hospice Benefit[268] demonstrate that the scope of Medicaid already encourages after-life services and care for the Aged and Medically Needy categories of Medicaid recipients. Given that Medicaid already pays for burial planning through its regulation of Hospice teams, including social workers and bereavement counselors,[269] it is not unreasonable that Medicaid funding cover state expenses to eradicate cemetery misfeasance. The additional proposed regulation is minimal, and as

259. Pasachoff, *supra* note 201, at 596.

260. Pasachoff, *supra* note 201, at 594.

261. Pasachoff, *supra* note 201, at 594.

262. Nat'l Fed'n of Indep. Bus v. Sebelius, 132 S. Ct. 2566, 2606 (2012).

263. *See* Blumstein, *supra* note 191 (noting the various accepted changes to the Medicaid Program).

264. *NFIB*, 132 S. Ct. at 2605-06 (citation omitted).

265. *Id.* at 2606.

266. *See infra* App. A.

267. 20 C.F.R. § 416.1231 (2012).

268. *See* 42 U.S.C. § 1395x (2013).

269. *See id.*

such, could not be said to cause "a shift in kind."[270]

If a condition merely alters the outer boundaries of previously existing statutes, "the more likely it is that the change works no shift in kind."[271] Alternatively, the more a condition can be said to change "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."[272] However, if a court were to determine the proposed Guidelines constitute a new and independent program (or a shift in kind), then the court would move to the next question. [273]

B. *"[D]id 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?"*[274]

Once a program condition is found to be a "new and independent program," the question turns to whether the notice of the condition was accurate and whether it was accepted knowingly and voluntarily.[275] The *NFIB* plurality noted that "[t]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or 'retroactive' conditions."[276]

In 1965, when states signed on to the Medicaid program, there was a clause reserving for Congress "[t]he right to alter, amend, or repeal any provision" of that statute.[277] Agreeing to this provision, "each State expressly undertook to abide by future Medicaid changes."[278] Since

270. *NFIB*, 132 S. Ct. at 2605. The Plurality left ambiguous what constitutes a "shift in kind."

271. Pasachoff, *supra* note 201, at 599.

272. Pasachoff, *supra* note 201, at 599.

273. Pasachoff, *supra* note 201, at 598.

274. Pasachoff, *supra* note 201, at 612.

275. Pasachoff, *supra* note 201, at 612.

276. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2606 (2012) (quoting Pennhurst St. Sch. & Hosp. v. Halderman, 451 U.S. 1, 25 (1980)).

277. *See id.* at 2630 (Ginsburg, J., concurring in part); *see also* 42 U.S.C. § 1304 (2013) (noting Congress has reserved "[t]he right to alter, amend, or repeal any provision of this chapter"). "In Pennhurst, residents of a state-run, federally funded institution for the mentally disabled complained of abusive treatment and inhumane conditions in alleged violation of the Developmentally Disabled Assistance and Bill of Rights Act." *NFIB*, 132 S. Ct. at 2637. The Court held that the State was not liable because it did not "voluntarily and knowingly accep[t]" the terms. *Id.* at 2605 (plurality opinion) (quoting *Pennhurst*, 451 U.S. at 17). The take away rule from Pennhurst is "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.*

278. *See* 42 C.F.R. § 430.12(c)(1) (2011); *see also NFIB*, 132 S. Ct. at 2639.

then, "Congress has repeatedly amended and expanded Medicaid 'with both mandatory and optional features, often as part of broader policy initiatives.'"[279] Thus, it is well settled that if states have proper notice of a condition from the outset, then it is unlikely it will be coercive under the *NFIB* analysis.[280]

States must be able to foresee future alterations that Congress might make. In 1985, Hospice Care was introduced as an optional Medicaid-covered benefit.[281] While Medicaid was intended to cover health services for society's most needy, it is unlikely that states could foresee that Medicaid would condition the receipt of a portion of existing funding to ensure that cemeteries avoid misfeasance and ensure consumer protections that have—until this proposal—remained unregulated at the federal level. According to Professor Pasachoff, this "simply means that the . . . inquiry should proceed to the third stage, asking whether the financial inducements are so significant as to constitute economic dragooning."[282]

C. *"Is the Amount of Funding at Stake So Significant That the Threat to Withdraw It Constitutes Economic Dragooning?"*[283]

In *NFIB*, the Court inquired whether "the financial inducement offered by Congress [was] so coercive as to pass the point at which 'pressure turns into compulsion.'"[284] As mentioned above, the plurality did not elaborate or set a bright line test as to when pressure becomes compulsion.[285] To overcome this hurdle, the proposal at hand seeks to condition an appropriate percentage of the Medicaid grant on state compliance with Minimum Grieving Consumer Protection Guidelines. This is done to essentially model the proposal set-forth in *Dole*. Since the drinking age condition in *Dole* targeted one percent of the state budget and the Medicaid expansion provision threatened a loss of ten percent of individual state budgets, it is likely the proposed appropriate percentage would fall somewhere in between. This proposal is vastly different from the Medicaid expansion provision, which threatened 100% of existing Medicaid funding.

279. Huberfeld, *supra* note 131, at 21.

280. Huberfeld, *supra* note 131, at 21.

281. Rutkow, *supra* note 181, at 11.

282. Pasachoff, *supra* note 201, at 603.

283. Pasachoff, *supra* note 201, at 612.

284. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).

285. *Id.*

This proposal is much closer to the "mild encouragement" rationalized in *Dole*.[286] While some portion of funding will be lost if states choose not to comply, such a small percentage is at stake that states are still left with a "real choice" whether to participate. Under the rationale set-forth by Professor Pasachoff, the above test should be read conjunctively.[287] This means the proposed grant condition must fail both the notice inquiry as well as the economic dragooning test to be unconstitutionally coercive. Thus, it is likely the implementation of the proposed Minimum Grieving Consumer Protection Guidelines would survive a facial constitutional challenge.

V. ALTERNATIVE PROPOSAL: ATTACHING THE PROPOSED FEDERAL CONDITION TO THE BURIAL ELIGIBILITY ALLOWANCE

This Note proposes that as an alternative to attaching the proposed condition to an appropriate percentage of the Medicaid grant—the federal government should attach the condition to the individual receipt of the Medicaid eligibility allowance provision for burial spaces and burial funds.[288] This means individual Medicaid recipients who patronize cemeteries deemed non-compliant with the proposed federal guidelines will be ineligible to receive the eligibility set-asides and will have to spend-down income in other ways to meet the asset limit and maintain Medicaid eligibility. Part A of this Section explains the relationship between the "Medically Needy" category of Medicaid recipients and the Medicaid eligibility set-aside for burial goods and services. Part B of this Section offers a comprehensive analysis of the policy implications and rationale behind the proposal. Finally, Part C of this Section compares this proposal to similar cases that were deemed constitutional.

A. *The "Medically Needy" Category as a Means of Regulating the Cemetery Industry*

Typically only the "Medically Needy" category of Medicaid recipients will have to spend-down assets to become eligible for the program.[289] Recipients in this category usually have high medical expenses, as well as incomes that exceed the maximum allowed

286. South Dakota v. Dole, 483 U.S. 203, 211 (1987).

287. Pasachoff, *supra* note 201.

288. *See supra* Part II.A.1.

289. Alison Barnes, *An Assessment of Medicaid Planning*, 3 HOUS. J. HEALTH L. & POL'Y 265, 271 (2003).

threshold.[290] For example, "[e]lderly [people] living in nursing homes and children and adults with disabilities who live in the community and incur high healthcare costs comprise a large portion of spending in the medically needy program."[291] In fiscal year 2009,[292] there were approximately 2.8 million enrollees in this category, resulting in over 36 billion-dollars in federal Medicaid funding.[293] The medically needy option is complicated for potential members to navigate.[294] It is generally thought to provide an important safety net for people whose medical costs greatly exceed their incomes.[295] As a result, the ability to spend-down is very important for these individuals.[296]

While Medicaid allows for various set-asides in determining eligibility,[297] the exception relevant to this Note is the value of burial items up to $1,500. It is important to note that states are permitted to use less restrictive methodologies in counting resources under the medically needy program, but they may not be more restrictive.[298] This means some states allow a set-aside of more than $1,500, but all states are required to allow at least that amount.[299] Further, in conjunction with the burial fund allowance, the value of a burial space or an agreement with a cemetarian representing the value of a burial space is also excluded from the claimant's countable resources.[300] Only one plot per individual member may be excluded.[301]

B. *Rationale Behind Penalizing the Individual Rather Than the State*

The underlying policy implication behind this proposal is that Medicaid recipients, who account for approximately sixty-seven million individuals in the United States, will be incentivized to enter into

290. *See* KAISER COMM'N ON MEDICAID AND THE UNINSURED, THE MEDICAID MEDICALLY NEEDY PROGRAM: SPENDING AND ENROLLMENT UPDATE 1 (2012), *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/01/4096.pdf [hereinafter Kaiser Comm'n].

291. *Id.*

292. *Id.* 2009 is the most recent survey date.

293. *Id.* at 16.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *See* 42 U.S.C. § 1382b (2012).

300. *Id.*

301. Other exclusions include: the value of the potential member's home, personal effects, and an automobile. *See id.*

business relationships with cemeteries that comply with the Minimum Grieving Consumer Protection Guidelines. Knowing members will be over the eligibility asset limit; they will avoid non-compliant cemeteries and opt for cemeteries that follow the proposed federal guidelines. This proposal would side-step the *NFIB* test because it does not materially alter the existing Medicaid program. It has long been understood that Congress has the power to spend for the general welfare. However, Congress also has the authority to attach conditions to the funds that the recipient must accept to receive the funds.[302] As opposed to the entire program, this second proposal seeks to attach the condition to the individual's choice of cemeteries.

While Congress has this authority, there is a fine line between compelling and incentivizing individuals to act in a certain way. Neither the Commerce Clause, nor the Spending Clause gives Congress the authority to compel individuals to engage in commerce. However, by incentivizing individuals to patronize cemeteries that comply with federal guidelines, the federal government is regulating a market in which citizens freely decided to engage. Medicaid members have the *option* to embrace the condition. This proposal would not be so coercive as to "hold a gun" to the individual's head because even those who become ineligible for the burial allowance may spend-down income through other allowances. Thus, they are afforded many more options than states affected by the all-or-nothing approach in *NFIB*.

C. *Attaching Condition to the Individual: A Look at Prior Case Law*

The Supreme Court has held on numerous occasions that Congress *can* condition federal funds on actions of individuals and individual businesses. For example, in *Rust v. Sullivan*, Chief Justice Rehnquist noted that the Government could selectively fund a program to encourage certain activities it believes to be in the public interest.[303] He further noted, "[w]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program."[304]

However, Chief Justice Roberts limited this notion in *NFIB*. He noted:

> Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when "pressure turns

302. South Dakota v. Dole, 483 U.S. 203, 203 (1987).

303. 500 U.S. 173, 173 (1991).

304. *Id.* at 194.

> into compulsion," the legislation runs contrary to our system of federalism . . . ."The Constitution simply does not give Congress the authority to require the States to regulate." That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.[305]

Both *NFIB* and *Dole* rationalize the federal-state relationship concerning the Spending Clause. However, Spending Clause jurisprudence also allows Congress to attach conditions to the individual or businesses in their individual capacities.

For example, in *Steward*,[306] the Court determined that "[an] unemployment compensation scheme offered as an option to the states, which was designed to induce the states to enact conforming legislation for private employees, did not violate the Tenth Amendment because the states were not coerced into adopting the legislation."[307] Similar to the *Steward* decision, the proposal at hand seeks to offer the Medicaid eligibility set-aside only to those potential recipients who patronize cemeteries in compliance with the proposed rules. This seeks to induce cemetarians to comply with the proposed guidelines as well as individuals to utilize only those cemeteries deemed to be in compliance. Like *Steward*, there is nothing in this proposal that suggest an "exertion of power akin to undue influence . . . ."[308]

VI. CONCLUSION

As William Shakespeare said "[t]he evil that men do lives after them; . . . [t]he good is oft interred with their bones."[309] The cemetery industry is left as one of the few unregulated industries in the United States. Thus, consumers should not blindly rely on cemetery providers to implement adequate consumer price protections. As mentioned, the industry has shifted from selling grave plots—to a vast array of funeral goods and services.[310] Both Congress and the FTC have recognized the conditions within the industry that make it susceptible misfeasance, but have failed to provide bereaved consumers with an adequate remedy.

305. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (quoting New York v. United States, 505 U.S. 144, 178 (1992)).

306. Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

307. Los Angeles County, Cal. v. Marshall, 442 F. Supp. 1186, 1190 (D.D.C. 1977) (emphasis omitted); *see also Steward* 301 U.S. at 548.

308. *Steward*, 301 U.S. at 590; *see also Marshall*, 442 F. Supp. at 1190.

309. *Act 3, Scene 2*, THE LITERATURE NETWORK, http://www.online-literature.com/shakespeare/julius_caesar/10/ (last visited May 20, 2014).

310. *See* Regulatory Review of the Trade Regulation Rule on Funeral Industry Practices, 64 Fed. Reg. 35965 (July 2, 1999).

The potential for another Burr Oak scandal continues to exist and reports of misconduct continue to surface.[311]

If every state adopted comprehensive consumer protection regulations, like those promulgated by Iowa, the probability of misconduct would diminish significantly. Because states have chosen not to do so, it is the federal government's duty to act. With the new test set forth in *NFIB*, it is likely that both of the proposed conditional spending programs would survive a facial constitutional challenge.

Kady S. Huff[·]

311. *See generally* News One, *Families Claim Relatives' Bodies Lost in Cemetery Scheme*, CHICAGODEFENDER (Jan. 30, 2014), http://chicagodefender.com/2014/01/30/families-claim-relatives-bodies-lost-in-cemetery-scheme/.

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APPENDIX A:
PROPOSED MINIMUM GRIEVING CONSUMER PROTECTION GUIDELINES[312]

A. PRICE DISCLOSURES:[313] It shall be an unfair or deceptive act for cemetarians or cemetery providers to fail to:

1. Furnish accurate price information disclosing the cost to the purchaser for each of the specific goods and services used in connection with the disposition of deceased human bodies, including:
    i. The price of embalming;
    ii. transportation of remains;
    iii. use of facilities including mausoleums;
    iv. caskets;
    v. outer burial containers;
    vi. immediate burials; or
    vii. direct cremations.
2. Provide accurate price information including the cost of the burial plot and any other cemetery expenses to:
    i. Persons who inquire in person about cemetery and cemetery expenses and offerings or prices including those goods and services in Section A(1) of these guidelines and any other readily available information that reasonably answers the question;
    ii. Persons who inquire via telephone about cemetery and cemetery expenses and offerings or prices including those goods and services in Section A(1) of these guidelines and any other readily available information that reasonably answers the question
    iii. Persons who inquire via e-mail or other forms of electronic communication about cemetery and cemetery expenses and offerings or prices including those goods and services in Section A(1) of these guidelines and any other readily available information that reasonably answers the question;
    iv. All other person who inquire about cemetery and cemetery expenses and offerings or prices including those goods and services in Section A(1) of these guidelines and any other readily available information that

312. Note: these guidelines are a compilation and adaptation of the cited sources and seek to serve as a representative, but not comprehensive, example of the consumer protections that are missing from the cemetery industry.

313. *See generally* 16 C.F.R. § 453.2 (2013).

reasonably answers the question.

B. GENERAL PRICE LIST:[314] It shall be an unfair or deceptive act for cemetarians or cemetery providers to *fail* to:
   1. Provide all consumers with a typewritten price list which clearly states the prices of all caskets or alternative containers, as well as headstones, burial plots, and other cemetery goods and services;
   2. Provide consumers with said list prior to showing any casket, alternative container, headstone, or other cemetery good or service;
   3. Provide an adequate General Price List which includes:
      i. The retail price of *all* cemetery goods and services for sale including but not limited to caskets, alternative containers, headstones, and burial plots;
      ii. The price range for the immediate burials offered by the funeral provider, together with:
      iii. A separate price for an immediate burial where the purchaser provides the casket;
      iv. Separate prices for each immediate burial offered including a casket or alternative container;
      v. A description of the services and container (where applicable) included in that price;
      vi. Notation of items requiring special ordering
      vii. The effective date of the price list
      viii. The name, address, and contact information of the cemetarians or cemetery provider
      ix. Identification of the cemetarian's place of business and corporate affiliation if any.

C. MISREPRESENTATIONS:[315] It shall be a deceptive act or practice for a cemetery provider to;
   1. Represent that state or local law requires outer-burial container when such is not the case;
   2. Represent that state or local law requires the purchase of other goods and services when such is not the case;
   3. Fail to disclose that particular cemetery goods and services are not required by state or local law;
   4. Represent that a deceased person is required to be embalmed for immediate burial; or
   5. Fail to provide a bereaved consumer with all written rules and

314. *Id.*
315. *Id.* § 453.3.

regulations and a clear explanation in writing of the interment, inurnment, or entombment right that has been purchased, and any material terms and conditions of that purchase, including any repurchase option by the cemetery or resale rights available to the consumer.

D. LISTING OF OPENING AND CLOSING SERVICES: A cemetery shall disclose, prior to the sale of interment rights, whether opening and closing of the interment space is included in the purchase of the interment rights. If opening and closing services are not included in the sale and the cemetery offers opening and closing services, the cemetery must disclose that the price for this service is subject to change and disclose the current prices for opening and closing services provided by the cemetery.[316]

E. INTERMENT RIGHTS: A person owning interment rights may sell those rights to third parties. The cemetery shall fully disclose, in the cemetery's rules and regulations, any requirements necessary to transfer title of interment rights to a third party.[317]

F. CASH ADVANCE PROVISIONS: It shall be a deceptive act or practice for a cemetery provider to:

1. Represent that the price charged for a cash advance item is the same as the cost to the funeral provider for the item when such is not the case; or
2. Fail to disclose to persons arranging funerals that the price being charged for a cash advance item is not the same as the cost to the cemetarian for the item when such is the case.

G. INSPECTIONS: All cemeteries shall be required to:

1. Retain all records in existence on the date of enactment of these guidelines including maps or other systems indicating the location and date of each interment, inurnment, or entombment;
2. Accurately record and retain records of all interments, inurnments, or entombments occurring, as well as any internment, inurnment, or entombment rights sold; and
3. Make such records available to Federal, State, and local governments, as appropriate.

H. RETENTION OF DOCUMENTS:[318] Cemetery providers must retain and make available for inspection true and accurate:

1. Copies of the price lists specified in Section B of these guidelines;
2. Records detailing the name and contact information of all patrons of the

316. *See* IOWA CODE § 523I.301

317. *See id.* § 523I.301.

318. 16 C.F.R. § 453.6.

cemetery including the date of inurnment, internment, or entombment.

3. Records detailing the contract information of patron indicating the price they paid for their cemetery goods and services.

I. DECLARATION OF INTENT:[319] It is a violation of these guidelines to engage in any unfair or deceptive acts or practices specified herein or to fail to comply with any of the preventive requirements so specified. The provisions of this rule are separate and severable from one another. If any provision is determined to be invalid, any remaining provisions shall continue in effect.

319. 16 C.F.R. § 453.8.